SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.;

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, APPELLANT,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.; AND

No. 60

UNITED STATES, ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 10, 1967

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[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No.

Three-Judge Case

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; LOUISIANA & ARKANSAS RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; UNION PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY; THE WESTERN PACIFIC RAILROAD COMPANY; Plaintiffs,

against

UNITED STATES OF AMERICA; and INTERSTATE COMMERCE COMMISSION; Defendants.

EXCERPTS FROM COMPLAINT—Filed Aug. 25, 1964

* * * * * * *

[File endorsement omitted]

[fol. 7]

11.

The aforesaid Rules 2 and 3 are not in accordance with law and are in excess of the Commission's statutory jurisdiction and authority in the following respects:

(a) Contrary to the provisions of Sections 206(a), 209 (a), 203(a)(12) through (15) inclusive, and 302(d) and (e), of the Interstate Commerce Act, 49 U.S.C. §§ 306(a), 309(a), 303(a)(12)-(15), 902(d)(e), as well as other provi-
[fol. 8] sions of the Act, Rules 2 and 3 authorize motor and water carriers to perform, by railroad transportation, service which such carriers can perform lawfully only on public highways or waterways.

(b) Rules 2 and 3 unlawfully authorize persons that are not railroads to file tariffs and schedules which provide for all-rail transportation.

(c) The Commission's report and order of March 16, 1964, and order of July 22, 1964, do not comply with Section 8(b) of the Administrative Procedure Act (5 U.S.C. Section 1007(b)) in that this report and these orders do not ". . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; . . .".

(d) Sections 216(c) and 217(a) of the Interstate Commerce Act, 49 U.S.C. §§ 316(c), 317(a), furnish the exclusive method under which motor carrier tariffs may lawfully give notice of and provide for coordinated motor and railroad service.

(e) Rules 2 and 3 compel the establishment of through routes between railroads and motor carriers in violation of the aforesaid Section 216(c), and between railroads and

water carriers in violation of Section 15(3), 49 U.S.C. § 15(3).

(f) The Interstate Commerce Act does not require railroads to accept under their trailer-on-flatcar open tariffs traffic tendered by a motor or water carrier, as Rules 2 and 3 would require, and the Act does not authorize the Commission to compel by Rules 2 and 3 what the Act does not require.

[fol. 9] (g) In prescribing Rules 2 and 3 the Commission overruled a rule of law established and actively, consistently, and unswervingly maintained and followed by the Commission ever since the first enactment by Congress in 1935 of legislation regulating motor carriers. This rule, expressed succinctly in the Commission's own words, is that it is "repugnant to the Interstate Commerce Act" for a motor carrier to ship by railroad property which the motor carrier holds as a carrier. Relying upon this rule plaintiffs have organized and developed their TOFC services, filed tariffs, and invested capital, and have acquired much business and good will from the shippers of the country.

(h) Legislation was introduced in Congress in 1962 (H.R. 11584 and S. 3242, 87th Cong., 2d Sess.) and again in 1963 (H.R. 4701 and S. 1062, 88th Cong., 1st Sess.) to amend Section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, to require that:

> "(b) Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated."

At no time in the hearings held by Congressional Committees upon the aforesaid bills did the Department of Justice or the Interstate Commerce Commission advise these

Committees that Section 2 of the Interstate Commerce Act already provided the authority to require railroads to [fol. 10] accept vehicles or containers of motor and water carriers for transportation under open tariffs and that an amendment of Section 2 was legally unnecessary. Congress has not enacted the foregoing proposed amendment to Section 2. Rules 2 and 3 are an unlawful attempt by the Interstate Commerce Commission to establish by rules requirements that Congress has not seen fit to enact as law.

12.

The aforesaid Rules 2 and 3 are contrary to the National Transportation Policy, note preceding 49 U.S.C. § 1, because they require the railroads to surrender to motor and water carriers the inherent advantages of railroads in the performance of TOFC service in that they compel railroads

(a) to make their physical facilities available to competing motor and water carriers, and

(b) to make available to competing motor and water carriers their ability to operate with rates lower than these competing modes of transportation.

The findings and conclusions of the Commission with respect to the impact of Rules 2 and 3 and the preservation of the railroads' inherent advantages are not supported by adequate or substantial evidence, or in fact any evidence.

13.

The prescription of the aforesaid Rules 2 and 3 is arbitrary, capricious, an abuse of discretion, and in violation of the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.*, and the Administrative Procedure Act (5 U.S.C. § 1001 [fol. 11] *et seq.*,) in the following related respects:

(a) The Commission's order is not supported by adequate or substantial evidence.

(b) The Commission's order is not supported by adequate findings.

• • • • • • •

[fol. 12] 16.

Prescribed Rule 7(a) is the following:

"500.7 *Tariff publication regulations.*—

"(a) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service."

17.

Insofar as Rule 7(a) applies to the leasing of equipment to shippers by a non-carrier affiliate of a railroad:

[fol. 13] (a) It is not in accordance with law and is in excess of the Commission's statutory authority;

(b) It is unsupported by substantial evidence or findings and is arbitrary, capricious, and an abuse of discretion.

18.

The Commission's order and prescribed rules are not in accordance with law, are in excess of the Commission's statutory jurisdiction, and are without observance of procedure required by law, in that the notice requirements of Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 1003(a), have not been complied with, in the following respects:

(a) Clause (2) of said Section 4(a) requires that the Commission shall publish in its notice of proposed rule making: "(2) reference to the authority under which the rule is proposed." The Commission's published notice referred only to "the authority of Parts I, II, and III, and IV of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act." This is precisely the same as saying that the authority under which the rule is proposed is the entire body of statutes under which the Commission is created and acts, and this is inadequate notice under the aforesaid Section 4(a).

(b) The parties were never notified of the substance of nor the authority for Rules 2 and 3. As stated by Vice Chairman Webb in the report (p. 395):

> [fol. 14] "At no stage of this proceeding were the parties advised that the Commission would consider any type of compulsory open tariff TOFC service involving Plan II rates and charges."

The document entitled "Prehearing Conference—Washington, D.C." served on the parties stated at page 3 that:

> "Finally, the proposed rules do not contemplate the use of TOFC service by motor contract carriers."

Rules 2 and 3 would make rail Plan II service available to motor common and contract carriers as well as water carriers.

As revealed in the report, pages 303 and 406-410, proposed rules were distributed to the parties at the prehearing conference on October 9, 1962. That action, insofar as the Commission was concerned, revised and defined the issues for the proceeding and superseded the issues set out in the Notice of Proposed Rule Making of June 29, 1962, Exhibit B hereto. It was made plain at the prehearing conference that if issues other than those involved in the proposed rules were to become a part of the proceeding, the parties would be expected to introduce them. The proposed rules were the rules confronting the parties at the time verified statements were filed and upon which the Hearing Examiners' proposed report and recommended rules were based. These proposed rules and the Examiners' proposed report and recommended rules did not contain the aforesaid Rules 2 and 3 or any issue or question as to the use of railroad open tariffs by motor and water carriers.

The procedures followed by the Commission did not give the parties proper notice of the terms or substance of Rules 2 and 3 nor as to the issues involved in those rules.

At no time did the Commission advise the parties that it considered Section 2 of the Interstate Commerce Act relevant to motor or water carrier use of railroad TOFC [fol. 15] tariffs until the issuance of the report of March 16, 1964.

The foregoing procedures have not complied with Section 4(a) of the Administrative Procedure Act, (5 U.S.C. 1003(a)) and have denied plaintiffs their right to a full and fair hearing.

* * * * * * *

[fol. 17] Amos M. Mathews, J. D. Feeney, 280 Union Station Building, Chicago, Illinois 60606, Telephone 726-6900;

Robert F. Munsell, 888 Union Station Building, Chicago, Illinois 60606, Telephone 236-7600;

Thormund A. Miller, 205 Transportation Building, Washington, D. C. 20006, Telephone 628-5897, Attorneys for Plaintiffs.

Eugene D. Anderson, Jr., Edmund J. Kenny, Ernest Porter, James A. Gillen, George M. Mariner, William E. Davis, Louis A. Harris, Roland J. Lehman, Harvey Huston, Robert H. Stahlheber, Charles W. Burkett, John MacDonald Smith, William P. Higgins, Robert H. Duesenberg, Harry B. LaTourette, Walter G. Treanor, J. H. Durkin, William A. Thie, Curtis H. Berg, C. Harold Peterson, E. D. Grinnell, Jr., John E. McCullough, Of Counsel.

[fol. 214]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title omitted]

ORDER PERMITTING ACME FAST FREIGHT, INC. ET AL. TO INTERVENE AS PLAINTIFFS—August 27, 1964

This cause coming on to be heard on the motion of Acme Fast Freight, Inc., et al. for leave to intervene as plaintiffs, and it appearing to the Court that the said applicants have the right to intervene as prayed:

It Is Hereby Ordered, Adjudged and Decreed that Acme Fast Freight, Inc.; Century Carloading, Inc.; Clipper Carloading Company; International Forwarding Company; Lifschultz Fast Freight; Merchant Shippers Association; National Carloading Corporation; Ohio Fast Freight Corporation; Pacific & Atlantic Shippers; Sheldon Forward-
[fol. 215] ing Company; Springmeier Shipping Co., Inc.; Western Carloading Company; and Westland Forwarding Company are hereby granted leave to intervene in this

cause as parties plaintiff and are hereby made parties plaintiff to this cause with the right to file their complaint herein.

Dated this 27th day of August, 1964.

Hubert L. Will, United States District Judge.

[fol. 217]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

EXCERPTS FROM COMPLAINT OF ACME FAST FREIGHT, INC. ET AL., INTERVENING PLAINTIFFS—Filed August 27, 1964

Come now Acme Fast Freight, Inc.; Century Carloading, Inc.; Clipper Carloading Company; International Forwarding Company; Lifschultz Fast Freight; Merchant Shippers Association; National Carloading Corporation; Ohio Fast Freight Corporation; Pacific & Altantic Shippers; Sheldon Forwarding Company; Springmeier Shipping Co., Inc.; Western Carloading Company; and Westland Forwarding Company, intervening plaintiffs in the above-entitled cause (hereinafter referred to as intervening plaintiffs) and for their action against defendants respectfully allege and show:

1. Each of the intervening plaintiffs is a freight forwarder as defined in Section 402(5) of the Interstate Commerce Act (49 U.S.C. Sec. 1002(5)) and is subject to Part [fol. 218] IV of the Interstate Commerce Act (49 U.S.C. Secs. 1001 *et seq.*). The intervening plaintiffs were among the respondents in the proceeding before the Interstate Commerce Commission identified as Ex Parte No. 230, *Substituted Service—Charges and Practices of For-Hire*

Carriers and Freight Forwarders (Piggyback Service), 322 I.C.C. 301. That proceeding culminated in the orders which the plaintiffs herein seek to enjoin, set aside, annul and suspend.

2. The intervening plaintiffs hereby adopt and incorporate herein by reference, as though rewritten, all of the statements and allegations made in Paragraphs 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15(b) and (c), and 18 of the complaint of the plaintiffs in the above-entitled cause.

* * * * * * *

4. Rules 2 and 3 are unlawful for the further reason that they would permit rail carriers, motor carriers and [fol. 219] water carriers (each being a "person" as that word is used in Rule 2) to engage in freight forwarder service subject to Part IV of the Interstate Commerce Act (49 U.S.C. Secs. 1001 *et seq.*) without applying for a permit as required by Section 410 of the Act (49 U.S.C. Sec. 1010) and without making the necessary proof to support the missing but indispensable findings by the Commission, as required by Section 410(c), that "the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; * * *." The blanket permit so granted by Rules 2 and 3 to railroads and to motor and water common carriers is in violation of the statutory mandate of Congress to the Interstate Commerce Commission in subsection (c) of the said Section 410, which directs that "No such permit shall be issued to any common carrier subject to part I, II, or III of this Act; * * *," railroads being subject to Part I, motor carriers to Part II and water carriers to Part III of the Act. Under Rules 2 and 3, for example, a common carrier by motor vehicle which, as defined in Section 203(14) of Part II of the Act (49 U.S.C. Sec. 303 (14)), "holds itself out to the general public to engage in the transportation by motor vehicle" would be permitted,

in the ordinary and usual course of its undertaking, to [fol. 220] assemble and consolidate shipments, to utilize the services of a railroad for the transportation of the consolidated shipment by tendering the shipment to the railroad for transportation by the railroad under the railroad's TOFC tariffs, and to break bulk and distribute the consolidated shipments at the point of destination. The common carrier by motor vehicle would thus be permitted to hold itself out as a freight forwarder as defined in Section 402(5) of the Act (49 U.S.C. Sec. 1002(5)) in addition to its present and lawful authority to engage in transportation by motor vehicle, contrary to the statutory prohibition against the granting of a freight forwarder permit to a common carrier by motor vehicle. Such a holding out to provide transportation by shipping over a rail carrier would not be a holding out by the motor carrier to transport property "as a carrier subject to" Part II of the Act (under which part the interstate transportation of property "by motor vehicle" is regulated) and would therefore not be within the statutory exception to Section 402(5) of the Act.

5. Freight forwarders, including the intervening plaintiffs, are authorized under Sections 402(5) and 418 of the Act (49 U.S.C. Secs. 1002(5) and 1018) to utilize the services of rail, motor and water common carriers in providing transportation of the shipments which the freight forwarders hold themselves out to transport or to provide [fol. 221] transportation for. No rail, motor or water carrier subject to the Interstate Commerce Act is so authorized under that Act to utilize the services of another common carrier for line-haul transportation. The authority so held only by freight forwarders constitutes one of the inherent and valuable advantages of freight forwarders. By purporting in Rules 2 and 3 to authorize and permit carriers which are not freight forwarders to utilize the services of other carriers for the line-haul transportation of shipments, the Interstate Commerce Commission would unfairly and unlawfully deprive freight forwarders of one

of the inherent advantages of freight forwarder operations, to the severe economic harm of the freight forwarders in competing with other modes of transportation for the patronage of the shipping public. Both for that reason and because, as heretofore stated, those rules would permit other carriers to engage in freight forwarder service, Rules 2 and 3 violate the terms of the National Transportation Policy (49 U.S.C. preceding Sec. 1) in that—

a. they fail to "recognize and preserve the inherent advantages of each" mode, as required by such policy, but would destroy those advantages, and

b. they fail to "foster sound economic conditions in transportation and among the several carriers" as required by such policy, and

c. they would permit and encourage "unfair or destructive competitive practices" contrary to the terms of such policy.

* * * * * * *

[fol. 224] Kenneth F. Burgess, D. Robert Thomas, 11 South La Salle Street, Chicago, Illinois 60603, Telephone: STate 2-5400;

George H. Leonard, 2 Lafayette Street, New York 7, New York;

F. N. Melius, Jr., 711 Third Avenue, New York 17, New York;

Theo. R. Schneider, 1123 Hadley Street, St. Louis 1, Missouri;

Giles Morrow, 1012 Fourteenth Street, N.W., Washington 5, D. C.,

Attorneys for Acme Fast Freight, Inc. et al., Intervening Plaintiffs.

Of Counsel: Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago, Illinois 60603.

[fol. 227]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title omitted]

ORDER GRANTING NEW YORK CENTRAL RAILROAD COMPANY LEAVE TO INTERVENE—August 27, 1964

This cause coming on to be heard on motion of The New York Central Railroad Company, a corporation, for leave to intervene as a party plaintiff and to file its complaint herein, and it appearing that due notice has been given,

And it further appearing that The New York Central Railroad Company was a party to the proceedings before the Interstate Commerce Commission upon which review has been instituted here.

Now, therefore, it is ordered that The New York Central Railroad Company be and is hereby given leave to intervene in this action as a party plaintiff and to file its complaint herein instanter.

Dated this 27th day of August, 1964.

Hubert L. Will, Judge, U.S. District Court.

[fol. 263]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

ORDER GRANTING LEAVE TO SOUTHERN RAILWAY COMPANY, ET AL., TO INTERVENE AND TO FILE THEIR COMPLAINT; GRANTING MOTION FOR CONVENING THREE-JUDGE COURT AND DENYING MOTION FOR TEMPORARY RESTRAINING ORDER.

Name of Presiding Judge, Honorable Hubert Will

Cause No.

64 C 1442 Date Aug 27, 1964

Title of Cause

The Atchison, Topeka and Santa Fe Railway Company, et al., vs. United States of America, and Interstate Commerce Commission.

Brief Statement of Motion

Motion to intervene as Parties Plaintiff and Motion for convening a three-judge court.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Bruce E. Brown, 135 S. LaSalle Street, Chicago, Illinois, William H. Dempsey, Jr., 734—15th St., N.W., Washington, D.C., Walter J. Myskowski, 712 Ring Bldg., 1200—18th St., N.W., Wash., D.C., James A. Bistline, Southern Ry. Bldg., Box 1808, Wash. 13, D.C.

Representing

Southern Railway Company, et al.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Attorney General of United States, Dept. of Justice, Wash. 25, D. C., representing the United States.

United States Attorney for Northern District of Illinois, U.S. Courthouse, Chgo., Ill., representing the United States.

General Counsel, Interstate Commerce Commission, Wash. 25, D.C., representing the Interstate Commerce Commission.

Amos M. Mathews and J. D. Feeney, 280 Union Station Bldg., Chicago, Ill., representing the Atchison, Topeka and Santa Fe Railway Co., et al.

Louis T. Duerinck, 1225 LaSalle St. Station, Chicago, Ill., representing the New York Central Railroad Company.

John A. Daily, 466 Lexington Ave., New York, New York, representing the New York Central Railroad Company.

Motion of Southern Railway Company, et al. to intervene as parties plaintiff and for leave to file their complaint granted. Motion for convening a three-judge court granted. Motion of said interveners for a temporary restraining order denied without prejudice.

Will. J.

(Stamp—Notices mailed Aug 28 1964.)

[fol. 277]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

ORDER GRANTING MOTION OF CERTAIN EASTERN RAILROADS TO INTERVENE AS PARTIES PLAINTIFFS AND TO FILE COMPLAINTS.

Name of Presiding Judge, Honorable A. L. Marovitz

Cause No.

64C 1442 Date Sept. 3, 1964

Title of Cause

The Atchison, Topeka and Santa Fe Railway Co., et al., v. United States of America and Interstate Commerce Commission.

Brief Statement of Motion

Enter Order. Motion of certain eastern railroads to intervene as parties plaintiff and to file complaint is granted.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Cornelius P. Callahan, Jr., 652 Union Station, Chicago, Illinois.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

The Honorable Robert F. Kennedy, Department of Justice, Washington, D. C.

Amos M. Mathews, J. D. Feen[illegible] 280 Union Station, Chicago, Ill.

Robert W. Ginnane, Esq., Interstate Commerce Commission, Washington, D. C.

Robert F. Munsell, 888 Union Station, Chicago, Illinois.

Edward V. Hanrahan, Esq., United States Attorney, Northern District of Ill., United States Courthouse, Chicago, Illinois.

Thormund A. Miller, 205 Transportation Bldg., Washington, D. C.

(Stamp—Notices mailed Sep 18 1964)

[fol. 351]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action

No. 64 C 1442

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; LOUISIANA & ARKANSAS RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; UNION PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY; THE WESTERN PACIFIC RAILROAD COMPANY; Plaintiffs,

v.

UNITED STATES OF AMERICA; and INTERSTATE COMMERCE COMMISSION; Defendants.

[File endorsement omitted]

OPINION—August 20, 1965

Before Castle, Circuit Judge, Hoffman and Decker, District Judges.

Julius J. Hoffman, District Judge. Piggyback service—the movement of highway trailers on railroad flatcars—[fol. 352] constitutes "probably the most significant recent development in transportation", in the opinion of the Interstate Commerce Commission. Because of the "explosive growth" of this service in the past five years, the Commission in 1962 instituted on its own motion a proceeding to investigate the subject generally and "to explore new approaches" to its regulation. That proceeding culminated in a Report and Order of the Commission issued under the title *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, Ex Parte No. 230, reported at 322 I. C. C. 301-417, dated March 16, 1964, rehearings denied June 22, 1964, and December 21, 1964. By this Report and Order, the Commission promulgated eight rules intended to regulate trailer-on-flatcar (TOFC) service. These Rules, herein referred to simply as Rules 1 through 8, are officially designated and reported as sections 500.1 through 500.8 of title 49, Code of Federal Regulations.

This suit was brought to enjoin and set aside the Commission's order on the ground that four of the eight rules issued by the Commission are beyond its authority and unlawful.[1] Pursuant to Sections 2284 and 2321 through 2325 of the Judicial Code,[2] the matter has been tried before a three-judge court. We conclude that the Commission's order must be set aside.

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[1] A motion for a temporary restraining order was withdrawn when the Commission, on its own motion, stayed the effectiveness of its rules until further order.

[2] 28 U.S.C. §§ 2284, 2321-2325 (1948).

[fol. 353] I.

The plaintiffs and intervening plaintiffs are aligned as five separate parties in interest, comprising three groups of railroads, one railroad individually, and a group of freight forwarders. For the defense, the American Trucking Associations, Inc., and some of its members, the Contract Carrier Conference, and the National Auto Transporters Association all intervened to join as defendants with the Commission and the United States. Despite this multiplicity, the several plaintiffs are agreed on the main point of the railroads' controversy with their rivals, the truckers, and in their objections to the Commission's new rules.

The primary issue to be decided is the validity of Rules 2 and 3, promulgated by the Commission in its proceeding by a divided vote. Briefly glossed, they require a railroad which offers TOFC service on an open-tariff basis, that is, to the regular shipping public, to make that service available on the same terms without discrimination to motor carriers[3] acting in that capacity in hauling freight, and, as a corollary, authorize the motor carriers to substitute this TOFC service of the railroads for their regular highway transportation by truck. In full, these rules provide:

> [fol. 354] 500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service

[3] These Rules apply equally to the use of railroad TOFC service by common and contract carriers by water, as by motor vehicle. Since the issues are largely identical, they will be considered by reference only to motor carriers except where different legal principles apply to water carriers. So-called fishyback service—the movement of highway trailers by barge—was severed from this proceeding for separate treatment, as were the practices of motor carriers of automobiles. Birdyback service is not involved.

in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service shall not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

These Rules break new ground. To the present time, the available TOFC service has been divided among five cate-

gories or "plans" which have evolved from the carriers' practices and the Commission's rulings. As capsulized in the Commission's Report, the five plans involve the following arrangements:

[fol. 355] Plan I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

Plan II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

Plan III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

Plan IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

Plan V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

It will be seen that these five plans can be classed more simply into two groups: the open-tariff plans, numbered II, III, and IV, available equally to regular shippers and

freight forwarders, but not to motor carriers; and the joint intermodal plans, numbered I and V, available only to common carriers, and only through negotiation and voluntary agreement between the rail carrier and the motor carrier. Thus motor carriers and ordinary shippers are differently served under separate plans. Negatively, this separation has foreclosed motor common carriers from the use of the three open-tariff plans. The prohibition implicit [fol. 356] in the plans was explicitly declared by the Commission a short while after motor carriers first were brought under federal regulation.[4] Since 1939, this ruling has been reaffirmed in subsequent decisions and observed in practice consistently down to the present time.[5] The established principle and its supporting reasons have come to be summed up in the abbreviated statement that it is repugnant to the Interstate Commerce Act for a motor carrier to act both as a carrier and a shipper as to the same shipment.

The new Rules promulgated by a majority of the Commission would work an abrupt departure from this established principle and from the settled practice. Since joint intermodal service of the kind provided by plans I and V would be continued under new Rule 4, (49 C.F.R. 500.4), the motor common carrier would enjoy the option of both classes of TOFC service, and could choose either open-tariff service without the railroad's consent or concurrence if that rate should be more favorable, or the joint intermodal service if the railroad in negotiation should agree to offer that at a lower rate. The railroads, presently free to bargain with their highway competitors, would be bound to accept whatever TOFC freight their rival carriers might choose to tender. These basic changes in the industry are not, however, inadvertent. The Commission plainly avowed

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[4] Substituted Freight Service, 232 I.C.C. 683 (1939).

[5] *See* Movement of Highway Trailers by Rail, 293 I.C.C. 93 (1954), and cases there cited.

[fol. 357] its purpose as "the reexamination of existing Commission precedents and pronouncements" and it specifically overruled those prior decisions which it found to be indistinguishable and absolutely irreconcilable with its newer view. The issue of power is thus clearly drawn.

II.

In reviewing the authority of the Commission to issue the Rules in question, we are confronted at the outset by the duty to measure the administrative action solely against the statutory grounds invoked by the agency. In the exercise of judicial review, a court is not at liberty to seek its own justification for the Commission's order or to accept appellate counsel's *post hoc* rationalizations.[6] The Commission bears a correlative duty to disclose clearly the grounds on which it acts.[7]

Here we cannot say that the Commission's Report is a model of clarity, guiding the court unerringly to the statutory source of the power relied upon. The Rules are described in the Report as partly interpretive, partly imposing billing and tariff requirements, and partly "to implement the broad provisions of existing legislation", without specification of which ground supports any particular rule. In overruling its earlier decisions which prohibited motor carriers from shipping their customers' goods by [fol. 358] rail, the Commission "does not doubt that when made they represented sound conclusions." The decisions are now regarded, however, as "incorrect in the light of this record and current conditions." The observation suggests that the Commission now regards itself as vested with a sweeping power to make quasi-legislative rules which

[6] Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962); Atchison, Topeka and Santa Fe Ry. v. United States, 209 F. Supp. 35, 45 (N. D. Ill. 1962).

[7] Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 94 (1943); Automatic Canteen Company v. Federal Trade Commission, 346 U.S. 61, 81 (1953).

it deems appropriate to carry forward the broad policies of the act of Congress, although it declared at an earlier day that "We are invested with no roving commission to carry out the policy of Congress . . . . "[8]

It is unnecessary to decide, however, whether the power delegated in Section 12 of the Interstate Commerce Act, authorizing the Commission "to execute and enforce the provisions" of the Act, confers such a general power to make rules to meet changed conditions. The Rules in question here must stand or fall with the interpretation of the Act itself, regardless of altered circumstances in the transportation industry. On one hand, Rules 2 and 3 are simply declaratory of the command of Congress if the Commission is correct in construing the Act to forbid railroad discrimination against motor carriers in the services afforded, and in interpreting the Act as imposing no limits on the power of a motor carrier to avail itself of substituted rail service in its authorized operations. On the other hand, the Rules are invalid as in conflict with the Act, despite changed conditions, if the congressional enactment is read [fol. 359] to excuse the railroads from a duty to serve motor carriers equally with ordinary shippers, or to limit the authority of motor carriers to ship their customers' freight by rail without the railroads' concurrence.

We turn first, then, to the interpretation of the relevant statutes, upon the Commission's assumption that the questions are open and may be treated as matters of first impression. We will thereafter consider the effect of the settled line of decision establishing an interpretation contrary to the Commission's revised views.

III.

The only statute mentioned in the Commission's report which could supply affirmative support for Rules 2 and 3

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[8] Kansas City Southern Ry. Co. v. Kansas City Terminal Ry. Co., 211 I.C.C. 291, 304 (1935).

is Section 2 of the Interstate Commerce Act.[9] Indeed, in considerable part the Commission's Rule 2 is merely a paraphrase of that Section. We may accept, therefore, the argument of counsel for the government, despite the ambiguity of the Report's reference and discussion, that the Commission invoked Section 2 as authority for its Rules.

Section 2 provides in full:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the [fol. 360] transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

By its terms, this Section deals only with discrimination in rates, and does not extend to a discriminatory refusal to provide service at all. This limitation in scope is not a legislative oversight, however. The next succeeding section of the Act rounds out the carrier's duty of equal treatment, by forbidding discrimination or preferences in the service afforded, in the following terms:

> Section 3(1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district,

[9] 49 U.S.C. § 2 (1887).

> gateway, transit point, region, district, territory, or any particular description of traffic whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

It appears, then, that the letter of the law singled out by the Commission as authority for its Rules offers no support, since the ostensible object and effect of those Rules is not to eliminate discrimination in rates under Section 2, but rather to compel the railroads to afford TOFC service to motor carriers if it is provided for others. The provision relevant to this purpose, Section 3, is nowhere cited in the Commission Report. This flaw might not be fatal if Section 3 provided the necessary foundation, since the two sections are plainly complementary and to be read *in pari materia*. But Section 3, by its proviso, specifically excludes [fol. 361] from its coverage "the traffic of any other carrier of whatever description."

Endeavoring to avoid the plain meaning of this proviso, the government relies upon a portion of its complex legislative history. The proviso was enacted in 1940, when it was adopted from a parallel provision of part II of the Interstate Commerce Act, dealing with motor carriers, which had been enacted in 1935.[10] Tracing to this source, the government points to a statement of Senator Wheeler, made in explanation of the language as used in this earlier bill, tending to show that the proviso was intended to allay fears that carriers by competing modes might complain

[10] Section 216(d), 49 U.S.C. § 316(d) (1935).

of injury by reason of the low rates of the rival.[11] The Senator expressed his opinion that the fears were not well founded, however, because the basic command of the section had in turn been borrowed from Section 3 of part I (applicable to railroads) as originally enacted *without* the proviso, and because that section had "always been interpreted as covering unequal and unjust treatment by a carrier of its patrons." Reading "patrons" as including carriers who tender freight for shipment, the government's argument proceeds from this observation through the tangle of cross-references to the conclusion that Section 3 *does* protect carriers who seek to use another carrier's services since it is said that the proviso exempts only discrimination against the traffic of other carriers competing on parallel routes for the same business. The plaintiffs point out in response that Senator Wheeler was contrasting "patrons" with "carriers" in his remarks, so the government's major [fol. 362] premise—that carriers are "patrons" in the Senator's thinking—is faulty.

At best this legislative history is inconclusive. It seems clear that the Senator did not have in contemplation the status of the carrier that tenders freight to another, and that his comments on this different bill provide only oblique evidence of the meaning of the basic provisions of Section 3(1), which had been enacted nearly fifty years earlier, or of the meaning of its proviso, enacted by another Congress five years later. This evidence of congressional intent is too slender a reed to support a disregard of the broad sweep of the words excluding from the railroad's obligation of equal service "the traffic of any other carrier of whatever description."

Practical problems which would arise under the Commission's interpretation of Section 2 also militate against such a reading. Although the Report emphasizes the value of *coordinated* service by motor carriers and railroads, the Rules promulgated would allow the motor carrier to use

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[11] 79 Cong. Rec. 5656.

any open-tariff TOFC plan, including plan II as well as plan III. Under plan II there is no coordination: the railroad provides complete door-to-door service, with its own tractors and trailers. Thus the motor carrier in using it would abandon any pretense of performing services as a carrier, and would function merely as the customer's agent in calling upon the railroad for its services. Moreover, if the Act required railroads to serve motor carriers and regular shippers without discrimination, there would be no warrant for confining the command to TOFC service. The trucker would be entitled to compel the railroads to carry not only the freight-laden trailer but bulk cargo and [fol. 363] boxcar freight as well. The Rules announced, limited as they are to TOFC shipment, would fall far short of the need for guidance were the novel interpretation of the Act to be sustained; the greater need would be for rules to govern the problem of handling freight in other forms. And since Sections 2 and 3 of the Act apply to the transportation of passengers as well as freight, the Commission's interpretation would open a host of new problems concerning substituted service for passengers. Moreover, the Commission's view of the Act would appear to require intra-modal substituted service, as pointed out by Commissioner Webb in his dissent, by which one railroad could shunt its unprofitable traffic onto a competing railroad, or by which one motor carrier could call upon another for the difficult hauls. Pressed to its logical ultimates, the Act, in the Commission's reading, would permit a carrier which had received freight from another to exercise the same right by tendering the same freight immediately back to the original carrier. Such examples, while remote, are not too extravagant to cast doubt on the validity of the Commission's construction of the Act.

An additional anomaly lies in the fact that the Commission's own Rules would appear to offend against its interpretation of Section 2. While motor carriers could demand TOFC service at the open-tariff rates offered to

regular shippers, they would still be authorized to enter into agreements with rail carriers for joint intermodal service under Commission Rule 4, at rates fixed by private negotiation and contract. The choice would seem to be inconsistent with the Commission's own justifying prin- [fol. 364] ciple as declared in its Rule 2, that TOFC service should "be made available to any person at a charge no greater and no less than that received from any other person . . . ." The effort to achieve equality rather produces a new inequality, since at least under the present practices carriers and shippers are separately served, each group at its own price. How far the Rules fall short of the announced objective of equal charges for all TOFC service is emphasized by the Commission's rejection of two proposed rules which would have fixed the open-tariff rate as the maximum rate which the railroad might receive through private agreements for joint intermodal service, and which would have required the railroads to treat all motor carriers equally, as to services and rates, in its agreements for such joint intermodal service.[12] If the Commission were correct in its view that carriers and regular shippers are equally "persons" within the meaning of Section 2 of the Act, then that statutory prohibition against a railroad's receiving "from any person or persons a greater or less compensation for any service rendered" than from another, "by any special rate . . . or other device," would seem to require not only that carriers be treated as well as shippers, but that shippers be treated as well as carriers, and each carrier as well as any other.

In still another aspect, the Commission's Rules countenance an apparent discrimination which may be difficult [fol. 365] to reconcile with the interpretation of Sections 2 and 3 of the Act as fully applicable to motor carriers shipping their customers' goods by rail. By its Rule 3, the Commission permits motor common carriers to utilize

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[12] The proposed rules, distributed in the initial stages of the proceeding, are set forth, and rejected, at 322 I.C.C. 328.

open-tariff TOFC service only between points on their authorized routes, and to tender traffic to railroads, or receive it from them, only at points which the motor carriers are authorized to serve. Under Rule 5, motor common carriers are subjected to still another limitation, prohibiting the use of open-tariff TOFC as a means to serve by direct route points which the motor carrier is authorized to serve only indirectly and circuitously, by combining route authorizations for other points. Since ordinary shippers are subject to none of these limits, the Rules do not achieve that equality of service which the Commission would require from its reading of Section 2. The answer, of course, lies in the fact that a motor carrier which makes use of open-tariff TOFC service is not merely an ordinary shipper, but is still a carrier subject to all limits imposed by law on its authority. The Commission itself thus recognizes that carriers and shippers are not equally and indiscriminately "persons" entitled to the same service at the same rates under Sections 2 and 3 of the Act.

IV.

While we have concluded that the Rules in question are not authorized in their affirmative commands by Sections 2 and 3 of the Interstate Commerce Act, properly interpreted, there is a related but independent ground under which these Rules must fall. Even if the Act specifically commanded the railroads to serve motor carriers and or- [fol. 366-7] dinary shippers without discrimination, there would remain the question whether the motor carriers could lawfully avail themselves of that service without violating their contracts with customers or exceeding the rights conferred by the certificate of public convenience and necessity which authorizes their operations. In other words, we are bound to consider the statutes regulating the operations of motor carriers as well as those imposing obligations upon the railroads.

The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority conferred on

the carrier. Each mode of transportation is the subject of a separate formal part of the Act: part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by "motor vehicle", not by rail or other modes, and on the "public highway".[13]

When operation by another mode is permissible, specific legislative exceptions have been created. Thus freight forwarders under part IV are specifically authorized to ship [fol. 368] goods by means of common carriers governed by other parts of the Act.[14] Such special exceptions mirror the underlying statutory scheme that limits the carrier in each mode to transportation within and by that mode, absent special exception.

These elementary observations make plain the legislative plan that motor carriers shall perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception. The only relevant statute which allows such substitution is Section 216(c) of the Act.[15] It provides:

> "(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water. . . . In case of such joint rates,

[13] Secs. 203(a)(1) and (c), 206(a)(1), 209(a)(1); 49 U.S.C. §§303(a) and (c), 306(a)(1), 309(a)(1).

[14] Sec. 418; 49 U.S.C. § 1018.

[15] 49 U.S.C. § 316(c) (1935).

> fares, or charges, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. . . ."

It is agreed on all sides that this provision is permissive. In declaring that carriers "*may* establish" through routes and joint rates, Congress left the matter to voluntary agreement, and did not empower the Commission to require such cooperation or coordination. This literal interpretation of Section 216(c) is reinforced by comparison with other provisions of the Act which, as between other classes of carriers, authorize compulsory through routes by Commission order.[16]

[fol. 369] In the proceedings before the Commission and in this court, these plaintiffs submitted that to require the railroads to offer TOFC service equally to motor carriers would constitute the compulsory establishment of through routes in violation of the section. The Commission did not dispute the two premises of the argument: first, that the Commission is "without statutory power indirectly to require the establishment of through motor or motor-rail routes," [17] and second, that requiring railroads to offer open-tariff TOFC service to motor carriers would amount to establishing compulsory *de facto* through routes. The Commission avoided the argument, however, by concluding that no compulsion was involved in its Rules. The Report states:

> "However, to say that we would be requiring the establishment of through routes merely by finding that it is

[16] See Secs. 15(3), 1(4), Interstate Commerce Act, 49 U.S.C. §§ 15(3), 1(4); United States v. Pennsylvania R. Co., 323 U.S. 612 (1945).

[17] 322 I.C.C. 301, at 334.

lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it. We find this argument to be without merit." [18]

The Commission's position is at odds with reality. To say that the railroads are subject to no compulsion so long as they can avoid such through routes by abandoning all TOFC service for anyone hardly preserves the free choice intended by the congressional direction that such carriers "may establish" through routes. If the absence of compulsion is measured by the availability of alternatives, here compulsion is absolute. Under Section 1(4) of the Act, the railroad is bound "to provide and furnish transportation [fol. 370] upon reasonable request therefor. . . ." [19]

With equipment available for TOFC service, the railroad is thus compelled by law to provide such service to the general shipping public, and would then be compelled, under the Commission's Rule, to provide equal service to motor carriers, with no alternative at all.

With the Commission's ground untenable, counsel for the government and the Commission have resorted in this court to new grounds for avoiding the application of Section 216 (c) and its implicit prohibition of compulsory through routes. This new position asserts that a through route exists by definition only when two carriers join in holding out the joint service. Since under the Commission's Rule the railroad would not join in holding out such service—and indeed would participate only by compulsion—it is said that no through route is involved. By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route.

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[18] 322 I.C.C. 301, 335.

[19] 49 U.S.C. § 1(4) (1887).

The want of reason in the position is exemplified by the Commission's holding that TOFC service as now provided under Plan I is authorized as a through route arrangement under Section 216(c). The operative features of that Plan are identical with the TOFC service contemplated by the Commission's newly promulgated Rule 3. In each case the motor carrier has the option, subject to the shipper's veto, to employ substituted rail service or to haul the trailers [fol. 371] over the highway. The shipper pays the motor carrier's rates upon motor carrier bills, and the motor carrier is subject to limits on circuity and points of service. The only difference between the two schemes is the railroad's consent under existing Plan I. If that Plan is to be sustained as a voluntary through route under Section 216 (c),[20] then the Commission's new open-tariff TOFC service must be viewed as involving a compulsory through route forbidden by the section.[21]

Moreover, the argument does not avoid the fundamental limit derived from the statutory scheme, prohibiting the carrier from performing its transportation services through

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[20] None of the parties has challenged the validity of Plan I in the proceedings before this court. The legality of the Plan is under attack, however, in a separate suit pending in the District Court for the Northern District of Texas, Civil Action No. 4-355.

[21] Carriers by water, otherwise governed by the same principles as motor carriers, must be differentiated on the matter of through routes. By virtue of Section 15(3) of the Act, 49 U.S.C. § 15(3), "the Commission *may*, and it shall whenever deemed by it to be necessary or desirable in the public interest, *after full hearing* upon complaint or upon its own initiative without complaint, *establish through routes* . . . applicable to the transportation of passengers or property *by carriers by railroad* subject to this chapter and *common carriers by water* subject to chapter 12 of this title . . . " The Commission's Report and Order make no reference to this section as authority for the Rules promulgated, and its proceedings did not in any sense constitute the "full hearing" on the necessity for through rail-water routes which is required by that section. Since the section is the exclusive method by which the Commission may require joint rail-water service, and since its powers were not exercised or its requirements met, the Rules are no more valid as applied to TOFC services due water carriers than to motor carriers.

a mode not within its authorization, absent special exception. Since the through route permitted by Section 216(c) is the exclusive statutory authority for the use of rail transportation by motor carriers, the Commission's Rule must qualify, if it is valid at all, as establishing through routes under that section.

V.

Still another obstacle to the Commission's Rules is posed by the separate complaint of the freight forwarders. They [fol. 372] assert that the Commission's new Rules are invalid in so far as they would permit motor carriers to "utilize TOFC service in the performance of all or any portion of their authorized service . . . ."[22] The motor carrier would thereby be permitted to confine its own service to the assembly and consolidation of the shipment, leaving the actual transportation to the railroad, and would be acting not as a carrier but as a freight forwarder. The Rules thus run counter to the provisions of part IV of the Act which forbid any person to act as a freight forwarder without a permit issued by the Commission, and which prohibit the issuance of such permit to a common carrier.[23] In response, the Commission appears to have concluded that so long as the motor carrier holds the requisite authority, so that it *could* act as a carrier by transporting the shipment itself, it is acting in its capacity "as a carrier" even though no carrier service is performed in fact.[24] The non-carrying carrier thus would not be subject to the statute prohibiting any person from performing the ser- [fol. 373] vices of a freight forwarder without a license, but would be excused by the provision exempting a person who performs such services "as a carrier."[25]

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[22] Rule 500.3(a), 322 I.C.C. 413.

[23] Sections 410(a)(1), (c), 49 U.S.C. 1010(a)(1), 1010(c).

[24] 322 I.C.C. 333, 335.

[25] Section 402(a)(5), 49 U.S.C. § 1002(a)(5).

No reason is suggested why we should suppose that Congress meant to allow a motor carrier to perform only the services of a freight forwarder, not as an incident to furnishing transportation, merely because the carrier holds a bare unexercised authority to furnish transportation, while at the same time Congress prohibited the licensing of motor carriers as freight forwarders.

The principal foundation for the Commission's new Rules is apparently summed up in its observation "We can see no justification either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally." [26] The observation can be sustained only if the motor carrier is permitted, chameleon-like, to change its coloration to evade these statutory prohibitions. Thus, to escape the Congressional denial of power to establish compulsory through routes under Sec. 216(c), it is claimed that the motor carrier in using the railroad's open-tariff TOFC service is acting not as a connecting carrier, but merely as a private person belonging to the general shipping public. At the same time, to escape the freight forwarder's claim, it is said that the motor carrier does the same thing not as [fol. 374] an ordinary member of the general shipping public but as a carrier. To keep faith with Congress, to give reasonable effect to its commands, we are obliged to eschew word-play and to read the statutes in the light and spirit of their purpose. The policy explicit in Sections 216(c) and 402(a)(5), and implicit in the structure of the Interstate Commerce Act as a whole, does not allow a motor carrier to perform its authorized service simply by tendering the shipment to the railroad for transportation without the railroad's concurrence. This policy is reflected in the National Transportation Policy declared by Congress "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent ad-

[26] 322 I.C.C., at 335.

vantages of each . . . ."[27] This underlying purpose militates against allowing rail carriers to invade the motor carrier field,[28] and its reason extends equally to the converse situation, where motor carriers seek to exploit the inherent advantages of rail transportation.

VI

We have thus far approached the issues of statutory interpretation as a matter of first impression. Our conclusion that the Commission's Rules exceed its powers under the Interstate Commerce Act does not rest alone, however, upon our construction of that legislation. The holding is [fol. 375] supported and confirmed by the consistent and repeated decisions of the Commission and the courts. Few of these opinions can be regarded as directly holding that motor carriers cannot legally avail themselves of the railroads' open-tariff TOFC service without railroad concurrence. Nonetheless, they proceed upon premises which reaffirm the statutory principles previously considered.

The Commission's course of decision began before the enactment of part II of the Act, and before motor carriers were subjected to federal regulation. In *Trucks on Flatcars Between Chicago and Twin Cities,* 216 I.C.C. 435 (1936), the railroad had offered open-tariff service to motor carriers before the passage of part II; in a decision handed down after the regulatory act had taken effect, the Commission sanctioned the offering. It should be noted, however, that the railroad had voluntarily offered the service to attract the traffic of a motor carrier, and that some five months later the railroad withdrew its open-tariff offering and entered into a through-route, joint rate arrangement with the motor carrier, approved in *Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245.

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[27] Act Sept. 18, 1940, 54 Stat. 899, 49 U.S.C. preceding § 1.

[28] American Trucking Associations, Inc. v. United States, 364 U.S. 1, 6 (1959); United States v. Rock Island Motor Transit Co., 340 U.S. 419, 431-2 (1951).

Whatever implications of approval might be drawn from the earlier decision were overruled three years later in *Substituted Freight Service*, 232 I.C.C. 683 (1939). Here the Commission plainly held that a motor carrier could not lawfully substitute rail service for its authorized highway service for a part of the line haul. Although the decision emphasizes the necessity for publication of tariffs disclosing the manner of carriage, it also requires that such tariffs be published with the concurrence of the railroad. In the absence of such concurrence, which would establish a [fol. 376] through route at joint rates under Sec. 216(c),[29] the opinion declares that it is "repugnant to the act" for a motor carrier "to act as a common carrier by motor vehicle and as a shipper by rail as to the same service . . . ." [30] This interpretation of the Act was followed and affirmed in an unbroken line of decisions of the Commission in the intervening years. Such cases as *Ringsby Truck Lines, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 263 I.C.C. 139, 141 (1945); *Savage Application*, 265 I.C.C. 157, 167 (1947); and *Movement of Highway Trailers by Rail* (the so-called New Haven case), 293 I.C.C. 93 (1954), are illustrative. For twenty-five years, until the decision here under review, the Commission had adhered to this interpretation of the act directly in conflict with its newly announced views.

In the courts, a similar principle is established in holdings to the effect that a person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the "grandfather" provisions of the Act. *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (D.C. N. Y. 1940), aff'd p.c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States*, 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. The rele-

[29] 49 U.S.C. §316(c).

[30] 232 I.C.C., 690.

vant premise of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, [fol. 377] not rail transportation by railroad. The cases would be distinguishable only if we were willing to rule that the unexercised power to provide highway service qualifies a person as a motor carrier even though he provides transportation solely by rail instead.

In the *Acme* case, it was also urged that a joint service arrangement might be valid outside the limits of Section 216(c) of the Act, 49 U.S.C. §316(c), a contention similar to that presented by counsel for the government here. The court concluded as we have, that the provisions of that section are the exclusive means for establishing joint motor-rail through routes and joint rates, and that any such arrangement not in conformity with the section must fall.[31] Implicit in that section is the Commission's lack of power to compel motor carriers and rail carriers to provide coordinated service, and it was this lack of power which justified permitting railroads to provide motor carrier service incidental and supplemental to their rail transportation. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 72 (1945). See Fulda, *Rail-Motor Competition: Motor Carrier Operations by Railroads*, 54 Nw. L. Rev. 156, 201 (1959).

Although it is settled that a common carrier may not discriminate against (or in favor of) another carrier shipping its own property for its own purposes,[32] Sections 2 [fol. 378] and 3 of the Act have never, so far as appears, been interpreted by the Commission or the courts to require one carrier to perform service as a substitute for

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[31] 30 F. Supp. at 973.

[32] I.C.C. v. Baltimore & Ohio R.R., 225 U.S. 326 (1912). Freight forwarders, not entitled to establish through routes and joint rates with common carriers under the Act, are in the same position as ordinary shippers and are thus protected from discrimination under the Act. I.C.C. v. Delaware, L. & W. R.R., 220 U.S. 235 (1911).

another carrier, *qua* carrier, as the Commission's new rules would command. In the face of this settled interpretation of the Act by the Commission itself as well as the courts, the deference ordinarily due to the construction of the Act by the administrative agency responsible for its enforcement is not called for. See *All States Freight, Inc.* v. *New York, New Haven & Hartford Railroad,* 379 U.S. 343 (1964); *Atchison, Topeka and Santa Fe Railway Co.* v. *United States,* 209 F. Supp. 35, 41-42 (N. D. Ill. 1962); *United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396 (1956).

Moreover, this settled interpretation of the Act has been recognized and accepted by both the executive and legislative branches. In his Message to Congress Relative to the Transportation System on April 5, 1962, the President recommended legislative action to achieve precisely the result of the Commission's Rules here in issue.[33] Bills to effectuate this proposal were introduced both in the Senate and in the House in 1962 and again in 1963.[34] Pending at the same time were bills proposed by the Commission itself to achieve a similar objective by amending Section 216(c) of the Act to empower the Commission to compel motor [fol. 379] carriers and railroads to establish through routes.[35] Congress failed to enact any of these proposals. While courts must take care not to give undue weight to legislative inaction, the fact that the President placed before the Congress a proposal predicated upon a specific interpretation of existing law cannot wholly be ignored in

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[33] H.R. Doc. No. 384, 87th Cong., 2d Sess.

[34] S. 3242 and H.R. 11584, 87th Cong., 2d Sess. (1962) and S. 1062 and H.R. 4701, 88th Cong., 1st Sess. (1963). It should be noted that each bill would have amended Section 2 of the Act not to prohibit discrimination against competing carriers generally and as to all service, as the Commission's reading would require, but merely to prohibit discrimination in the transportation of "loaded or empty vehicles or shipping containers," that is, TOFC service.

[35] S. 3510 and H.R. 12362, 87th Cong., 2d Sess. (1962); S. 676 and H.R. 2088, 88th Cong., 1st Sess. (1963).

interpreting that law when Congress has refused to make the suggested change. See *Blau* v. *Lehman*, 368 U.S. 403, 412-13 (1962); *Maurer* v. *Hamilton*, 309 U.S. 598, 613 (1940).

In conclusion, it appears that neither the specific provisions of the Interstate Commerce Act nor its general underlying scheme confer authority upon the Commission to compel railroads to provide open-tariff TOFC service to motor carriers; on the contrary, the Act both in its specifics and general policy, forbid such compulsion. With the confirmation of this interpretation in an unbroken line of Commission decisions, in judicial precedent, and in executive and legislative understanding, there is no room for the Commission to alter the settled meaning. Like the Commission, this court is foreclosed from indulgence in the broad formulation of wise transportation policy. Those considerations belong to the Congress. We therefore hold that Rules 2 and 3 as promulgated by the Commission in [fol. 380] this proceeding, and Rule 5 in so far as it amplifies those rules, are invalid and must be set aside.

VII

Two collateral matters remain for disposition. While the plaintiffs asserted principally the invalidity of Rules 2 and 3, they have also attacked Rules 5 and 7 promulgated by the Commission in the same proceeding and order.

Rule 5 represents the Commission's effort to assure that TOFC service will not be misused by motor carriers as a means of circumventing the limits of their certificates concerning authorized routes. Since a motor carrier might be able to link its separately authorized routes to create a circuitous route between authorized points of service, and to achieve the benefits of a direct route authorization by utilizing TOFC service directly between those points, Rule 5 permits motor carriers to use TOFC service "in lieu of their authorized line haul transportation" only if the rail distance is at least 85 per cent of the highway dis-

tance by the authorized route.[36] In so far as this Rule [fol. 381] relates to open-tariff TOFC service, it falls, *pro tanto,* with Rules 2 and 3. The railroads have attacked its remaining application to joint intermodal service as ambiguous and arbitrary, to the extent that it may control joint intermodal service under existing plan V. We cannot agree that the Rule is without rational foundation. To the extent that through routes are established end to end under plan V, the Rule by its terms has no application. Where the TOFC service is used "in lieu of" the motor carrier's line haul transportation between points the motor carrier could serve, we cannot conclude that the Commission was fatally arbitrary in concluding that respect for the limits of the certificates issued requires the imposition of circuity safeguards, whether the intermodal arrangement for the substitution of TOFC service would be classed as plan I or plan V.

Finally, the plaintiffs have attacked the validity of Rule 7, claiming it to be arbitrary, ambiguous, and beyond the Commission's power. In substance, the Rule requires publication in tariff form of the rates and rules governing the leasing of equipment (practically, highway trailers) by a railroad or its affiliate to any person using the railroad's TOFC service. Literally, the Rule does not require that the lease be *for the purpose* of TOFC shipment, but only

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[36] The Rule provides in relevant part:

500.5 *Circuity limitations.*—

(*a*) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open-tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 per cent of the distance between such points over the motor or water carrier's authorized service route; *provided, however,* that the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

to a "person using" the railroad's TOFC service. It is plain from the objectives of the Commission as elaborated in its Report, however, that the Commission was concerned [fol. 382] with the leasing of trailers by the railroad for use in its own TOFC service, as part of the total transportation service supplied. This limited interpretation of the Rule was specifically avowed by counsel for the government on brief and in oral argument. In this reading, the Rule would find support in Section 6(1) of the Act, requiring full publication of all charges and privileges or facilities affecting the value of the service rendered to the shipper, and by Section 1(3)(a), defining rail "transportation" to include the instrumentalities of carriage, irrespective of ownership.

Since the proceeding must be remanded to the Commission in any event, for a general revision of the Rules as a whole in conformity with these views, we will adopt and accept this limited interpretation of Rule 7. The Commission will have an early opportunity to clarify its intent if a broader scope should be thought necessary. Limited in this way, the Rule appears to be subject to no invalidating objection.

A decree will be entered for the plaintiffs, consistent with the foregoing conclusions.

[fol. 383]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
Civil Action No. 64 C 1442

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; LOUISIANA & ARKANSAS RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; UNION PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY; THE WESTERN PACIFIC RAILROAD COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA; and INTERSTATE COMMERCE COMMISSION, Defendants.

DECREE—August 20, 1965

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having heard and considered the evidence and

the briefs and arguments of counsel for the parties, and [fol. 384] having rendered and filed its Opinion herein containing its findings of fact and conclusions of law, and being fully advised in the premises, it is

Ordered, Adjudged, and Decreed:

1. That the Report and Order of the Interstate Commerce Commission entered in its proceeding numbered Ex Parte 230 and entitled *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, dated March 16, 1964, in so far as it issues and prescribes Rules 2 and 3 contained therein and designated as 49 C.F.R. 500.2 and 500.3, be and hereby is set aside and annulled;

2. That the defendant Interstate Commerce Commission be and hereby is permanently enjoined and restrained from enforcing said Rules 2 and 3 contained in and issued by the Report and Order aforesaid; and

3. That this proceeding be and hereby is remanded to the Interstate Commerce Commission for such further proceedings, consistent with the Opinion and Decree of this Court, as may be appropriate.

Dated this 20th day of August, 1965.

Enter:

Latham Castle, Circuit Judge; Julius J. Hoffman, District Judge; Bernard M. Decker, District Judge.

[fol. 386]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL BY AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., TO THE SUPREME COURT OF THE UNITED STATES —Filed October 15, 1965

I

Notice is herewith given that American Trucking Associations, Inc., et al., intervening defendants in the above-entitled civil action, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on August 20, 1965, reversing in part the report and order of the Interstate Commerce Commission, dated March 16, 1964.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the record in the cause for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

(a) Complaint, filed August 25, 1964, by plaintiffs, Atchison, Topeka and Santa Fe Railway Co., et al., including Exhibits A through E;

[fol. 387] (b) Intervening complaint, dated August 25, 1964, of the New York Central Railroad Company;

(c) Intervening complaint of Acme Fast Freight, Inc., et al.;

[File endorsement omitted]

(d) Order of the Court, dated August 28, 1964, granting Acme Fast Freight, Inc., et al., leave to intervene as plaintiffs;

(e) Intervening complaint, dated September 2, 1964, of the Eastern Railroads;

(f) Order of the Court, dated September 3, 1964, granting the Eastern Railroads leave to intervene as plaintiffs;

(g) Intervening complaint of Southern Railway Company, et al.;

(h) Order of the Court, dated September 14, 1964, granting Southern Railway Company, et al., leave to intervene as plaintiffs;

(i) Answer to the complaint, dated September 10, 1964, of intervening defendant, American Trucking Associations, Inc., et al.;

(j) Order of the Court, dated September 14, 1964, granting American Trucking Associations, Inc., et al., leave to intervene as defendants;

(k) Supplemental answer to the complaints, dated October 6, 1964, of intervening defendant, American Trucking Associations, Inc., et al.;

(l) Joint answer to the complaint, dated November 6, 1964, of the United States of America and the Interstate Commerce Commission;

(m) Amended complaint, dated January 21, 1965, of intervening plaintiff, the New York Central Railroad Company;

(n) Joint answer to the amended complaint, dated January 29, 1965, of the United States of America and the Interstate Commerce Commission;

(o) Second supplemental answer to the amended complaint, dated February 8, 1965, of intervening defendants, American Trucking Associations, Inc., et al., embracing

supplemental answer to the amended complaint of intervening defendant Contract Carrier Conference of American Trucking Associations, Inc.;

[fol. 388] (p) Opinion and judgment of the Court, dated August 20, 1965;

(q) Transcript of testimony and exhibits 1 through 51, before the Interstate Commerce Commission in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, certified by the Acting Secretary of the Interstate Commerce Commission and admitted into evidence at the hearing before the Court on June 1, 1965;

(r) This Notice of Appeal.

III

The following questions are presented by this appeal:

1. Did the District Court err in holding that Rules 2 and 3, and Rule 5 insofar as it relates to open-tariff TOFC service, prescribed by the Interstate Commerce Commission in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, are not authorized by Sections 2 and 3 of the Act?

2. Did the District Court err in holding that Rules 2 and 3, and Rule 5 insofar as it relates to open-tariff TOFC service, violate the provisions of Section 216(c) and Part IV of the Act, respectively?

3. Did the District Court err in setting aside the Commission's report and order insofar as it prescribed Rules 2 and 3?

Respectfully submitted,

Peter T. Beardsley, Harry J. Jordan, William R. Rubbert, Paul D. Borghesani, F. G. Freund, R. Edwin Brady, 1616 P Street, N. W., Washington, D. C. 20036.

[fol. 389] Bryce Rea, Jr., 1329 E Street, N. W., Washington, D. C. 20004;

Roland Rice, Homer S. Carpenter, John S. Fessenden, Richard R. Sigmon, 1111 E Street, N. W., Washington, D. C. 20004;

James E. Wilson, 1111 E Street, N. W., Washington, D. C. 20004;

Guy H. Postell, 1375 Peachtree Street, N. E., Atlanta 9, Georgia;

Ferdinand Born, 708 Chamber of Commerce Building, Indianapolis, Indiana.

George D. Michalson, P. O. Drawer 647, Kansas City 41, Missouri;

Herman Matthei, 125 Lincoln Street, Boston 11, Massachusetts;

Robert Gawley, 631 Niagara Street, Buffalo, New York;

LeGrand A. Carlston, 4045 Pecos Street, Denver 11, Colorado;

F. H. Lynch, Jr., 4112 San Jacinto Street, Dallas, Texas,

Attorneys for Appellant.

Of Counsel:

Carl L. Steiner, Esq., Axelrod, Goodman & Steiner, 39 South La Salle Street, Chicago 3, Illinois.

[fol. 390] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 392]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL BY U.S., AND I.C.C. TO THE SUPREME COURT OF THE UNITED STATES—Filed October 18, 1965

I.

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled action, appeal to the Supreme Court of the United States from the final judgment and order entered in this action on August 20, 1965.

This appeal is taken pursuant to 28 U.S.C. §§1253 and 2101(b).

II.

These appellants hereby adopt and incorporate into this Notice of Appeal the designation of record contained in the Notice of Appeal filed in this action by the American [fol. 393] Trucking Associations, Inc., et al., which designated the portions of the record to be prepared by the Clerk of this Court for transmission to the Clerk of the Supreme Court of the United States, but request the Clerk of this Court to include in said transcript the following additional document:

This notice of appeal.

III.

The following questions are presented by this appeal:

1. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff

[File endorsement omitted]

TOFC service), 49 C.F.R. 500.2, 500.3, 500.5, issued by the Commission in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, are not authorized by Sections 2 and 3 of the Interstate Commerce Act, 49 U.S.C. §§2 and 3?

2. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff TOFC service) violate the internal structure of the Interstate Commerce Act and are specifically forbidden by the provisions of Sections 216(c), 402(a)(5), 410(a)(1) and 410(c), 49 U.S.C. §§316(c), 1002(a)(5), 1010(a)(1), and 1010(c)?

[fol. 394] 4. Did the District Court err in setting aside the Commission's report and order insofar as it issued and prescribed Rules 2 and 3?

Dated October 15, 1965

Donald F. Turner, Assistant Attorney General;

Lionel Kestenbaum, Attorney, Department of Justice, Washington, D. C. 20530;

Edward V. Hanrahan, United States Attorney, Northern District of Illinois, Chicago, Illinois,

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C. 20423,

Attorneys for the Interstate Commerce Commission.

[fol. 395] Proof of Service (omitted in printing).

[fol. 414]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL BY NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN TO THE SUPREME COURT OF THE UNITED STATES—Filed October 20, 1965

I.

Notice is hereby given that the National Automobile Transporters Association of Detroit, Michigan, intervening defendant in the above-entitled action, appeals to the Supreme Court of the United States from the final judgment and order entered in this action on August 20, 1965.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101 (b).

II.

This intervening appellant hereby adopts and incorporates into this Notice of Appeal the designation of record contained in the Notice of Appeal filed in this action by the American Trucking Associations, Inc., et al., which designated the portions of the record to be prepared by the Clerk of this Court for transmission to the Clerk of the [fol. 415] Supreme Court of the United States, but requests the Clerk of this Court to include in said transcript the following additional documents:

1. Motion of National Automobile Transporters Association for leave to intervene as defendant.

2. Order of the Court dated September 14, 1964, granting National Automobile Transporters Association leave to intervene as defendant.

[File endorsement omitted]

3. Answer of National Automobile Transporters Association, intervening defendant.

4. This Notice of Appeal.

III.

The following questions are presented by this appeal:

1. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff TOFC service), 49 C.F.R. 500.2, 500.3, 500.5, issued by the Commission in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, are not authorized by Sections 2 and 3 of the Interstate Commerce Act, 49 U.S.C. §§ 2 and 3?

2. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff TOFC service) violate the internal structure of the Interstate Commerce Act and are specifically forbidden by the provisions of Sections 216(c), 402(a)(5), 410(a)(1) and 410(c), 49 U.S.C. §§ 316(c), 1002(a)(5), 1010(a)(1), and 1010(c)?

[fol. 416] 3. Did the District Court err in setting aside the Commission's report and order insofar as it issued and prescribed Rules 2 and 3?

George S. Dixon, Attorney for Appellant National Automobile Transporters Association, Suite 1700—One Woodward Avenue, Detroit, Michigan 48226, 962-8920; Matheson, Dixon & Bieneman, Of Counsel, Suite 1700—One Woodward Avenue, Detroit, Michigan 48226, 962-8920.

Dated: October 19, 1965.

[fol. 417] Proof of Service (omitted in printing).

[fol. 420]

SUPREME COURT OF THE UNITED STATES

Nos. 908, 916 and 924, October Term, 1965

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.;

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, Appellant,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.; and

---

UNITED STATES, ET AL., Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

Appeals from the United States District Court for the Northern District of Illinois.

ORDER NOTING PROBABLE JURISDICTION—April 18, 1966

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of three hours is allotted for oral argument.

[fol. 421]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

NOTICE OF PROPOSED RULE MAKING AND ORDER—
June 29, 1962

It appearing, That in recent years there has been a marked expansion of and changes in the use of coordinated and substituted service, particularly in so-called motor-rail piggyback operations; and that it is desirable that certain aspects of coordinated and substituted service be further considered by the Commission looking to the resolution and control of the legal and operational problems arising in connection therewith through the promulgation of appropriate rules, regulations, statements of policy, and precedent; therefore:

It is ordered, That a proceeding be, and it is hereby, instituted under the authority of Parts I, II, III, and IV of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act, into the practices of, and the manner and methods of the performance and use of coordinated and substituted motor-rail service, as hereinafter more particularly described, and all similar and related types of service, including, but not limited to, so-called "piggyback" service under Plans I to V, both inclusive (defined in the Appendix hereto), now provided by or participated in, or to be provided by or participated in, or used by shippers and carriers not subject to economic regu- [fol. 422] lation, and by motor common and contract carriers, rail carriers, water carriers, express companies and freight forwarders subject to the Act, for the transportation or shipment of property, in interstate or foreign commerce, for the purposes of ascertaining and determining,

in the light of the national transportation policy, and the provisions of the Interstate Commerce Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided and utilized by or for rail, motor, and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers, and of taking such other and further action as the facts and circumstances may justify or require.

Specific issues to be considered and determined in this proceeding, among others, are:

I. What is the nature of the operating rights that must be held by motor carriers in order to participate in TOFC Plan I substituted service, including the question whether motor carriers may participate in such service where the motor carrier's route is circuitous with respect to the portion of the rail route used.

II. The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV TOFC rail rates and service in their operations. If so permitted, under what conditions and limitations.

Evidence to be considered in this proceeding bearing upon the above-described issues shall include, but not be limited to:

I. All operational practices and methods utilized in coordinated and substituted service transportation;

[fol. 423]

II. Re-examination of existing Commission precedents and pronouncements governing coordinated and substituted service transportation;

III. Rules and regulations, if any, which may be required to regulate, in the public interest, the utilization of coordinated and substituted service trans-

portation from a competitive standpoint or otherwise, particularly in connection with the substitution of rail service for any other mode of transportation;

IV. The need, if any, for corrective or implementing legislation for expansion or regulation of coordinated and substituted service transportation;

V. The existence of unjust discrimination, or undue preference or prejudice in the offering or furnishing of services in the transportation of such vehicles or containers, or in the rates demanded or charged therefor; and

VI. All related matters inherent in or to the basic purposes underlying this investigation.

It is further ordered, That the Bureau of Inquiry and Compliance of this Commission be, and it is hereby, authorized and directed to participate in this proceeding for the purpose of developing the evidence and the issues.

It is further ordered, That all railroads, motor carriers, water carriers, express companies, and freight forwarders of property operating in interstate or foreign commerce, subject to the Interstate Commerce Act, be, and they are hereby, made respondents in this proceeding.

It is further ordered, That all respondents herein that participate in coordinated and substituted service to any extent or any other interested party including shippers or carriers of any mode not subject to the Interstate Commerce Act, be, and they are hereby, invited to submit to this Commission, on or before September 4, 1962, representations, consisting of an original and 20 copies, setting [fol. 424] forth the extent of such participation and the practices connected therewith. Those filing representations are urged to include therein, among other things, the following information to assist the Commission in accom-

plishing the purposes of this investigation: Whether such service is participated in as joint line service or substituted service; if the latter, whether the motor or water carrier has underlying operating rights and if so, the amount of circuity involved; the type of tariff arrangements entered into with the railroads; whether at any time the carrier acts as a shipper or agent of a shipper; and whether the trailers or containers move on joint through routes and rates or single factor rates, or otherwise. The statements of the rail respondents should set forth, among other things, the type of tariff arrangements entered into with the motor carriers or other carriers; the particular plans that they have in effect and the nature thereof; the extent to which the several plans utilized are held out to all carriers; whether they receive a division of a rate or a published rate for their services; the extent to which they furnish terminal or over the road services; and the extent to which they participate in coordinated and substituted service with motor or other carriers exempt from economic regulations.

It is further ordered, That, in accordance with Rule 68 of the Commission's General Rules of Practice, the proceeding be, and it is hereby, assigned for a prehearing conference at 8:30 o'clock a.m., United States Standard Time (9:30 o'clock a.m., District of Columbia Daylight Saving Time), on October 9, 1962, at the Offices of the Interstate Commerce Commission, Washington, D. C., before Commissioners Clyde E. Herring and William H. Tucker, for the purposes of:

[fol. 425] 1. Agreeing upon special procedures to expedite and control the handling of this proceeding and the production and submission of evidence on the issues presented;

2. Agreeing as to the time and place or places of any hearing or hearings which may be required;

3. Determining the practicability and desirability of all parties exchanging exhibits covering the immediately

above-listed matters in advance of hearing, if one is to be held;

4. Ascertaining the need, if any, of the entry of a supplemental order changing the scope of the proceeding;

5. Determining any other matters by which the processing of the proceeding can be expedited, simplified, or the Commission's handling thereof aided.

And it is further ordered, That a copy of this order be served on the Public Utility Commissions or Boards, or similar regulatory bodies, of each State having jurisdiction over the transportation here involved; that a copy be posted in the Office of the Secretary of the Interstate Commerce Commission for public inspection; and that a copy be delivered to the Director, Division of the Federal Register, for publication in the Federal Register as notice to all interested persons.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 426]

APPENDIX TO NOTICE OF PROPOSED RULE MAKING AND ORDER

PLAN I: Railroad movement of trailers or containers of common motor carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

PLAN II: Railroad performs its own door-to-door service, moving its own trailers or containers on flat cars under tariffs usually similar to those of truckers.

PLAN III: Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or con-

tainers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

PLAN IV: Shipper or forwarder furnishes a trailer or container-loaded flat car, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

PLAN V: Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

[fol. 427]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPRESENTATIONS OF McLEAN TRUCKING COMPANY

• • • • • • •

Pursuant to the order of the Commission dated July 2, 1962 in the above entitled proceeding, McLean Trucking Company and its wholly owned subsidiary, Hayes Freight Lines, Inc., are happy to accept the Commission's invitation to supply data as requested with respect to their use of piggyback service in connection with authorized highway operations.

• • • • • • •

[fol. 428] While the attached exhibits indicate widespread substituted service arrangements for use of Plan I piggyback service, such service has been used limitedly by our companies. Generally our companies have only been able to make effective use of Plan I service when we have had a pronounced shortage of power equipment at origin points and in some instances where a serious imbalance of traffic

was involved. For the most part use of Plan I service has been used to supplement our line haul operations rather than as a substitute for such operations.

• • • • • • •

[fol. 429] Respectfully submitted

Hayes Freight Lines, Inc., McLean Trucking Company, By: Alex A. Spach, Traffic Manager.

[fol. 430]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230—Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders

EXCERPTS FROM REPRESENTATIONS OF SOUTHERN RAILWAY SYSTEM

In response to the Commission's order of June 29, 1962, in the above-entitled case, Southern Railway System's answers to questions of rail respondents set forth on page four are as follows:

• • • • • • •

2—*Question*: The particular plans that are in effect and the nature thereof;

Answer: Plans II, III, IV, V. See Exhibit A of order dated July 2, Ex Parte 230

3—*Question*: The extent to which the several plans utilized are held out to all carriers;

Answer: None

• • • • • • •

5—*Question*: The extent to which the respondent furnishes terminal or over the road services;

Answer: No motor carrier authority or operation.

• • • • • • •

James A. Bistline.

[fol. 431]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex parte No. 230

EXCERPTS FROM REPRESENTATIONS OF BEKINS VAN LINES CO.

Comes Now Bekins Van Lines Co., a respondent herein, and in response to the invitation in the Commission's order in this matter, files this its written statement setting forth its participation in, practices and views in connection with substitute service by motor-rail trailer on flatcar operations, (hereinafter referred to as TOFC).

• • • • • • • •

[fol. 432]

I

Bekins Position Generally

Bekins consistently endeavors to provide its customers the most efficient and economical service that can be made available. As a corollary of that policy, Bekins has continually sought to broaden its use of substituted service of all kinds into the applicable phases of its business when, in its opinion it would be to the benefit of the shipping public. In its considered judgment, there are definite benefits derived from a need for Plan I TOFC in some phases of our business. Pursuant to that need, we have sought to obtain this service from the rail companies. In some geographical areas the rail carriers have cooperated and the service has been instituted to our mutual benefit, in other instances prevailing rate structures in effect make the service unfeasible. Certain railroads have absolutely refused to provide the service for traffic moving between the Pacific Coast, on the one hand, and, on the other, the Midwest and the East. No railroad or combination of railroads has been willing to provide this transcontinental Plan I TOFC service.

• • • • • • •

[fol. 433]

III

The Integration of Rail and Highway Transportation by Household Goods Carriers

Rails can be utilized to implement the highway transportation service of household goods carriers in two basic ways: to minimize the problems resulting from the inevitable inbalance in traffic; and to provide a more efficient service with concomitant lower costs.

In the transportation of household goods, experience has shown that there is an inevitable inbalance of traffic between various areas of the country. When this exists it delays the movements of the crews and equipment in one direction and the shipment in both directions until the traffic is balanced. The alternative is to move the equip-
[fol. 434] ment in the necessary direction either empty or lightly loaded. Either alternative increases costs generally and the service to the public is deteriorated. With Plan I TOFC integrated into household goods carrier service these problems could be minimized.

* * * * * * *

IV

Bekins Present Utilization of Rail Service

Bekins can and does utilize the rail carriers to perform portions of its transportation service. It has had and continues to have sufficient concentrated traffic capable of long hauls without intermediate pickups and deliveries. It has provided for Plan I TOFC substituted service as indicated in Household Goods Carrier Bureau Tariff 94-B, MF-I.C.C. No. 107 Rule 40, between 23 cities via seven railroads (a
[fol. 435] copy of said rule is attached hereto as Exhibit No. 1).

V

Unavailability of TOFC Plan I Service

Bekins is informed that there is no transcontinental railroad Plan I TOFC service now being offered or provided

to any motor carrier. We do know, however, that railroads and their connecting lines provide Plans II, III, and IV TOFC transcontinental service. We know also that the number of trailers transported and the volume of freight handled by these methods is substantial.

Bekins has separately approached the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Company, the Union Pacific Railroad Company and the Western Pacific Railroad Company seeking to obtain Plan I service between the Pacific Coast on the one hand, and on the other, Midwestern and Eastern points. These railroads have either declined to enter into Plan I TOFC operations with Bekins or have declined to enter into such operations on an interline basis with connecting railroads to provide a through service between these areas. Western Pacific and Southern Pacific have stated a willingness to enter into Plan I TOFC service between points within the Western States, but this proffered substitute service is so limited in scope that it would be inefficient and uneconomical for Bekins to change its present methods of operation in order to utilize the service.

• • • • • • •

[fol. 436] Conclusion

• • • • • • •

The rail lines by failing to provide this service to motor carriers of household goods are denying themselves the [fol. 437] benefit of additional traffic which would otherwise not be available to them. They do not compete nor want to compete with the household goods carrier.

• • • • • • •

Respectfully submitted,

Bekins Van Lines Co., a Nebraska corporation, By Eldon R. Clawson, General Counsel.

Of Counsel:

Lloyd Ownbey, Jr., Asst. General Counsel.

[fol. 438]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPRESENTATIONS OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Comes now St. Louis-San Francisco Railway Company (hereinafter called Frisco) and for its response to the Commission's invitation for the filing of representations makes the following statement:

Frisco has participated in the handling of trailers on flat cars for a number of years. This type of traffic has been increasing constantly through the years to the extent that in 1961 6,213 flat cars, and in the first six months of 1962 3,340 flat cars containing trailers were handled. In entering into this type of transportation Frisco has been guided by the Commission's pronouncements in *Movement of Highway Trailers by Rail* (1954), 293 I.C.C. 93. It has been Frisco's experience that that report is sufficiently comprehensive to provide, in nearly all situations, a guide to dealing with questions which may arise concerning trailer-on-flat-car (TOFC) operations and tariffs. For this reason Frisco is deeply concerned that the present proceeding should not develop into an attempt to relitigate the issues there involved, or into an attempt to disturb the sound rules there set forth under which TOFC has developed into a significant segment of railroad traffic.

* * * * * * *

[fol. 439]

The Type of Tariff Arrangements Entered Into With Motor Carriers or Other Carriers.

* * * * * * *

Frisco is a party to tariffs providing what is known as Plan I TOFC service. *Frisco participation in this plan is limited to the handling of trailers of Frisco Transportation Company, a motor common carrier, which is its wholly*

owned subsidiary. Under this plan the traffic moves on truck rates and truck billing and the rail carrier's service is limited to that of acting as a substitute carrier for a portion of the total haul. Tariff publications contain conventional substitute service provisions.

Frisco is also a party to tariffs with motor common carriers providing what is known as Plan V TOFC service. This is a joint rail-motor or motor-rail-motor service in which the rail portion utilizes trailer-on-flat-car service. The tariffs covering this service provide a joint through origin-destination service in which the participating carriers furnish the equipment and provide the service for a stated rate. Frisco is party to such tariffs covering the transportation of automobiles and general commodities. There has been no movement of automobiles under these tariffs in the recent past.

• • • • • • •

[fol. 440] Terminal Services and Over-the-Road Services

Frisco furnishes terminal services only under Plan II TOFC tariffs. When tariffs provide for such service, it is performed by local draymen under contract. In some instances Frisco Transportation Company, Frisco's wholly owned motor carrier subsidiary, is the contracting drayman.

Frisco provides no over-the-road motor service. In tariffs to which Frisco is a party providing such service (Plan I or Plan V), it is performed by certificated motor common carriers. It has been Frisco's practice to determine whether motor common carriers with which it participates in performing joint through service have certificates authorizing them to perform the service which the tariff covers. It has been Frisco's experience that the motor carriers are willing to cooperate in making this determination.

• • • • • • •

[fol. 441] Respectfully submitted,

John E. McCullough.

• • • • • • •

[fol. 442]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM REPRESENTATIONS OF CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ET AL.

Comes now Consolidated Freightways Corporation of Delaware, Missouri Consolidated Freightways Corporation, and New York Consolidated Freightways Corporation, all three of which, jointly or singly, are hereinafter referred to as Consolidated Freightways and/or Consolidated, and files this their statement in response to the Commission's invitation in Ex Parte No. 230, as contained in the Notice of Proposed Rule Making dated June 29, 1962.

• • • • • • •

[fol. 443] Consolidated Freightways has a long standing policy favoring coordinated service among the various modes of transportation and as a consequence, thereof, Consolidated has utilized both Plan I and Plan V piggyback service of various railroads for more than six (6) years. However, for the purpose of this statement, Consolidated will not dwell on its Plan V arrangements with three railroads since little traffic has moved under these arrangements. This latter statement should not be interpreted as belittling the importance of Plan V arrangements, however, since Consolidated feels that such arrangements hold much promise for the future. Actually, Plan V arrangements are nothing more than an interchange of traffic moving on joint rates and do not, therefore, fall within the term "substituted service" as it is generally understood. For these reasons, Consolidated's statement, which follows, will be confined primarily to Consolidated's utilization of, and comments on, Plan I piggyback as defined in the Commission's Notice of Proposed Rule Making in Ex Parte 230.

• • • • • • •

[fol. 444] 1. *What is the extent of Consolidated's participation in piggyback services?*

Consolidated Freightways has utilized Plan I piggyback arrangements of various railroads for more than six (6) years. In every instance such utilization has been in connection with a published and effective substituted service tariff provision. At present Consolidated has Plan I arrangements with 21 railroads and has substituted service tariff provisions, published and effective, between approximately 320 pairs of points. All points involved are ones for which Consolidated holds authority from the Commission to serve as a regular route motor common carrier. Appendix "A", attached, lists those points between which Consolidated has Plan I service available and for which Consolidated has published and effective substituted service tariff provisions.

In the first six months of 1962, Consolidated moved 127,804,665 pounds of freight in Plan I piggyback. This amounted to slightly more than five (5) percent of all tonnage handled by Consolidated during the same period. Indicative of Consolidated's increasing utilization of piggyback were the 3,974 loaded trailers moved in Plan I service during the first six months of 1962 as compared to the 2,153 trailers moved during the same period of 1061.

• • • • • • •

[fol. 445] Additionally, the necessity for maintaining highway service between our authorized points is an effective deterrent to complete utilization of this, or any other, piggyback route. Then, too, the need for flexibility dictates the continuing movement of highway schedules since piggyback trains usually move only once every twenty-four (24) hours and then only five (5) days a week.

• • • • • • •

[fol. 446] 3. *What type of tariff arrangements are entered into with the railroad?*

Since all Plan I arrangements are, in effect, joint services, reimbursement to any railroad with which Consolidated has a Plan I arrangement is based on a division of the revenue accruing to Consolidated through [fol. 447] application of the published and effective motor carrier tariff rate between the points involved.

• • • • • • •

[fol. 448] 4. *Does Consolidated, at any time, act as a shipper in its relationship with any railroad?*

At no time under any of its Plan I arrangements does Consolidated act as a shipper in its relationship with any railroad.

• • • • • • •

Suggested Areas For Commission Consideration

Since Ex Parte 230 is an investigation into the broad field [fol. 449] of piggyback generally, Consolidated wishes to take this opportunity to lay before the Commission several important questions and/or practices involving piggyback which, in Consolidated's opinion, need answers and/or clarification.

Questions Which Should Be Answered

• • • • • • •

[fol. 450] 4. *Can a motor common carrier, within the limits of its own operating authority, act as a shipper and a common carrier with respect to the same traffic?*

Consolidated asks this question in full knowledge that it has been answered in the negative by past Commission decisions, however, such decisions are inconsistent with the Commission's practice of allowing freight forwarders and express companies, both of whom are defined as common carriers in the Interstate Commerce

Act, to act as shippers within the scope of their operating authority.

[fol. 451] 5. *Under what circumstances and/or conditions may a motor common carrier utilize Plans III and/or IV piggyback service?*

Although both Plans III and IV are the spawning grounds for a multitude of sins detrimental to the common carrier industry as a whole, and although the legality of both Plans III and IV is still under attack before the Federal Court in Kansas City, Mo., Consolidated is of the firm conviction that both plans, to the extent the Commission finds them legal and desirable, should be open to use by the motor common carrier industry. Such use by a motor common carrier should be subjected to the same limitations applicable in connection with said motor common carriers utilization of Plan I piggyback.

Practices Currently in Effect Which Are Apparently Illegal and Which Are Definitely Detrimental to the Common Carrier Industry

• • • • • • • •

3. Refusal of many railroads to make Plan I service available particularly when the same railroad does offer Plan III and IV service.

• • • • • • • •

[fol. 452] For reasons already discussed herein, all Plan III and IV arrangements offered by the railroads should be open to use by the motor common carrier in the same manner and under the same ground rules as Plan I.

• • • • • • • •

[fol. 453] Respectfully submitted,

Gene T. West, Registered Practitioner.

[fol. 454]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM STATEMENT OF TRANSAMERICAN FREIGHT LINES, INC., RESPONDENT, BY R. B. GOTFREDSON, PRESIDENT

Comes now Transamerican Freight Lines, Inc., 1700 North Waterman Avenue, Detroit 9, Michigan, respondent in the above-entitled proceeding, and files this statement pursuant to the invitation of the Interstate Commerce Commission.

• • • • • • •

[fol. 455] III. Scope of the Use of Substituted Service

The substituted service operations of Transamerican are carried on through use of the trailer-on-flat-car service of the Pennsylvania Railroad Company between Cleveland, Ohio, and Pittsburgh, Pennsylvania, on the one hand, [fol. 456] and Kearny, New Jersey, and Philadelphia, Pennsylvania, on the other. The trailers used are exclusively those operated by the motor carrier. The traffic involved is moving between points that Transamerican is authorized to serve, is now serving, and has served for years. The substituted service is in a bridge operation covering in most instances only a portion of the distance between the points involved and in all instances the shipments are originated and delivered by Transamerican in motor carrier service.

• • • • • • •

[fol. 457] All operations involving the use of substituted service conducted by Transamerican are under Plan I. No so-called "piggyback" operations of any kind have been carried on by respondent under any other plan.

• • • • • • •

[fol. 458] *Plan V.* Transamerican objects to Plan V as it is now set up. Operations performed thereunder enable

thousands of short-line carriers to extend their operations on a coast-to-coast basis and far beyond any territory which the carrier could serve under its authority without recourse to this plan. This plan, as now operated, is de- [fol. 459] structive to long-haul motor carriers. It is not coordination of rail and motor service. On the contrary, it is a long step to limit motor carrier operations to short hauls only. The inherent advantages of motor carrier service guaranteed by the National Transportation Policy of the Act can be lost to the shipping public if operation of the plan is carried out with no restriction as to the extent of the operating authority of the motor carrier and railroad involved.

• • • • • • •

[fol. 460] "5. Where TOFC service is used, has there been a total or substantial abandonment of over-the-highway service by the motor carrier?"

The answer to this question, as far as Transamerican is concerned, is that there has been no total abandonment of motor carrier service between any points. On the contrary, substantial motor carrier operations have been and are being conducted between all authorized points covered by the certificate of respondent in MC-10761 and sub-numbers thereunder. There are several reasons for this action on the part of Transamerican.

One of these reasons is because Transamerican does not desire to jeopardize in any way the validity of its operating rights, which have substantial value and a portion of which were obtained by substantial cash outlays as approved by the Commission in finance proceedings.

• • • • • • •

[fol. 461] Respectfully submitted,

Transamerican Freight Lines, Inc., By: R. B. Gotfredson, President.

[fol. 462]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPRESENTATIONS OF RESPONDENTS, THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND LOUISIANA & ARKANSAS RAILWAY COMPANY PURSUANT TO COMMISSION'S NOTICE AND ORDER OF JUNE 29, 1962

[fol. 463] The following is submitted by The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company pursuant to invitation in Order of the Interstate Commerce Commission in Ex Parte No. 230:

Item No. 1

"the type of tariff arrangements entered into with the motor carriers or other carriers;"

(a) Motor Carriers

The KCS-L&A Railway Companies are participating carriers for joint line application (Plan V) in motor carrier tariffs published by:

Southwestern Motor Freight Bureau, Inc.
Middlewest Motor Freight Bureau
Southern Motor Carriers Rate Conference
Central & Southern Motor Freight Assn.
Rocky Mountain Motor Tariff Bureau

A prototype of the item authorizing participation of the KCS-L&A Railways in the above motor tariffs is attached hereto as Exhibit A.

The KCS-L&A Railway Companies are participating carriers in joint rail-motor (Plan V) rates on automobiles published in:

Wabash Railroad Company Tariff 19855, ICC 7969
Southwestern Freight Bureau Tariff 91, ICC 4489

(b) Water Carriers:

The KCS-L&A Railway Companies are participating carriers in rail-water, rail-water-motor and motor-water-rail rates, for application in Seamobile Service, published in Seatrain Lines, Inc., Tariff SM-2-D, I.C.C. No. 189.

[fol. 464] *Item No. 2*

"the particular plans that they have in effect and the nature thereof;"

Plan I—The KCS-L&A Railway Companies do not participate in any Plan I arrangements.

Plan II—The KCS-L&A Railway Companies are participating carriers for both single and joint line application in TOFC tariffs issued by the various rail bureaus.

Plan III—The KCS-L&A Railway Companies are participating carriers for joint line application in rates published in tariffs issued by the Southern Freight Association and Southwestern Freight Bureau; also the L&A Railway is participating carrier in joint line Plan III rates published by the Southern Railway System in its individual tariffs.

Plan IV—The KCS-L&A Railway Companies are party to the Plan IV joint rates published in Southwestern Freight Bureau Tariff SW/T 75-D, I.C.C. 4380.

Plan V—The KCS-L&A Railway Companies are participating carriers as outlined in answer to Item No. 1.

Item No. 3

"the extent to which the several plans utilized are held out to all carriers;"

Plan II, III and IV arrangements, in which the KCS-L&A Railway Companies participate, are held out to all

rail interstate carriers subject to required tariff publication of rates, routes, rules and regulations.

Plan V arrangements, in which the KCS-L&A Railway Companies participate, are held out to all motor carriers desiring to participate subject to possession of enabling certificate from the Interstate Commerce Commission, the proper tariff publication and satisfactory divisional arrangements.

[fol. 465] Respectfully submitted

The Kansas City Southern Railway Company, Louisiana & Arkansas Railway Company, By W. R. Henry, Freight Traffic Manager.

[fol. 466]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM STATEMENT OF FACTS, VIEWS AND ARGUMENTS OF J. L. COX & SON, INC., PARKHILL TRUCK COMPANY, J. O. (RED) WILLETT PIPE LINE STRINGING CORPORATION, AND DUNN BROS., INC., INTERVENERS

* * * * * * *

[fol. 467] Furthermore, said motor carriers cannot be considered as common carriers in relation to shippers, and as shippers in relation to the railroads, with respect to the same traffic, since your Commission held in *Substituted Freight Service*, supra, that such dual relationships are [fol. 468] repugnant to the Act.

* * * * * * *

[fol. 469] Respectfully submitted:

J. F. Edell, Kretsinger & Kretsinger, 510 Professional Building, Kansas City 6, Missouri, Attorneys for Interveners.

[fol. 470]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM REPRESENTATIONS OF EAZOR EXPRESS INCORPORATED

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Re: Ex Parte No. 230
Substituted Service

Dear Sir:

This is in reference to the above proceeding, in which your Commission invited carriers to submit their views regarding the subject of substituted service.

Eazor Express, Inc. is a regular and irregular route common carrier of general commodities by motor vehicle under Docket MC-59120. Under temporary authority, a portion of Hartford Transportation Co. (MC-18264) is also being operated pending disposition of permanent authority under MC-F-7991. The attached map shows Eazor's general commodity operations including Hartford Transportation.

Eazor Express, Inc. utilizes substituted service under Plan I Trailer-on-Flatcar Service with a number of railroads. Rates assessed by Eazor are the regular motor carrier rates published by the various motor carrier tariff bureaus, while the charges against Eazor Express by the railroads are published in their Division Basis publications and are available to all common carriers. Although the word "Division" is used, no joint rates are involved. Appropriate references to the substituted service are published in the affected motor carrier tariffs. Such arrangements are in effect with the Boston & Maine; Delaware & Hudson; Erie-Lackawanna; New York, New Haven & Hartford; Lehigh & Hudson; Chesapeake & Ohio; Pennsylvania; Nickel Plate; and Wabash Railroads.

Plan I service is being utilized between Pittsburgh and Chicago; Pittsburgh and Kearney, N. J.; Pittsburgh and Boston; Boston and Chicago; Kearney, N.J. and Chicago; Charleston, W. Va. and Chicago; and Buffalo, N. Y. and Chicago.

[fol. 471] Such utilization varies as to extent, but in all instances service between the points involved is both by highway and by trailer-on-flatcar, neither one being exclusive. In all instances, such service was provided between the points listed long before trailer-on-flatcar service became available.

* * * * * * *

Very truly yours,

Eazor Express, Inc., M. G. Rein, Traffic Manager.

MGR:gc

[fol. 472]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders

EXCERPTS FROM STATEMENT OF SOUTHERN PACIFIC COMPANY

These representations are made in response to the request set forth in the Commission's order of June 29, 1962, in Ex Parte No. 230, and are made for the purpose of assisting the Commission in its investigation.

1. *Operations of Southern Pacific Company*

Southern Pacific Company, whose principal office is at 65 Market Street, San Francisco 5, Calif., is a carrier by railroad operating 12,017 miles of line in the States of Oregon, California, Nevada, Utah, Arizona, New Mexico, Texas and Louisiana. Its rail system extends from Port-

land, Ore., on the north, south to Los Angeles, Calif., and east to New Orleans, La., as well as east from San Francisco, Calif., to Ogden, Utah, and northeasterly from El Paso, Texas, to Tucumcari, N.M. Numerous branch lines, as well as the main-line routes indicated, are operated in this territory. Separately-operated, wholly-owned rail subsidiaries, Northwestern Pacific Railroad Company, Petaluma & Santa Rosa Railroad Company, Visalia Electric Railroad Company, Pacific Electric Railway Company, San Diego & Arizona Eastern Railroad Company, and Holton Inter-Urban Railroad Company, provide supplementary rail routes which connect with the principal Southern Pacific Company railway system.

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[fol. 473] 2. *Southern Pacific Piggyback Service*

Plan II

Southern Pacific pioneered Plan II piggyback in the West in 1953, and today offers shippers the largest fleet of diversified piggyback equipment in the United States. Southern Pacific's piggyback service has shown consistent growth since its inception, and Plan II piggyback has proven an effective means of staying in competition against common, contract and proprietary motor carriage for a large and continually growing range of traffic movements which otherwise would be lost.

Southern Pacific's piggyback service has been developed over the last nine years through institution of expedited train schedules which endeavor to match or better the over-the-road running times of motor trucks, coupled with a motor pickup and delivery and line-haul to and from the rail ramp performed by our highway subsidiaries, Pacific Motor Trucking Company in the territory west of El Paso, Texas, and Southern Pacific Transport Company in Texas and Louisiana. This service has been expanded to cover a broad group of commodities, including not only the usual run of boxed, crated, sacked or packaged articles, but also

heavy machinery, bulk liquids in tank trucks, automobiles, fresh meats, frozen foods, and articles of unusual size or length. Shipper demand for Plan II piggyback service has been consistently strong, and in our view the shippers in our area have welcomed this service as a valuable and [fol. 474] needed transportation tool to assist them in their businesses. The growth of our piggyback has to a substantial extent been dependent upon the responsive cooperation of our experienced highway motor-carrier subsidiaries, who maintain and dispatch the piggyback trailers and provide prompt and willing pickup, delivery and line haul to and from piggyback ramps co-ordinated with our expedited train schedules. There is no doubt that had Southern Pacific Company been compelled to rely upon an aggregation of independent motor carriers for the development of piggybacking, this transportation technique would be nowhere near so well developed as it is today, nor would shippers have available to them the prompt co-ordinated service under over-all railroad responsibility which they have at present when dealing with this Company.

Plan I

In addition to its major piggyback service, that under Plan II, Southern Pacific Company also offers Plan I piggyback to motor common carriers between principal ramp points on its lines. This service is offered at a uniform charge or division between the same points, although not necessarily to all interstate and intrastate motor carriers. Only carriers with appropriate over-the-road operating authority are considered, and we will not enter into agreements to transport their trailers unless the carrier under consideration is, in Southern Pacific's judgment, responsible and thoroughly reliable.

This power to select is important, for it helps prevent use of Plan I piggyback in a manner detrimental to us. To [fol. 475] give an example, it would not be in our interest to extend Plan I piggybacking to a carrier whose rates are

generally maintained on a basis below that applicable to Plan II piggybacking, who would then be able to solicit for his own billing at lesser rates traffic now moving by rail under Plan II between the same points. Plan I piggyback is a form of partnership, and it is essential to the relationship that each partner have confidence in the other. That confidence could not exist where the objective of one partner is to use the partnership as a device to take existing business away from the other.

The privilege of accepting or rejecting requests for Plan I piggyback has not hindered its growth. We have made a tariff study for the Commission's reference which shows the extent to which Plan I piggybacking is now available via Southern Pacific for movements from, to or within the Pacific Coast states. It does not attempt to include movements within Southwestern territory, nor between Southwestern territory and other territories than Mountain-Pacific. This study is contained in two exhibits, Appendices B and C to this statement.

Appendix B lists 43 rate tariffs of individual motor common carriers or motor-carrier tariff publishing bureaus which provide for substitution of Southern Pacific rail service within, or from or to, Pacific Coast states. Appendix C supplements Appendix B and contains a list of 14 motor-carrier "privilege" tariffs or directories which detail the substitution of the rail service of Southern Pacific.

We invite the Commission's attention to the very broad [fol. 476] coverage of these tariffs. They include substitution not only for regular-route general-commodity carriers but also for regular- and irregular-route carriers of specific commodities: heavy equipment, furniture, automobiles, lumber, perishables and frozen foods, among others.

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[fol. 477] Southern Pacific Company, By Charles W. Burkett, Jr., Thormund A. Miller, Its Attorneys.

APPENDIX B TO STATEMENT OF SOUTHERN PACIFIC COMPANY

MOTOR COMMON CARRIER RATE TARIFFS PROVIDING SUBSTITUTED RAIL SERVICE FOR MOTOR CARRIER SERVICE

LINE	TARIFF ISSUING AGENT OR CARRIER	TARIFF NUMBER	ICC NO.	TYPE OF TARIFF (WHETHER GENERAL OR SPECIFIC COMMODITY)	ITEM NUMBER AUTHORIZING SUBSTITUTED SERVICE	TYPE OF MOTOR CARRIER (REGULAR OR SPECIFIC)	APPLICATION OF RATE TARIFF BETWEEN	APPLICATION OF RATE TARIFF AND	INTERSTATE INTRASTATE APPLICATION OR BOTH	NAME OF TARIFF PROVIDING SUBSTITUTED SERVICE TO WHICH RATE TARIFF HAS REFERENCE (Includes Sup. Thereto And Reissues Thereof)
COLUMN	2	3	4	5	6	7	8	9	10	
1	(1)The Arizona Motor Tariff Bureau, H. E. Pringle, Agent.	2	MF ICC 75	General	830	Regular	Arizona Arizona Texas Nevada	Arizona Tex., N.M., Nev. N.M.-Nev. Nevada	Both	Pacific Motor Trucking Co.-Substituted Frt. Service Tariff No. 67 (PCC No. 1, MF ICC No. 59).
2	(1)Arizona Motor Transport Assn., Otto R. Storey, Agent.	100	MF ICC 1	General	710	Regular	Arizona	Arizona	Both	Pacific Motor Trucking Co.-Substituted Frt. Service Tariff No. 67 (PCC No. 1, MF ICC No. 59).
3	Biggs Drayage Co., Henry L. Biggs, President.	5	MF ICC 5	Specific (Heavy Equipment)	190	Irregular	Calif. Idaho Oregon Washington Ida., Ore., Nevada	Calif. Idaho Oregon Washington Calif.	Both	Western Carriers Tariff Bur., Sub. Frt. Service Directory No. 1, (MF-ICC No. 3).
4	Calif. Common Carrier Motor Freight Tariff - Interstate Freight Carriers Conference, Inc., C. J. Sullivan, Issuing Officer.	10	MF ICC 4	General	1508	Regular	Calif.	Calif.	Both	Interstate Freight Carriers Conference, Inc., Agt., Calif. Common Carriers Motor Freight Service Directory No. 1 (MF-ICC-5).
5	Calif. Common Carrier Motor Freight Tariff - Interstate Freight Carriers Conference, Inc., C. J. Sullivan, Issuing Officer.	11	MF ICC 8	General	690	Regular	Calif.	Calif.	Both	Interstate Freight Carriers Conference, Inc., Agt., Calif. Common Carriers Motor Freight Service Directory No. 1 (MF-ICC-5).
6	Calif. Motor Express, Ltd. (1) Calif. Motor Transport Co., Ltd. R. C. Ellis, Agt.	14-A	MF ICC 1	General	370	Regular	Calif.	Calif.	Both	Western Motor Tariff Bureau, Inc., Agt., Sub. Frt. Service Directory No. 1, (MF-ICC-No. 12).
7	(1)Converse Trucking Service. R. N. B. Converse, President.	1-G	MF ICC 15	General and Mileage	Rule 190	Irregular	Calif. Ida., Mont., Utah	Ida.-Mont.-Utah Ida.-Mont.-Utah	Interstate	Pacific Coast Tariff Bureau Sub. Frt. Service Directory 1-A (MF-ICC No. 37).
8	(1)Converse Trucking Service, R. N. B. Converse, Pres.	2	MF ICC 16	General and Mileage	Rule 243	Regular	Calif. Cal.-Ore.-Wn.-Nev.-Ida.-Mont.	Ore.-Wn.-Nev. Cal.-Ore.-Wn.-Nev.-Ida.-Mont.	Interstate	Pacific Coast Tariff Bur., Sub. Frt. Service Dir. 1-A (MF-ICC No. 37)
9	Exley Express, Inc., Joseph M. Exley, Pres.	1	MF ICC 2	Specific (Perishables)	383	Regular	Ore. & Wn. Ore. B.C.	Calif. Ariz.-Nev. Calif.	Interstate	Pacific Inland Tariff, Inc., Agt., Sub. Frt. Service Dir. 1-H, (ICC No. 113).
10	Home Transfer & Storage Co., Basillo Cinnera, Pres.	1-A	MF ICC 4	Specific (Perishables & Lumber)	178	Regular	From and To Points in The United States.		Both	Pacific Inland Tariff Bur., Sub. Frt. Service Dir. 1-G (MF-ICC No. 111).
11	Hills Transportation Co., E.A. Hills, Pres.	3	MF ICC 7	General	334	Regular	Calif.	Calif.	Both	Hills Transportation Co. Tariff No. 3, (MF-ICC No. 7).
12	Interstate Freight Carriers Conference, Inc., C. J. Sullivan, Issuing Officer.	1-E	MF ICC 7	General	1590-PMF	Regular	Calif.	Ariz.-N.M. Tex.(El Paso)	Interstate	Pacific Motor Trucking Co., Sub. Frt. Service Trf. No. 67-A, ICC 2, MF-ICC-73.
13	Interstate Freight Carriers Conference, Inc., C. J. Sullivan, Issuing Officer.	1-E	MF ICC 7	General	1600	Regular	Calif.	Ariz.-N.M. Tex.(El Paso)	Interstate	Interstate Frt. Carriers Conf. Inc., Sub. Frt. Service Dir. No. 2 (MF-ICC-6) & Sub. Frt. Service Dir. No. 1 (MF-ICC-5).
14	Interstate Freight Carriers Conference, Inc., C. J. Sullivan, Issuing Officer.	5-D	MF ICC 2	General	616	Regular	Calif. Also Distance Commodity Rates From Ariz.-Calif.-Colo.-Nev.-N.M. to TC Points.	Ariz.-Nev. N.M.-Ore.	Interstate	Interstate Frt. Carriers Conference, Inc., Agt. Sub. Frt. Service Directory No. 2, (MF-ICC-No. 6).
14	Interstate Freight Carriers Conference, Inc., C. J. Sullivan, Issuing Officer.	7-B	MF ICC 9	General	1260-PMF	Regular	Nev. Cal.-Ariz.	Nev. Nev.-Ore.	Both	Pacific Motor Trucking Co., Sub. Frt. Service Trf. No. 67-A (ICC No. 2, MF-ICC No. 73, PSCW No. 8).
15	Interstate Freight Carriers Conference, Inc., C. J. Sullivan, Issuing Officer.	7-B	MF ICC 9	General	1270	Regular	Nev. Cal.-Ariz.	Nev. Nev.-Ore.	Both	Interstate Frt. Carriers Conf., Inc., Agt., Sub. Frt. Service Directory No. 2, (MF-ICC No. 6).
16	Kenosha Auto Transport Corp. Motor Freight Tariff, L. De Vayst, Vice Pres.	74-B	MF ICC 242	Specific (Automobiles)	5	Regular	Kenosha, Wisc.	Cal.(LA,Richmond, Oakland) Nev.	Interstate	Kenosha Auto Transport Corp., Motor Frt. Tariff 74-B (MF-ICC-242).
17	Kenosha Auto Transport Corp. Motor Freight Tariff, L. De Vayst, Vice Pres.	84	MF ICC 234	Specific (Automobiles)	32	Regular	Ft. Wayne, Ind.	Ariz.-Cal.-Ida.-Nev.-Ore.-Wn.	Interstate	Kenosha Auto Transport Corp., Tariff No. 84 (MF-ICC-234).
18	Lads Furniture Freight, Inc., Steve De Maggio, Pres.	3	MF ICC 2	Specific (Furniture & Fixtures)	29	Regular	Calif.	Calif.	Both	Lads Furniture Freight, Inc., Tariff 3 (MF-ICC-2).

[fol. 479]

APPENDIX B

LINE	TARIFF ISSUING AGENT OR CARRIER	TARIFF NUMBER	ICC NO.	TYPE OF TARIFF (WHETHER GENERAL OR SPECIFIC COMMODITY)	ITEM NUMBER AUTHORIZING SUBSTITUTED SERVICE	TYPE OF MOTOR CARRIER (REGULAR OR SPECIFIC)	APPLICATION OF RATE TARIFF BETWEEN	APPLICATION OF RATE TARIFF AND	INTERSTATE INTRASTATE APPLICATION OR BOTH	NAME OF TARIFF PROVIDING SUBSTITUTED SERVICE TO WHICH RATE TARIFF HAS REFERENCE (Includes Sup. Thereto and Reissues Thereof)
	COLUMN 1	2	3	4	5	6	7	8	9	10
19	Pacific Inland Tariff Bur., Inc., Agt., E. J. Barry, Gen. Mgr.	9-C	MF ICC 97	General	1820	Regular	Ariz.-Nev.	Ore.-Wash. B.C.-Cal.-Ida. Ore.-Wn.	Both	PITB Sub. Frt. Service Directory 1-H, MF-ICC No. 113. PMT Shipments Only: PMT Sub. Frt. Service Tariff No. 67-A (ICC No. 2, MF-ICC-73).
20	(1)Pacific Inland Tariff Bur., Inc., Agt., E. J. Barry, Gen. Mgr.	10-B	MF. ICC 71	Specific	1550	Regular	Between Points in Ore., West of the Cascade Mountains.Also the following Points East of the Cascade Mts., Chemult to Klamath Falls, inclusive, Merrill and Malin.		Both	On Ore. Intrastate Traffic only. (PMT Traffic on File with Oregon PUC). On Interstate Traffic ONLY (PMT-Sub. Frt. Service Tariff No. 67-A, ICC No. 2, MF-ICC No. 73).
21	Pacific Inland Tariff Bur., Inc., Agt., E. J. Barry, Gen. Mgr.	83	MF ICC 108	Specific (Cold Pack or Frozen Foods)	470	Regular	Ariz.-B.C. Cal.-Ida. Mont.-Nev. N.Mex.-Ore. Wn.-Utah Also Idaho Intrastate.	Ariz.-B.C. Cal.-Ida. Mont.-Nev. N.Mex.-Ore. Wn.-Utah	Both	PITB, Inc., Agt., Sub. Frt. Service Directory No. 1-H (MF-ICC No. 113).
22	Pacific Inland Tariff Bur., Inc., Agt., E.J. Barry, Gen. Mgr.	86	MF ICC 116	General	1550	Regular	Ariz. Colo.(Cortez-Durango & Scuth) N.M.	Ida. Ore.(Except Nyssa & Ontario) Wash.	Interstate	PITB, Inc., Agt., Sub. Frt. Service Directory No. 1-H (MF-ICC No. 113).
23	Pacific Motor Trucking Co. Frt. Tariff, E. J. McSweeney.	1	Cal PUC 1	General	142	Regular	Calif.	Calif.	Intrastate	PMT-Sub. Service Dir. No. 61 (CPUC No. 72).
24	Pacific Motor Trucking Co. Frt. Tariff, E. J. McSweeney.	49-D	MF 115	General	670	Regular	Calif.	Calif.	Interstate	PMT-Sub. Frt. Service Tariff 67-B MF-ICC 105)
25	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	21-B	MF ICC 117	General Class Rates	50	Regular	North Coast & South Coast Territory	T/C Points	Interstate	Rocky Mountain Motor Tariff Bureau, Sub. Frt. Service Tariff 64-G (MF-ICC 114).
26	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	25-B	MF ICC 133	General Commodity	50	Regular	Westbound	Transcontinental	Interstate	Rocky Mountain Motor Tariff Bureau, Sub. Frt. Service Tariff 64-G (MF-ICC 114).
27	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	26-A	MF ICC 119	General Commodity	50	Regular	Eastbound	Transcontinental	Interstate	Rocky Mountain Motor Tariff Bureau, Sub. Frt. Service Tariff 64-G (MF-ICC 114).
28	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	27-D	MF ICC 116	Arbitrary Comm. and Class	50	Regular Irregular	From or to Points in North Coast, Southcoast and T/C Territory		Interstate	Rocky Mountain Motor Tariff Bureau, Sub. Frt. Service Tariff 64-G (MF-ICC 114).
29	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	29-A	MF ICC 98	East-Bound Import Comm.	50	Regular	Pacific Coast Ports	TC Terr.	Interstate	Rocky Mountain Motor Tariff Bureau, Sub. Frt. Service Tariff 64-G (MF-ICC 114).
30	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	30-B	MF ICC 139	General	5	Regular	Calif.	Ariz. Idaho, Mont. Nevada, (Contact)Ore. (Eastern) Utah Wyo.(Yellowstone Nat'l Park Station).	Interstate	PMT-Sub. Frt. Service Tariff 67-B, MF-ICC 105 Rocky Mt. Motor Tariff Bur. Sub. Frt. Service Tariff 64-G, MF-ICC 114.
31	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	32-A	MF ICC 111	General	5	Regular	Ariz. Ariz.-N.Mex. Nevada	Ariz. Idaho-Ore. Utah, Wash. New Mexico	Interstate	Rocky Mountain Motor Tariff Bureau, Sub. Frt Service Tariff 64-G, MF ICC 114.
32	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	39-A	MF ICC 126	General	5	Regular	Calif.	Montana Wyoming	Interstate	PMT-Sub. Frt. Service Tariff No. 67-B, MF-ICC 105 Rocky Mountain Motor Tariff Bureau, Sub. Frt Service Tariff 64-G, MF-ICC 114.
33	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	41	MF ICC 134	General	5	Regular	Colorado (Western)	Calif. Nevada	Interstate	PMT-Sub Frt. Service Tariff No. 67-B, (MF-ICC 105).
34	(1)Rocky Mountain Motor Tariff Bur., Inc., Agt., K. Tracy Power, Gen. Manager	42	MF ICC 135	Specific (Foodstuffs)	5	Regular	Calif. Colo.-Wyo	Idaho-Mont. Oregon (Eastern) Utah Idaho, Utah Ore.(Eastern)	Interstate	PMT-Sub. Frt. Service Tariff No. 67-B, MF-ICC 105 Rocky Mountain Motor Tariff Bureau, Sub. Frt. Service Tariff 64-G, MF-ICC 114.
35	Southern California Freight Forwarders Tariff. Carroll J. Roush, Pres.	4	CPUC No. 4	General	79	Regular	Calif.	Calif.	Intrastate	Interstate Frt. Carriers Conf., Inc. Agt., Calif. Common Carriers Motor Frt. Sub. Frt. Service Directory No. 1, MF-ICC 5

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APPENDIX B

Page 3 of 3 Pages

LINE	TARIFF ISSUING AGENT OR CARRIER	TARIFF NUMBER	ICC NO.	TYPE OF TARIFF (WHETHER GENERAL OR SPECIFIC COMMODITY)	ITEM NUMBER AUTHORIZING SUBSTITUTED SERVICE	TYPE OF MOTOR CARRIER (REGULAR OR SPECIFIC)	APPLICATION OF RATE TARIFF BETWEEN	APPLICATION OF RATE TARIFF AND	INTERSTATE INTRASTATE APPLICATION OR BOTH	NAME OF TARIFF PROVIDING SUBSTITUTED SERVICE TO WHICH RATE TARIFF HAS REFERENCE (Includes Sup. Thereto and Reissues Thereof)
	COLUMN 1	2	3	4	5	6	7	8	9	10
36	Western Motor Tariff Bureau, Inc., W. J. Knoell	18-B	CPUC No. 17	General	383	Regular	Calif.	Calif.	Intrastate	Western Motor Tariff Bureau Inc., Agt., Sub. Frt. Service Directory No. 1, Cal. PUC No. 8.
37	Western Motor Tariff Bureau, Inc., W. J. Knoell	103	MF ICC-8	General	410	Regular	Calif.	Calif.	Interstate	FMT-Sub. Frt. Service Tariff No. 67, ICC No. 1 (MF-ICC No. 59).
38	Western Motor Tariff Bureau, Inc., W. J. Knoell	107	MF ICC-16	General	40	Regular	Calif.	Calif.	Interstate	Western Motor Tariff Bureau, Inc., Agt., Sub. Frt. Service Directory No. 1, (MF-ICC 12) Interstate Frt. Carriers Conf., Inc., Agt., Sub. Frt. Service Directory No. 1 (MF-ICC No. 5)
39	(2)Ashworth Transfer Inc.									Western Carriers Tariff Bureau, Sub. Frt. Service Directory No. 3, MF-ICC No. 6)
40	(2)Belyea Truck Co.									Western Carriers Tariff Bureau, Sub. Frt. Service Directory No. 3, MF-ICC No. 6)
41	(2)St. Johns Motor Express									Western Carriers Tariff Bureau, Sub. Frt. Service Directory No. 3, MF-ICC No. 6)
42	(2)Valley Motor Lines, Inc.									Sub. Frt. Service Directory No. 1 (MF-ICC No. 1) F. S. Kohles, Agent.

EXPLANATION OF REFERENCE MARKS:

(1) Southern Pacific Company shown as a party to the substituted tariff but not to the rate tariff.
(2) Reference indicates Carriers Tariff not on file in general office and not otherwise available.

[fol. 481]

APPENDIX C TO STATEMENT OF SOUTHERN PACIFIC COMPANY

MOTOR COMMON CARRIER
SUBSTITUTED FREIGHT SERVICE TARIFFS. (INTERSTATE EXCEPT AS NOTED)

Appendix C

Page 1 of 2 Pages

LINE	TARIFF ISSUING AGENT OR CARRIER	TARIFF NUMBER (AND REISSUES THEREOF)	ICC NUMBER	SUBSTITUTION OF SOUTHERN PACIFIC COMPANY AND WHOLLY OWNED SUBSIDIARY RAIL LINES			
				RAIL CARRIER	SUBSTITUTED FOR THE FOLLOWING MOTOR CARRIER	BETWEEN DESIGNATED POINTS IN THE FOLLOWING STATES	AND DESIGNATED POINTS IN THE FOLLOWING STATES
	COLUMN 1	2	3	4	5	6	7
1	Pacific Motor Trucking Co.	67-B	105	SP, PE, MP		California	California
2				SP		California	Oregon
3				SP		Oregon	Oregon
4				SP	PMT	Nevada	Nevada
5				SP		Arizona	Arizona
6				SP		Arizona	New Mexico
7				SP		Arizona	Texas (El Paso)
8	Western Carriers Tariff Bureau	Directory No. 3	6	SP, SDAE		California	California
9				SP, SDAE		California	Oregon
10				SP, SDAE		California	Nevada
11				SP, SDAE		California	Utah
12				SP, SDAE		California	Arizona
13				SP		California	Texas (El Paso)
14				SP		Oregon	Nevada
15				SP	AT,BT,BD,STJ	Oregon	Utah
16				SP		Oregon	Arizona
17				SP		Oregon	Texas (El Paso)
18				SP		Utah	Arizona
19				SP		Utah	Oregon
20				SP		Utah	Nevada
21				SP		Arizona	Oregon
22				SP		Arizona	Nevada
23				SP		Arizona	Arizona
24	Interstate Freight Carriers Conference, Inc.	Directory No. 1	5	SP	CC,CF,CTC,DST,FOR,MC, PIE,SE,SC,STC,USE,WW, WFL	California	California
25	Western Motor Tariff Bureau, Inc.	Directory No. 1	12	SP	CMT,MC,PTC	California	California
26	Pacific Coast Tariff Bureau	Directory No. 1-B	42	SP	CTS,DTC	California	California
27						California	Oregon
28	Pacific Inland Tariff Bureau, Inc.	Directory No. 1-H	113			California	California
29						California	Arizona
30						California	Texas (El Paso)
31						California	Nevada
32				SP	CC,CMT,CF,CTC,CTS,KK, FOR	California	Utah
33					HTS,LAS,CHC,PIE,SC,WFL	California	Oregon
34						Nevada	California
35						Nevada	Utah
36						Nevada	Oregon
37						Arizona	Oregon
38						Oregon	Utah

LINE	TARIFF ISSUING AGENT OR CARRIER	TARIFF NUMBER (AND REISSUES THEREOF)	ICC NUMBER	SUBSTITUTION OF SOUTHERN PACIFIC COMPANY AND WHOLLY OWNED SUBSIDIARY RAIL LINES			
				RAIL CARRIER	SUBSTITUTED FOR THE FOLLOWING MOTOR CARRIER	BETWEEN DESIGNATED POINTS IN THE FOLLOWING STATES	AND DESIGNATED POINTS IN THE FOLLOWING STATES
	COLUMN 1	2	3	4	5	6	7
39	Hills Transportation Co.	3	7	SP	HTC	California	California
40	Interstate Freight Carriers Conference, Inc.	2	6			Arizona	Arizona
41						California	California
42				SP	BT, CF, OMC, PIE, MIL, SC, TIME, TAM, WW	California	Arizona
43						California	Texas (El Paso)
44						California	Nevada
45	Kenosha Auto Transport Corporation	74-B	242	SP	KATC	Utah	California
46						New Mexico	California
47	Kenosha Auto Transport Corporation	84	239	SP	KATC	Utah	California
48	Lads Furniture Freight, Inc.	3	2	SP	LFF	California	California
49	Rocky Mountain Motor Tariff Bureau, Inc.	64-H	140			California	California
50				SP	CF, FOR, GFL, IML, PIE	California	Nevada
51					RTL	California	Utah
52						Oregon	Arizona
53	Pacific Motor Trucking Co.	Directory No. 81	CFUC No. 72	SP	PMT	California (Intrastate only)	California
54	F. S. Kohles, Agent	Directory No. 1	1	SP	VML	California	California

EXPLANATION OF RAIL AND MOTOR CARRIER ABBREVIATIONS:

AT - Ashworth Transfer, Inc.
BT - Belyea Truck Co.
BD - Biggs Transfer Co.
CC - Cal-Canadian Motor Express
CMT - California Motor Transport Co.
CF - Consolidated Freightways
CTC - Constructors Transport Co.
CTS - Converse Trucking Co.
DST - DiSalvo Trucking Co.
DTC - Doudell Trucking Co.
EX - Exley Express, Inc.
FOR - Fortier Transportation Co.
GFL - Garrett Freight Lines, Inc.
HTC - Hills Transportation Co.
HTS - Home Transfer & Storage Co.
IML - Interstate Motor Lines, Inc.
KATC - Kenosha Auto Transport Corporation
LFF - Lads Furniture Freight, Inc.
LAS - Los Angeles-Seattle Motor Express, Inc.
MC - Merrifield Trucking Co.

ABBREVIATIONS - Continued

MIL - Milne Truklines, Inc.
NWP - Northwestern Pacific Railroad Co.
OMC - Oregon Nevada California Fast Freight, Inc.
PE - Pacific Electric Railway Co.
PIE - Pacific Intermountain Express Co.
PMT - Pacific Motor Trucking Company
PTC - Paxton Trucking Co.
RTL - Ringsby Truck Lines, Inc.
SJJ - St. Johns Motor Express Co.
SC - Southern California Freight Lines
SX - Shippers Express Co.
SDAE - San Diego and Arizona Eastern Railway Co.
SP - Southern Pacific Company
STC - Sterling Transit Co., Inc.
TAM - Texas-Arizona Motor Freight, Inc.
TIME - T.I.M.E. Freight Inc.
USX - United States Express
VML - Valley Motor Lines, Inc.
WW - Watson Wilson Transportation System
WFL - Willig Freight Lines

[fol. 483]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service; Charges and Practices of For-Hire Carriers and Freight Forwarders; Piggyback Service

EXCERPTS FROM REPRESENTATIONS OF DELTA MOTOR LINE, INC.

Delta Motor Line, Inc., a motor common carrier of general commodities, operating under Certificate of Public Convenience and Necessity No. MC-105957, and Subs thereto, over regular routes primarily, submits the following statement in the above entitled proceeding.

Delta has entered into arrangements with two rail carriers to provide substituted rail service under Plan 1 trailer on flatcar (Piggyback) as outlined below:

1—Chicago and Northwestern Railway Company, between Chicago and East St. Louis, Illinois.

2—Illinois Central Railroad, between Chicago and East St. Louis, Illinois; between Chicago, East St. Louis and Peoria, Illinois on the one hand and Memphis, Tennessee, Jackson, Mississippi and New Orleans, Louisiana on the other; between Memphis, Tennessee on the one hand and Jackson, Mississippi and New Orleans, Louisiana on the other; and, between Jackson, Mississippi and New Orleans, Louisiana.

Under there arrangements, the rail carriers transport loaded or empty trailers owned or operated by Delta on flatcars between the points indicated above. Loading and unloading of the trailers onto and off the rail flatcar is performed by the rail carriers. The revenues derived by [fol. 484] the rail carriers are specific per trailer charges agreed to by both parties.

* * * * * * *

[fol. 485] Delta does not utilize Plan III piggyback service. By appropriate tariff provisions, Delta can utilize Plan I piggyback service as a substitution of its own actual available service over its authorized highway routes where such service is provided by the rail lines, and use of Plan III by Delta, acting as a carrier and a shipper on the same transaction, would serve no useful purpose, unless the Plan III rates are lower than the charges agreed to under the substituted service agreement.

Delta's use of substituted service has been limited to the handling of traffic over-flow when power equipment is not available. Such an arrangement relieves congestion and [fol. 486] permits Delta to handle traffic it would not be able to do otherwise. Delta maintains an "actual" service over its authorized highway routes, a prerequisite under the substituted freight service tariff, and no "new" service results therefrom.

* * * * * * *

Based on actual experience and from an operational viewpoint, the following, in addition to the above, is submitted for consideration in this proceeding.

* * * * * * *

[fol. 487] *Plan III*

Motor carriers are prohibited from utilizing Plan III TOFC service. Lawful substituted service is available under Plan I when such carriers can meet the conditions set forth in connection therewith.

* * * * * * *

Plan III TOFC service shall be available to shippers and legitimate non-profit shipper organizations, all elements of rate making to be thoroughly considered in the establishment of rates and charges to apply on the specific commodities being transported.

Plan IV

Same restrictions and conditions as in connection with Plan III, giving due consideration to the equipment furnished by the shipper or shipper organization.

* * * * * * *

[fol. 488] Respectfully submitted,

Delta Motor Line, Inc., John J. Borth, Vice President.

[fol. 489]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPRESENTATIONS OF ST. LOUIS SOUTHWESTERN RY CO.

Statement of Respondent St. Louis Southwestern Railway Company

Comes now respondent, St. Louis Southwestern Railway Company, and for its statement concerning its participation in trailer-on-flat-car service, respectfully states as follows:

* * * * * * *

[fol. 490] V.

The only form of connecting line service respondent performs by trailer-on-flat-car is in connection with substituted service performed for its motor carrier subsidiary, Southwestern Transportation Company. The substituted service for Southwestern Transportation Company is covered by Substituted Service Directory 16-G, MF-ICC 351.

The only other connecting line service performed by respondent is in the tri-level movement of automobiles from Kenosha, Wisconsin, to Arizona points under joint rates with Chicago and Northwestern Railway Company and

Southern Pacific Company (as other intermediate rail carriers) and Kenosha Auto Transport Corporation (as originating carrier) and Starlite Auto Transport Co., Inc. (as delivering carrier). The connecting line service for the tri-level automobile movement is covered by Kenosha Auto Transport Corporation Tariff No. 86, I.C.C. No. 2, publishing motor-rail (tri-level rail car service)—motor rates from Kenosha, Wisconsin, to points in Arizona.

* * * * * * *

[fol. 491] Respectfully submitted,

St. Louis Southwestern Railway Company, By Harry B. LaTourette, 1517 West Front Street, Tyler, Texas, Its Attorney.

[fol. 492]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM STATEMENT ON BEHALF OF THE ATLANTIC COAST LINE RAILROAD COMPANY

Trailer-on-flatcar service, often referred to as TOFC or piggyback, is in reality a door-to-door service effectuated through the use of different instrumentalities of transportation (types of carriage) by individual carriers or through the coordinated efforts of different modes of transportation, i.e., rail, sea and air. The utilization thereof by Coast Line has and is today generally based upon the public demand and economic necessity for this type service.

Atlantic Coast Line inaugurated its piggyback service, on a pilot basis, in May 1959. That initial operation between Alexandria, Virginia, and Jacksonville, Florida, became so popular that it was not only installed on a permanent basis but has experienced continual and almost phenomenal expansion in all directions since that time. Such

participation may be generally described as the transportation of highway trucks or trailers on railroad freight cars from one railhead to another with a prior and/or subsequent movement via highway.

The Coast Line's piggyback service has been guided by, and this Company has relied upon, the Commission's pronouncements in the *Movement of Highway Trailers by Rail,* [fol. 493] 293 I.C.C. 93. In this connection, we submit that, if past experience is indicative of what may be expected in the future, there will be an effort on the part of individuals or groups of individuals to not only engage in "fishing expeditions" but an attempt will be made to turn this investigation into a re-trial of the issues in that case—despite the fact that repeated efforts to reopen that case have been consistently denied by the Commission. Such dilatory tactics could only result in adding to the uncertainty which has been created by the investigation order of June 29, 1962, not only within the railroad industry but among the users of coordinated services.

* * * * * * *

The following indicates the manner in which Coast Line presently participates in TOFC service:

1. The type of tariff arrangements entered into with motor carriers or other carriers

The only carriers with which Coast Line has tariff arrangements are motor common carriers and a list of those carriers is attached hereto as Appendix A. Thus, Coast Line is a party to substituted service tariffs under Plan I as reflected in the Substituted Freight Service Directory of Southern Motor Carriers' Rate Conference. Where such [fol. 494] arrangements are in effect with individual motor carriers who publish their own tariffs, Coast Line is a party to those tariffs only insofar as the tariff names the railroad as the substituted carrier.

* * * * * * *

[fol. 495]

3. The extent to which the several plans utilized by Coast Line are held out to all for-hire carriers

Plan I service is held out to all certificated motor carriers subject to the usual managerial discretion as to the individual carrier's financial responsibility, public demand and the economic necessity for such operations. Plans II, III and IV are not held out to common carriers. Plan V is held out to motor carriers with which Coast Line is able to properly negotiate joint rates, service and divisions suitable to both.

• • • • • • • •

[fol. 496]

5. The extent to which Coast Line furnishes terminal or over-the-road service

Terminal services are not performed by Coast Line or its agents under Plan I. Terminal services are, however, provided by Coast Line and/or its agents under the other four basic plans to a limited extent. Under Plan II service, Coast Line and/or its contract agent performs actual pick-up and delivery of the trailers to and from the customers' place of business but only within the terminal zone of the particular origin or destination involved. In addition, terminal services are provided by Coast Line and/or its contract agents at the 48 piggyback ramp stations to the extent of loading and unloading trailers to and from flat cars moving via its line in Plans III and IV TOFC service. If Coast Line originates or terminates the traffic under Plan V, the trailers are accepted on the ground or [fol. 497] placed on the ground in direct interchange with the motor carrier at the railhead.

• • • • • • •

[fol. 498]

APPENDIX A TO STATEMENT ON BEHALF OF ATLANTIC COAST LINE RAILROAD COMPANY

LIST OF MOTOR CARRIERS

Operating Plan I TOFC With Coast Line

Akers Motor Lines, Inc.
Allied Van Lines
Alterman Transport Lines, Inc.
Associated Transport, Inc.
Belford Trucking Co., Inc.
Carl Subler Trucking, Inc.
Carolina Freight Carriers Corp.
Central Truck Line
Clay Hyder Trucking Lines
Cooper Motor Lines
Dixie Transport Co.
Georgia-Florida Motor Express
Harper Motor Lines, Inc.
Hennis Freight Lines, Inc.
Herrin Transportation Co.
Johnson Motor Lines, Inc.
McDowall Transport, Inc.
Mason & Dixon Lines, Inc.
McLean Trucking Company
Mercury Motor Express, Inc.
Miller Motor Express, Inc.
New Dixie Lines, Inc.
North American Van Lines
Overnite Transportation Company
Pilot Freight Carriers, Inc.
R-C Motor Lines, Inc.
Refrigerated Transport, Inc.
Ryder Truck Lines, Inc.
Terminal Transport Co., Inc.
Thurston Motor Lines, Inc.
United Van Lines, Inc.
Watkins Motor Lines, Inc.
Weathers Bros. Transfer Co.

[fol. 499]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM STATEMENT OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

In response to the Commission's invitation as expressed in their Order dated June 29, 1962, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is filing this statement in the above proceeding.

* * * * * * *

[fol. 500] During 1960, our TOFC handling showed an increase of 187 per cent over 1959, which, aside from a few days in the end of December, 1958, covered our entire experience up to that time. During 1961, we increased 94.5 per cent over 1960. In 1962, we are looking toward an increase of 50 per cent over our 1961 figures, though this will be governed to some extent by the availability of the proper type of equipment. We on the Milwaukee Road believe that TOFC service is going to experience tremendous expansion in the years to come.

The order of investigation in this proceeding seems to be directed to two specific areas of Trailer on Flat Car Service and they are:

1. The nature of Plan I and V Service and the necessary requirements that the Carriers, both Rail and Motor, must meet to provide this service.
2. The extent to which other than rail carriers utilize other Plans; namely, Plans III and IV, and the possible regulation of such carriers using these plans.

The balance of our statement will be very brief and will deal with other carriers' use of and our participation in Plans I, III, IV, and V.

The Milwaukee Railroad has no Plan I rates in effect in any territory in which it operates and does not participate in such traffic.

[fol. 501] Under Plan III and IV rates which the Milwaukee Railroad has in effect, we have not permitted any Motor Carriers, Water Carriers, or Express Companies to utilize these rates. The only carriers whom we have permitted to utilize Plans III and IV are Freight Forwarders. Our practice is consistent with the Commission's views as expressed in *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, wherein it was held, and as a matter of law, a carrier cannot act as a shipper in regard to the same freight.

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[fol. 502]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

EXCERPTS FROM STATEMENT OF INTEREST—OF THE MINNEAPOLIS TRAFFIC ASSOCIATION OF MINNEAPOLIS, MINNESOTA

Comes now, the Minneapolis Traffic Association of Minneapolis, Minn., and respectfully represents that it has an interest in the matters involved in the above-entitled proceeding.

This statement is filed pursuant to the Commission's order of July 2, 1962 announcing this proceeding, and wherein an invitation was made for statements from interested parties, including shippers, having participation in coordinated and substituted service.

I

The Minneapolis Traffic Association is a non-profit corporation, created, organized and existing under and by

virtue of the laws of the State of Minnesota, with offices and place of business in the City of Minneapolis, Minn. The Minneapolis Traffic Association is maintained by the Minneapolis Chamber of Commerce of Minneapolis, Minn., and represents the freight shipping and receiving members of said organization in traffic and transportation matters.

• • • • • • •

[fol. 503]

III

A review of the activities and plans of our members, in regards to the various "Plans of Piggyback", may be of assistance to the Commission in this proceeding.

Plan I—Has been in operation for many years between Minneapolis, Minn., and Chicago, Illinois. We are aware that a number of motor common carriers and certain railroad(s) have performed this service on traffic moving for the account of our members. The primary interest of our members in this plan, relates to the motor carrier tariff rates and charges and the adequacy of the service performed.

Plan II—The rail carriers have in recent years increased their activity and service under this provision. Accordingly, our members' participation in this plan has increased and now used very extensively. Certain specific movements of traffic are regularly scheduled via this method of operation.

[fol. 504]

Plan III—Certain areas and conditions have prompted members to use this plan to a considerable degree; appears to have great potential for future expansion, both as to territory involved and a greater activity by the members.

Plan IV—Has had a somewhat limited participation, but opinion of our members indicated a greater

interest in, and definite plans for further movements via this method.

Plan V—Carrier activity appears to have been slow in this area. No particularly significant experience by our members to relate at this time. Consideration of prospects for the future, however, may produce benefits for the shipping public and carriers alike.

IV

The greatest majority of the participation of our members in these plans are in relation to the Minneapolis Market. It should be noted though, that a number of our members do have additional locations throughout the United States. Activities of these concerns are pertinent to those areas as well as Minneapolis.

V

The position of the Minneapolis Traffic Association in the matter of "piggyback" operations has been, that it offers a broader selection of transportation facilities and service to better meet the various requirements of the shipping public.

Further cooperation among the railroads, truck-lines, and shippers can materially increase the value of these types of services.

• • • • • • •

[fol. 505] Respectfully submitted

Minneapolis Traffic Association, By Eugene J. Mielke, Director of Traffic, Registered Practitioner.

[fol. 506]

BEFORE THE INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

Ex Parte No. 230

Substituted Service—Charges And Practices Of For-Hire Carriers And Freight Forwarders

EXCERPTS FROM STATEMENT OF THE CONTRACT CARRIER CONFERENCE

Preliminary Statement

By order dated June 29, 1962, the Commission instituted a rule making proceeding pursuant to the provisions of Section 4 of the Administrative Procedure Act and invited interested parties to file statements on or before September 4, 1962. This is the statement of position of the Contract Carrier Conference of the American Trucking Associations, Inc., hereinafter referred to as the Conference.

The Conference is a non-profit corporation, organized and existing by virtue of the laws of the State of Delaware. Its purpose is to foster and protect the best interests of the contract carrier industry on a nation-wide basis. It is affiliated with the American Trucking Associations, Inc., and regularly participates in proceedings before the Commission and the Courts which may affect the contract carriers as a group.

The contract carriers to a large extent perform a service which has been characterized on many occasions by the [fol. 507] Commission as a substitute for private carriage. The rail carriers by the institution of Plan III TOFC Service have allegedly attempted to meet the competition of private carriage. This has been done by the utilization of ramp to ramp all commodity freight rates leaving it up to the shipper to supply a trailer and pickup and delivery service. This phase of piggyback service is directly com-

petitive with the type of service performed by contract carriers in that it allegedly is a substitute for private carriage.

The Contract Carrier Conference representing its members has a substantial interest in the rule making proceeding instituted by the Commission, for unless proper rules and regulations are established in connection with all phases of TOFC service, the contract carriers who are circumscribed by various rules and regulations of the Commission will be placed at a competitive disadvantage in competing for traffic moving in private carriage.

• • • • • • • •

Respectfully submitted,

Contract Carrier Conference of American Trucking Associations, Inc., By Clarence D. Todd, Its Attorney.

[fol. 508]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPRESENTATIONS OF UNION PACIFIC RAILROAD COMPANY

Description of Union Pacific Railroad's Participation in Coordinated and Substituted Service

Introduction

The Union Pacific Railroad Company participates in TOFC Plans I through V as defined by the Commission in its order of June 29, 1962 in this proceeding, and in multi-level rail car movements to the extent described herein. This coordinated and substituted service is performed in connection with certificated highway carriers only.

• • • • • • • •

[fol. 509] TOFC Plan I

Union Pacific's active participation in Plan I is presently limited to the following substituted rail-for-highway services provided for Kenosha Auto Transport Corporation (MC 30837) between Kenosha (Bain), Wisconsin, and [fol. 510] specified stations in Colorado and California:

1. Westbound—

Motor vehicles from Kenosha to Denver, Colorado; Montebello and Richmond, California:

This traffic moves at rates and provisions named in KAT Tariff 87, MF ICC No. 244 and 74-B, MF ICC 242. The rail carriers, namely C&NW, UP and SP, perform substituted rail service to these railheads; movement beyond is via highway on KAT automobile trailers.

2. Eastbound—

Automobiles, used; Bodies, truck and trailer; Cable Pullers; Reel Dollies and Winders; Street Sweepers; Trenching Machines; Trailers except house trailers; Tension Wire Stringers; Truck, concrete mixers; Trucks, lift:

This traffic moves at rates and provisions named in KAT Tariff 80, MF ICC No. 233. The rail carriers, namely C&NW, UP and SP perform substituted service from railheads in California to Kenosha, Wisconsin.

The rail carriers receive a flat fee per rail carload for their substituted service.

Union Pacific Railroad has received no requests to extend service on commodities described in sub-paragraphs 1 and 2 above to other motor carriers.

TOFC Plan II

Union Pacific Railroad provides service on commodities generally at most of its stations. It also provides service on automobiles in a more limited area. The services are described in detail below:

1. Other than automobiles—Local and interline service is available at most stations and the railroad originates, terminates, receives from and delivers to con- [fol. 511] necting lines. Its rates are published in numerous bureau tariffs as well as in a few tariffs published by individual carriers. The rates published generally compare with those published by motor common carriers from and to same points. Generally its rates include free pickup and free delivery. Accessorial services as follows are also provided.

   Refrigeration and heating service.
   Stopping in transit to complete loading or partially unload.
   Distribution service (split delivery).

2. Automobiles only—Service is available from specified origins in California to specified Union Pacific Railroad points in Nevada, Utah, Oregon and Idaho. Traffic moves at proportional rates named in Pacific Southcoast Freight Bureau Tariff 296, W. O. Gentle's ICC 1710 from origins to ramp stations. Movement beyond ramp stations takes place at rates named in Union Pacific Railroad Tariff 5000, ICC 5381.

Ramps are provided at 47 stations and trailers are transported on flat cars between those stations. Substituted highway service is provided between ramp stations and the origin and/or destination stations.

The Union Pacific Motor Freight Company, a wholly owned subsidiary, is the principal substituted highway contractor or terminal drayage contractor but Union Pacific Railroad also contracts with several additional carriers to

provide either one or both of these services. List of substituted highway carriers and the stations they serve is shown in WTL Tariff 457-C, Agent W. J. Prueter's ICC No. 4425.

All substituted highway carriers are certificated common carriers holding general common authority (with the usual exceptions) to serve stations which are included in [fol. 512] their contracts. These carriers are reimbursed generally on a per hundredweight basis.

* * * * * * * *

[fol. 513] Respectfully submitted,

L. W. Hobbs, John J. Burchell, William P. Higgins, Attorneys for Union Pacific Railroad Company, Respondent.

[fol. 514]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

EXCERPTS FROM RETURN OF FREIGHT FORWARDERS INSTITUTE TO COMMISSION'S ORDER OF JUNE 29, 1962

Comes now Freight Forwarders Institute, on behalf of its members, all of whom are freight forwarders subject to Part IV of the Act, to make this its return to the order of the Commission dated June 19, 1962, in the above-entitled proceeding.

I

Freight forwarders utilize underlying transportation by rail under the so-called Plan III and Plan IV rates. As the Commission knows, the former rates apply for what is described as "ramp to ramp" service from stated points

of receipt to stated points of delivery in railroad yards, when the loaded (or empty) trailers are supplied by the [fol. 515] shipper. Under the latter type of rate (Plan IV) the shipper furnishes both the trailer and the flat car.

II

All members of the Institute utilize Plan III or Plan IV, or both, and in doing so comply with all tariff requirements of the railroads, incident to those plans. In respect of practices or operational methods it is difficult to comment without something more definite in the nature of a bill of particulars. Furthermore, a meaningful study of such a matter would require a comprehensive investigation of the many facets of our operation and we are in no position, from the standpoint of time or otherwise, to inaugurate such a study in the absence of more definite guidelines. If the investigation should proceed as ordered, we will produce, at the proper time, such facts and matters as we deem relevant to the case.

* * * * * * *

[fol. 516] IV

"Specific Issue" under No. II reads as follows:

> II. The extent to which motor carriers, water carriers, express companies, and freight forwarders should be permitted to use Plans III and IV TOFC rail rates and service in their operations. If so permitted, under what conditions and limitations.

So far as water carriers and express companies are concerned, the question is purely academic, as we know of no proceeding in which the issue has been raised. In any event, the law on the subject could not be different as between water carriers and motor carriers. The leading express company at the moment—Railway Express Agency—is completely owned by a group of rail carriers and as to it the question could not well arise.

So far as freight forwarders are concerned our right to use such rates is recognized in decisions of the Commission in I. & S. 6993, *Forwarder Volume Rates Between Chicago and New York*, 308 I.C.C. 455 (1959), and *Eastern Central Motor Carriers Association* v. *B. & O. R.R. Co. et al.*, 314 I.C.C. 5, (1961). The former decision was affirmed on review, by a three-Judge Court in *Eastern Express, Inc., et al.* v. *United States, et al.*, 198 Fed. Supp. 256, and by the Supreme Court in 369 U.S. ——, 7 L. ed. 2d 548 (1962). The right of freight forwarders to utilize Plans III and IV having thus been determined and affirmed by the Supreme Court, is not properly the subject of inquiry in the instant proceeding.

[fol. 517] As to the stated issue of the extent to which motor carriers should be permitted to use Plans III and IV TOFC rates, we submit that such carriers may not utilize such rates to any extent for the reason that they do not have that "duality of character" which would enable them to function as a "shipper" and a "carrier" in relation to the same transportation undertaking. (Compare *Chicago, M. St. P. & P. R. Co.* v. *United States*, 336 U. S. 466, 467, 68). The Commission itself, has passed upon this question on numerous occasions and has characterized such a relationship as "repugnant to the Act." *

The arrangement could not lose that repugnancy through the medium of an investigation however protracted it might be. Furthermore, Congress is the forum which should decide whether it should, or whether it could, consistent with the constitution, so amend the Act, as to make the arrangement possible. That is a legislative function and Congress has the machinery to conduct any investigation it may deem necessary in the premises.

V

In the light of the foregoing we fail to understand what the Commission expects to accomplish as a result of this

* E. G., *Substituted Freight Service*, 232 I.C.C., 683, 690.

proceeding. It is incomprehensible to us that the Commission should intend to try again the legal right of freight forwarders to use Plan III and IV rates and service. And [fol. 518] it would shock the conscience for the Commission to delay the decisions in pending cases involving use by motor carriers of Plans I, III, and IV while those issues are retried in the vacuum of a rule-making proceeding.

We shall hope to be enlightened on these points at the prehearing conference. We do not, of course, for a moment question the right or the duty of the Commission to investigate practices and prescribe procedural rules, but we reiterate that we do not consider this proceeding a proper vehicle by which to try or retry the specific issues herein discussed.

Respectfully submitted,

Freight Forwarders Institute, By Giles Morrow, Attorney.

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[fol. 519]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM REPRESENTATIONS OF BURLINGTON LINES

August 31, 1962
File: 30.230

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington, D. C.

Dear Mr. McCoy:

In response to the Commission's invitation in connection with Ex Parte 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders, for submission of statements by respondents setting forth the nature and extent of their participation in the various operations embraced in this proceeding, the following is submitted for account of the Burlington Lines. In accordance with the Commission's request, an original and twenty copies of this statement are enclosed.

The CB&Q Railroad participates to a greater or lesser extent in all forms of coordinated rail-truck arrangements of which we have knowledge. Brief statements of the nature and extent of participation in these various arrangements follow:

TOFC PLAN I: This company has complete Plan I arrangements with its subsidiary, Burlington Truck Lines, Inc., between points reached by that company. Where CB&Q service is used by Burlington Truck Lines under Plan I, the CB&Q is compensated on a trailer-mile basis. The CB&Q does not generally have Plan I arrangements with other truck lines; however, we do have several such arrangements in connection with movement of motor vehicles. To a large extent these arrangements are now inactive because of the widespread movement of motor vehicles on multi-level flat cars. Where such arrangements are in effect, CB&Q compensation is on a division basis.

TOFC PLAN II: The CB&Q operates Plan II rates quite generally between points on its own line and also from and to points on the lines of connecting rail carriers. Where the CB&Q is a terminal carrier, the drayage at such terminal and the handling of the trailers on and off the flat cars is done by the Burlington Truck Lines, Inc. at points where they operate. At points where the Burlington Truck Lines do not operate, arrangements have been made with other drayage companies to perform this service. Generally, the drayage company is compensated on an hourly basis except that the Burlington Truck Lines receive flat amounts for handling of loaded trailers on and off of flat cars.

TOFC PLAN III: The CB&Q participates in a number of rates of a Plan III nature, but to date there has been no widespread publication of Plan III rates between CB&Q points or between CB&Q points, on the one hand, and points on connecting lines, on the other.

[fol. 520] *TOFC PLAN IV*: The CB&Q participates in Plan IV rates between Chicago, Illinois and Pacific Coast points, also between Official Territory and Southwestern Territory.

TOFC PLAN V: Insofar as our company is concerned, Plan V arrangements up to this time have been limited to motor vehicles. These arrangements, even where in effect, are generally inactive since the development of motor vehicle movement on multi-level flat cars.

SUBSTITUTED SERVICE ARRANGEMENTS: The CB&Q has provided for substituted service via the Burlington Truck Lines in connection with its Plan II TOFC rates. While the actual use of these substituted service arrangements has not become widespread up to the present time, there are a number of instances from time to time where such substitution is used. In these cases the truck line is compensated on a trailer-mile basis.

The CB&Q also provides for substituted service via Burlington Truck Lines in connection with less carload traffic, and a considerable amount of this substituted service is employed. In these cases the truck line is compensated on a ton-mile basis.

The CB&Q also has rules whereby less than carload traffic normally handled in trap car service within a terminal may in lieu of such service be handled by highway vehicles. In such instances the arrangements with the truck lines are covered by operating contracts and the compensation is usually on a per hundredweight basis. The CB&Q also has a number of rules which permit substitution of trailers for rail cars on carload traffic having both origin and destination on the CB&Q and on traffic originating on or terminating on connecting lines. In such instances where the CB&Q is the terminal carrier the terminal drayage service is performed by the Burlington Truck Lines or other motor carriers on much the same basis as in connection with Plan II rates. Some of these

rules provide the shipper must deliver the trailer to the carrier's ramp and the consignee take delivery at the ramp. In such instances the drayage is arranged for by shipper and consignee.

JOINT RAIL-MOTOR RATES (NOT TOFC): The CB&Q does not generally participate in rates of this nature. However, this company is a party to such joint rates on motor vehicles in a number of instances where the movement insofar as the rail lines are concerned is on multi-level flat cars. Usually in connection with such rates the motor carrier performs terminal services and receives flat amounts per vehicle for such services. In some cases, [fol. 521] however, the motor carrier performs actual over-the-road service for a portion of the distance and receives a division of the through rate or charge.

The United States Bureau of Reclamation is currently having a dam constructed in Montana known as the Yellowtail Dam. The site of this construction is not reached by rail, the nearest railhead being Hardin, Montana on the CB&Q. Our company has entered into joint rail-truck arrangements to this dam site on a number of commodities, notably cement and iron and steel. In connection with such through rates the motor carriers receive a division of the rate.

* * * * * * *

[fol. 522] Yours very truly,

G. H. Rehm.

[fol. 523]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPRESENTATIONS OF GREAT NORTHERN RAILWAY COMPANY

Submission of Respondent
Great Northern Railway Company

Respondent, Great Northern Railway Company, for its submission pursuant to the Commission's order of June 29, 1962, in the above matter makes the following statement:

• • • • • • •

[fol. 524] *Plan I*:

Respondent transports automobiles for a motor carrier authorized to transport automobiles over-the-highway from origin to destination. Said motor carrier loads his own trailers on rail flat cars and unloads same at destination.

Plan II:

Respondent transports general commodities for shippers in its own trailers and performs all services from pickup at shipper's platform to delivery to consignee's platform. Trailers move in rail service on rail flat cars. Respondent substitutes trailer-on-flat-car handling for freight car handling on published rail rates.

• • • • • • •

[fol. 525] 3. The extent to which the several plans utilized are held out to all carriers.

Plan I is held out by Respondent to an automobile motor carrier.

Plan V is held out by Respondent to an automobile motor carrier.

* * * * * * * *

[fol. 526] 5. Extent to which Respondent furnishes terminal or over the road services.

Plan I:

Respondent performs no terminal service and acts only as an intermediate bridge carrier.

Plan II:

Respondent spots its flat cars at its ramps. With exceptions Respondent performs all terminal services such as pickup and delivery with its trailers as well as loading and unloading. Where Respondent has its own motor carrier authority it sometimes performs partial over the road service to and from its points. Where Respondent does not have its own motor carrier authority Respondent sometimes utilizes the services of a motor carrier who has authority to and from Respondent's points. This is accomplished by the publication of motor carrier's authority in a substituted motor carrier for rail carrier service tariff.

Plan III:

Respondent loads trailer at origin from a point adjacent to its ramp onto flat car and unloads trailer at destination from flat car to a point adjacent to its ramp. Respondent performs no other terminal or over the road service.

Plan IV:

Flat cars are spotted only at origin and destination ramps. Shipper loads or unloads loaded trailer on or off flat car and performs all terminal services.

[fol. 527] *Plan V*:

Respondent spots flat cars at its ramps. Motor carrier at rail destination unloads trailers from flat cars and performs all terminal services.

• • • • • • •

Respectfully submitted,

L. E. Torinus, R. W. Cronon, Curtis H. Berg, Attorneys for Respondent, Great Northern Railway Company, 175 East Fourth Street, St. Paul 1, Minnesota.

[fol. 528]

BEFORE THE INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

Ex Parte No. 230

• • • • • • •

EXCERPTS FROM REPRESENTATIONS OF REGULAR COMMON CARRIER CONFERENCE, ET AL.

Come now the Regular Common Carrier Conference and the Common Carrier Conference—Irregular Route, both Conferences of the American Trucking Associations, Inc. (the Conferences) and file this their representation in the captioned proceeding in response to the invitation extended by order of the Commission dated June 29, 1962, served July 2, 1962.

The Regular Common Carrier Conference is a non-profit corporation with a membership composed of almost 2,000 general commodity common carriers of property by motor vehicle, operating for the most part over regular routes. The Common Carrier Conference—Irregular Route is also [fol. 529] an incorporated organization, non-profit, with a membership of some 500 carriers of general or limited commodities, operating primarily over irregular routes. Both are Conferences (or divisions) of the American

Trucking Associations, Inc., a non-profit corporation, constituting the national trade association of the trucking industry. The Conferences are organized primarily to foster, protect, and promote the interests of motor common carriers of freight, and to advance such interests through cooperation and organization.

The parties hereto are authorized to inform the Commission that the instant representation is concurred in by the following motor common carrier organizations:

Central & Southern Motor Freight Tariff Association, Inc., Louisville, Kentucky

Central States Motor Freight Bureau, Inc., Chicago, Illinois

Eastern Central Motor Carriers Association, Inc., Akron, Ohio

Indiana Motor Rate & Tariff Bureau, Inc., Indianapolis, Indiana

Middlewest Motor Freight Bureau, Kansas City, Missouri

New England Motor Rate Bureau, Inc., Boston, Massachusetts

Ohio Motor Freight Tariff Com., Inc., Columbus, Ohio

Southern Motor Carriers Rate Conference, Atlanta, Georgia

• • • • • • •

[fol. 530]

The Conferences are here assuming that the provision by the railroads of legitimate Plan II service is now an established fact and that no issue will be raised with respect to its lawfulness. • • •

Scope of Investigation and Suggested Principles Respecting Plan I TOFC Service

The Interstate Commerce Act provides that motor carriers and railroads may join in the provision of transpor- [fol. 531] tation over through routes and at joint rates. The Commission is, however, without jurisdiction to compel the provision of such service. That fact makes it essential that the Commission do all within its power to promote and encourage Plan I TOFC service because it is the finest type of coordination of services of different modes of transport in that:

(1) It provides the shipper with single-carrier responsibility by a regulated carrier which:

(a) Is itself equipped to supply all of the *physical* operation necessary.

(b) Provides assurance of carrier capacity regardless of availability of rail facilities.

(c) Has a substantial investment in facilities for transportation in the considered area.

(d) Has a history of carrier performance by its own facilities and, thereby, a dedication to public service.

(2) It combines the best and most economical features of the two great modes of surface transport because:

(a) The motor carrier has by performance demonstrated its adaptability to the infinite variety of shipper demands and needs.

(b) The railroads have by performance demonstrated their ability to handle trainload volumes economically over long distances.

(c) The liability of the railroad to the motor carrier may lawfully be limited by agreement, some-

thing which may not be done between shipper and carrier.

(3) It furthers the goals of the National Transportation Policy in that:

[fol. 532] (a) The public will ultimately be the beneficiary of savings.

(b) The provision to the railroads of desirable traffic will aid in preserving a vigorous and healthy rail service which is in the public interest.

(c) It can be the means of reducing the excessive and unrestrained price competition between railroads and motor carriers which, for the past five years, has exercised a continuous and irresistible downward pressure on the rate structure resulting, as is now plain, in the financial ill health of both modes of transportation.

The promotion and encouragement of Plan I TOFC service should be tempered with rules and regulations, the first of which should require the cooperating motor and rail carriers to show by tariff publication the points between which the motor carrier reserves the right to substitute rail TOFC transportation for its own over-the-road line-haul operation.

* * * * * * *

[fol. 533] Moreover, if Plans III and IV are to be continued, carriers should be authorized to utilize those services, thereby requiring the railroads to provide a trailer-on-flatcar service for line-haul transportation when so desired by the motor carriers themselves. This would go beyond Plan I under which, at the present time, the railroad is free to decline to join with the motor carrier in the provision of such service. Any motor-carrier use of Plan III or IV should be subject to the same limitations as apply to Plan I.

Regulations Respecting Plan V

The Commission should do nothing in this proceeding which would in any way suppress the freedom now enjoyed by the motor carriers and the railroads to provide transportation over through routes and at joint single-factor rates. As earlier pointed out, this is a right granted by statute and no handicap or obstacle should be put in the way of the free exercise thereof. Such a view is consistent with the fact that for many years joint-line motor transportation has been able to compete with single-line motor transportation by multiple-carrier routings with trailer interchanges which, to all intents and purposes, have been as expeditious and as efficient as the single-line service. [fol. 534] Under Plan V TOFC, the motor carriers should be permitted to continue to enjoy all opportunities for coordination and cooperative service in the public interest.

• • • • • • •

Respectfully submitted,

Regular Common Carrier Conference, Of American Trucking Associations, Inc., By: R. Edwin Brady, Albert B. Rosenbaum, 1616 P Street, N.W., Washington 6, D. C.

Roland Rice, 618 Perpetual Building, Washington 4, D. C.,
Its Attorneys.

Common Carrier Conference—Irregular Route, Of American Trucking Associations, Inc., By: James E. Wilson, 716 Perpetual Building, Washington 4, D. C., Its Attorney.

[fol. 535]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPRESENTATIONS OF NORTHERN PACIFIC RAILWAY COMPANY

Statement of P. A. Walsh for Northern Pacific Railway Company

[fol. 536]

St. Paul, Minnesota

August 31, 1962

My name is P. A. Walsh. I am General Freight Traffic Manager-Rates and Divisions, of Northern Pacific Railway Company, located at St. Paul, Minnesota. The representations made in this statement are in response to the Interstate Commerce Commission's order dated June 29, 1962, in Ex Parte No. 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service).*

• • • • • • •

As reflected by Exhibit 3, Northern Pacific presently participates in all five TOFC plans and in coordinated service arrangements. Plan II and Plan V tariff provisions are the most extensive and varied.

• • • • • • •

[fol. 537] Created and expanded to meet the needs of Northern Pacific patrons, Plan II service has made it possible for shippers and receivers at both rail and off-rail points to enjoy the economies of line-haul rail transportation and the convenience of store-door pickup and delivery service. In addition, Plan II service has generated sorely needed revenues for Northern Pacific, and we will continue to expand this service where it best satisfies the particular transportation requirements of our patrons.

Northern Pacific has established Plan III rates on boats and portable or fabricated houses or buildings, because the

peculiar needs of shippers of these commodities can best be met by movement of loaded shipper-owned trailers via rail to specific distribution points. Although its present participation in Plan III traffic is limited to these commodities, Northern Pacific anticipates further growth in this service tailored to the requirements of the shipping public.

• • • • • • •

[fol. 538] Northern Pacific has entered into numerous Plan V and coordinated rail-truck operations in order to meet shippers' specific needs. Not all are limited to TOFC rail movements. Some rates apply where the lading is physically transferred from truck to rail or from rail to truck. Where joint rail-truck rates and routings are provided, divisions are based upon the published through rates. In some cases, Plan V coordinated service is provided under separately published rail and motor carrier rates.

Service under the various plans was inaugurated on Northern Pacific as follows:

Plan I	June 1958
Plan II	September 1954
Plan III	April 1955
Plan IV	May 1959
Plan V (TOFC)	August 1959.

TOFC services constitute a significant advance in the development of the nation's common carrier transportation system. These services and coordinated rail-truck operations meet the specific requirements of Northern Pacific's shippers. They yield vitally needed revenues which contribute substantially to the preservation and further improvement of the Company's transportation system.

P. A. Walsh

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PAGE

[fol. 539]
[fol. 540]

EXHIBIT 3 TO REPRESENTATIONS OF NORTHERN PACIFIC RAILWAY COMPANY

LIST OF TARIFFS IN WHICH THE NORTHERN PACIFIC RAILWAY COMPANY IS A PARTICIPATING CARRIER

Tariff Issuing Agent or Carrier	Tariff No.	I.C.C. No.	Commodity	General Application of Tariff Between	And
		PLAN I TARIFFS			
Northern Pacific Transport Co.	5-J	MF-ICC No. 21	General	Montana	Montana
Northern Pacific Transport Co.	45-B	MF-ICC No. 24	General	Montana	Yellowstone National Park, Wyo.
Kenosha Auto Transport Corp.	72-C	MF-ICC No. 241	Automobiles	Kenosha, Wis.	Idaho, Wash., Ore., Montana
Kenosha Auto Transport Corp.	52-F	MF-ICC No. 209	Boats	Kenosha, Wis.	Wash., Calif.

* * * * * * *

PLAN V TARIFFS - TOFC AND RAIL-MOTOR COORDINATED SERVICE (REPRESENTATIVE TARIFFS)

Pacific South Coast Freight Bureau, Agent	297-E	1708	Motor Vehicles, TOFC	From Calif.	To Ida., Mont., Ore., Wash.

Tariff Issuing Agent or Carrier	Tariff No.	I.C.C. No.	Commodity	General Application of Tariff Between	And
		PLAN V TARIFFS, ETC. (Cont.)			
National Automobile Transporters Association, Agent	504-B	12	Automobiles and other commodities via Motor-Rail (Tri-Level)-Motor	From Flint, Lansing and Pontiac, Mich.	To Pacific Coast
" " "	507	11	Automobiles and other commodities via Motor-Boat-Rail (Tri-level) -Motor	From Flint, Lansing and Pontiac, Mich.	To Calif., Colo., Ida., Iowa, Minn., Mont., Nev., N. Dak., Ore., S.Dak., Utah, Wash., Wyo.
V. P. Brown, Agent	-	8	Motor Vehicles, TOFC	From South Bend, Ind.	To Mont., Ore., Wash.
V. P. Brown, Agent	-	9	Motor Vehicles, TOFC	From Wayne, Wixom, Mich.	To Mont., Ore., Wash.
Wabash Railroad Co.	19856-A	8000	Motor Vehicles, (Bi-level & tri-level)	From Detroit, Mich.	To Ida., Mont., Wash., Ore.
Northern Pacific Transport Co.	5-J	MF-ICC No. 21	Iron and Steel Articles, Rail (TOFC)-Motor	Montana	Montana
Pacific Inland Tariff Bureau Inc., Agent	8-C	MF-ICC No. 85	General Motor-Rail	Canada, Ida., Ore., Wash.	Ida., Ore., Wash.
" " " "	9-C	MF-ICC No. 85	General Motor-Rail	Ariz., Nev., Calif.	Ore., Wash., British Columbia, Canada, Ida., Ore., Wash.

Tariff Issuing Agent or Carrier	Tariff No.	I.C.C. No.	Commodity	General Application of Tariff Between	And
			PLAN V TARIFFS, ETC. (Cont.)		
North Pacific Coast Freight Bureau, Agent	10-O	978	Grain, Grain Products and Other Articles, Motor-Rail	Ida., Ore., Wash.	British Columbia, Canada, Ida., Ore., Wash.
Pacific South Coast Freight Bureau, Agent	80-I	1536	Lumber and Its Products, Rail-Motor	Mountain Pacific, Canada	Mountain Pacific, Canada
North Pacific Coast Freight Bureau, Agent	21-L	1042	Cement, Rail-Motor	From Montana, Ore., Wash.	To Ida., Ore., Wash., Montana, British Columbia, Canada

[fol. 543]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

REPRESENTATIONS OF MANUFACTURING CHEMISTS' ASSOCIATION, INC.

These representations are filed by The Manufacturing Chemists' Association, Inc., in response to the invitation contained in the Notice of Proposed Rule Making entered in this proceeding June 29, 1962.

The Manufacturing Chemists' Association, Inc., is a non-profit trade association of chemical manufacturers organized 90 years ago. Its members comprise over ninety per cent of the productive capacity of the chemical industry within the United States. They have more than one thousand plants in the United States with a representation in almost every State. They have a vital interest in all types [fol. 544] of transportation in connection with the assembly of raw materials to be used in manufacturing processes and in the distribution of manufactured products. All agencies of transportation are used by them for the movement of numerous commodities inbound to and outbound from their plants and warehouses. They ship in various quantities from small minimum charge shipments to truckloads, carloads, bargeloads, and shiploads.

Many members of the Association avail themselves of motor carrier service part of which is performed under Plan I in trailers transported by railroads on flat cars. They also utilize Plans II and III, and some either are using or are contemplating the use of Plan IV. Members of the Association consider that in the public interest, including the interests of shippers, railroads and motor carriers, the motor and rail carriers should enter extensively in Plan V arrangements.

The intense interest and concern of members of the Association in trailer-on-flat-car matters is evidenced by their participation through witnesses and counsel in No. 32533 and related cases, *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, and their intervention in support of the Commission's findings and order in that proceeding which are now under attack in the United States District Court for the Western District of Missouri, Civil [fol. 545] Action No. 13469, *Cooper-Jarrett, Inc., et al.* v. *United States and Interstate Commerce Commission.* This intense interest and concern is further evidenced by the participation of the Association in No. 33133, *All Freight in Trailer on Flat Cars—Between the East and Chicago and East St. Louis,* which is now being heard.

The Association respectfully represents:

1. Trailer-on-flat-car service provides a needed coordination of motor and rail services.

2. Where coordinated motor-rail services can be performed by the carriers at a cost less than either motor or rail service alone, the carriers should be permitted to provide the coordinated service and pass the savings along to the shippers.

3. All forms of transportation should be encouraged to try out and develop new and improved techniques.

4. All Plans, I, II, III, IV, and V, should continue to be approved and their continued development and expansion should not be hindered.

5. Taking trailers off the highways and moving them on flat cars reduces safety hazards on the highways.

6. Members of the Association use Plan II and III services, have found them economical and efficient, and desire their continuance and expansion.

[fol. 546]

7. Provision of coordinated motor-rail service under Plans I to V, inclusive, have the effect of discouraging shippers from entering into private motor carriage.

Respectfully submitted,

By: Maurice F. Crass, Jr., Secretary, Manufacturing Chemists' Association, Inc., 1825 Connecticut Ave., N. W., Washington, D. C.;

Paul Coyle, 5631 Utah Avenue, N. W., Washington, D. C., For Manufacturing Chemists' Association, Inc.

Dated: August 31, 1962.

Date Due: September 4, 1962.

[fol. 547]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM REPRESENTATIONS OF ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Trailer-on-Flat-Car Service

AT&SF Railway Company

Railroad	Plan I Motor Carriers Trailers	Plan II Railroad Owned Trailers and Cars	Plan III Private Shipper Trailers	Plan IV Private Shipper Trailers and Cars	Plan V Joint Rail Motor Carrier	Interline Arrangements
AT&SF Ry.	*Yes	Yes	Yes	Yes	*Yes	Yes

* Autmobiles only

[fol. 548]

Plan V—(1) Joint Line Service (Rail-Truck). • • •

• • • • • • •

(5) Held out to all carriers desiring to participate.

• • • • • • •

L. C. Hudson, General Freight Traffic Manager.

[fol. 549]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. MC-230

EXCERPTS FROM REPRESENTATIONS OF PACIFIC INTERMOUNTAIN EXPRESS CO.

Supplemental Statement of Pacific Intermountain Express Co. Concerning Specific Issues to Be Considered the Subject Proceeding

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[fol. 550]

Issue No. 2: Plan III & IV Rates and Services—Extent of Permissible Use by Regulated Carriers

Motor Carriers: Motor carrier use of Plan III or IV service should be subject to the same limitations as apply to Plan I. However, in respondent's area of operation there is no Plan IV type of service available to motor carriers, and no Plan I service of any type available between midwest points east of the tier of states of Wyoming, Colorado, and New Mexico, on the one hand, and, on the other hand, points in the states west thereof. Transcontinental railroads operating between the latter points have elected not to offer any form of Plan I service to motor carriers between such points. Rather than the Commission considering the extent of permissible use of Plan III and IV service, it should direct its attention to the more pressing matter

of how best to encourage the closer cooperation of motor carriers and railroads in this geographical area in the rendition of coordinated TOFC service of all types, as well as the advisability of recommending a law change to permit motor carriers to use, to the full extent available, the services and rates under the open Plan III and IV tariffs. Respondent so recommends.

Freight Forwarders and The Express Company: Neither the freight forwarders nor the express company should be denied the full use of open tariffs. However, the express company is not a freight consolidator unless he has a freight forwarder permit allowing the rendition of freight forwarder service in addition to its express service. The consolidation of shipments by the express company to [fol. 551] obtain a volume rate violates Part IV of the Act, hence the use of Plan III or IV service by the express company, except on a single shipment basis, should not, and is not, permitted under the law as presently worded.

Respectfully submitted,

W. S. Pilling, Attorney for Pacific Intermountain Express Co.

[fol. 552]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM REPRESENTATIONS OF DENVER AND RIO GRANDE WESTERN RR. CO.

The Denver and Rio Grande Western Railroad Company, a Delaware corporation, with its principal place of business in Denver, Colorado, operates a railroad in intrastate, interstate and foreign commerce in the States of Colorado, Utah and New Mexico. It owns 100% of the stock of the motor carrier subsidiary, Rio Grande Motor Way, Inc., a Colorado corporation with its principal place of business in Denver, Colorado, which operates under au-

thority and by virtue of certificates of public convenience and necessity in Docket No. MC-60012 and subs thereto. Rio Grande Motor Way, Inc., in turn, owns 100% of the stock of Larson Transportation Company, which operates as a common carrier by motor vehicle under and by virtue of certificates of convenience and necessity issued in Docket No. MC-68370 and subs thereto. Rio Grande Motor Way, Inc. also owns 49% of the stock of Carbon Motorway, Inc., [fol. 553] a Utah corporation with its principal place of business in Salt Lake City, Utah, which operates as a common carrier by motor vehicle in interstate and foreign commerce, under and by virtue of the certificates of convenience and necessity issued in Docket No. MC-113649 and subs thereto. There is pending a proceeding wherein Rio Grande Motor Way, Inc. seeks authority to control Carbon Motorway, Inc. by stock ownership and to merge Carbon Motorway, Inc. with Rio Grande Motor Way, Inc., this proceeding being docketed as MC-F-7328.

• • • • • • •

[fol. 554] The Denver and Rio Grande Western Railroad Company does perform piggy-back service for Rio Grande Motor Way and Carbon Motorway. The motor carriers involved handle the freight on their billing and the railroad provides the piggy-back service under an arrangement in which the motor carrier subsidiaries pay on a trailer-mile basis whether loaded or empty. The only Plan I piggy-back in which The Denver and Rio Grande Western Railroad Company participates is that of the subsidiary motor carriers.

• • • • • • •

[fol. 555] Respectfully submitted,

Ernest Porter, Attorney for The Denver and Rio Grande Western Railroad Company, Rio Grande Motor Way, Inc., Carbon Motorway, Inc., and Larson Transportation Company.

[fol. 556]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

SPECIAL RULES OF PROCEDURE—Filed October 9, 1962

1. The proceeding shall be handled, to the extent practicable, by the filing of verified[1] statements and replies. All parties desiring to participate in the proceeding shall file verified statements, with or without exhibits attached, with the Commission, and serve the other parties as hereinafter described, on or before December 10, 1962. The statement should set forth the position of the party making it with respect to, among other things, the proposed Rules and Regulations governing the use of coordinated and substituted service, and should be limited primarily to statements of fact.

2. Replies to the verified statements, if any, should be filed with the Commission on or before January 10, 1963. The party whose verified statement is being replied to shall be served with a copy of the reply by first-class mail.

3. An original (signed in ink) with 25 copies of each verified statement or reply shall be filed with the Commission.

A. In order to conserve time and avoid expense, it is strongly urged that persons finding themselves with common interests in the proceeding shall, to the greatest [fol. 557] extent possible, endeavor to consolidate their

[1] In lieu of verification under oath, the verified statements and replies may be made subject to the following declaration: "I solemnly declare that I have examined the foregoing statement [or reply] and that, to the best of my knowledge and belief, the representations contained therein are true."

presentation of verified statements or replies. Individual participation is not precluded, but mere casual interest, however, will not justify participation, and will make the preparation and service of verified statements burdensome and impracticable. The Commission desires participation only by those who intend to take an active part in the proceeding. Otherwise, it reserves the right to restrict service of verified statements upon groups or organizations fairly representative of all interests.

B. On or before November 16, 1962, any person, in addition to those participating in the prehearing conference, who desires to participate in the proceeding shall notify the Secretary of the Commission to that effect, giving his name, address, and company, if any represented, and he will become a party to the proceeding. No additional party will be allowed to participate except by special permission and for good cause shown and except to the extent described hereinafter in paragraph 5.

C. As soon as practicable after expiration of the time specified in paragraph 3B, the Commission will serve a list of the names and addresses of all persons parties to this proceeding and upon whom service of verified statements must, unless waived, be made. Such service is to be as otherwise set forth in Rule 1.22 of the Commission's General Rules of Practice.

4. Requests, if any, for oral hearing shall be the subject of a separate pleading which shall include the supporting [fol. 558] reasons and arguments for oral hearing, as well as the name or names of the place or places desired for oral hearing. If the request is only with respect to cross-examination of the maker or makers of verified statements or replies, the maker or makers of such statements or replies shall be served with a copy of the request by first-class mail. A copy of any other request for oral hearing shall be served on the parties as described in paragraph 3C above.

[fol. 556]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

SPECIAL RULES OF PROCEDURE—Filed October 9, 1962

1. The proceeding shall be handled, to the extent practicable, by the filing of verified[1] statements and replies. All parties desiring to participate in the proceeding shall file verified statements, with or without exhibits attached, with the Commission, and serve the other parties as hereinafter described, on or before December 10, 1962. The statement should set forth the position of the party making it with respect to, among other things, the proposed Rules and Regulations governing the use of coordinated and substituted service, and should be limited primarily to statements of fact.

2. Replies to the verified statements, if any, should be filed with the Commission on or before January 10, 1963. The party whose verified statement is being replied to shall be served with a copy of the reply by first-class mail.

3. An original (signed in ink) with 25 copies of each verified statement or reply shall be filed with the Commission.

A. In order to conserve time and avoid expense, it is strongly urged that persons finding themselves with common interests in the proceeding shall, to the greatest [fol. 557] extent possible, endeavor to consolidate their

[1] In lieu of verification under oath, the verified statements and replies may be made subject to the following declaration: "I solemnly declare that I have examined the foregoing statement [or reply] and that, to the best of my knowledge and belief, the representations contained therein are true."

presentation of verified statements or replies. Individual participation is not precluded, but mere casual interest, however, will not justify participation, and will make the preparation and service of verified statements burdensome and impracticable. The Commission desires participation only by those who intend to take an active part in the proceeding. Otherwise, it reserves the right to restrict service of verified statements upon groups or organizations fairly representative of all interests.

B. On or before November 16, 1962, any person, in addition to those participating in the prehearing conference, who desires to participate in the proceeding shall notify the Secretary of the Commission to that effect, giving his name, address, and company, if any represented, and he will become a party to the proceeding. No additional party will be allowed to participate except by special permission and for good cause shown and except to the extent described hereinafter in paragraph 5.

C. As soon as practicable after expiration of the time specified in paragraph 3B, the Commission will serve a list of the names and addresses of all persons parties to this proceeding and upon whom service of verified statements must, unless waived, be made. Such service is to be as otherwise set forth in Rule 1.22 of the Commission's General Rules of Practice.

4. Requests, if any, for oral hearing shall be the subject of a separate pleading which shall include the supporting [fol. 558] reasons and arguments for oral hearing, as well as the name or names of the place or places desired for oral hearing. If the request is only with respect to cross-examination of the maker or makers of verified statements or replies, the maker or makers of such statements or replies shall be served with a copy of the request by first-class mail. A copy of any other request for oral hearing shall be served on the parties as described in paragraph 3C above.

5. If an oral hearing is held, upon leave granted by the Hearing Officer, any interested person may be permitted to participate in such hearing without the necessity for filing any written pleading to intervene.

6. For good cause shown, the proceeding may be separated with respect to one or more of the issues or operational areas involved. If any person desires to make such request, it shall be set forth in a separate pleading except that requests for separation of issues and operations areas, and for oral hearing, may be contained in the same pleading. A copy of such request shall be served on the parties as described in paragraph 3C above.

7. Replies to the pleadings described in paragraphs 4 and 6 above may be filed within 20 days after the date such pleadings are filed. The party whose pleading is being replied to shall be served with a copy of the reply by first-class mail.

8. An original (signed in ink) and 14 copies of any pleading tendered under these rules, except as otherwise provided under paragraph 3 above, shall be filed with the Commission.

[fol. 559]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

PREHEARING CONFERENCE—WASHINGTON, D. C.
October 9, 1962

The order instituting this proceeding, entered June 29, 1962, and subsequently published in the Federal Register, made all carriers and freight forwarders of property subject to the Interstate Commerce Act respondents and

established a procedure by which respondents and other interested persons could file representations. Those filing representations are listed in Appendix I.

Additional information has been obtained through questionnaires, circulated to certain carriers, in which data relating to piggyback practices were requested. Replies to these questionnaires have been received from many motor and rail carriers and forwarders, and a summary of their responses is attached hereto as Appendix II.

Based on all available information, a draft of proposed rules has been prepared and is set forth in Appendix III. These rules are designed to serve as a framework upon which can be developed the rules ultimately to be adopted—if it is determined by the Commission that such rules are necessary. They attempt to deal with most of the specific areas within which, according to the representations received by the Commission, confusion, and, in some in- [fol. 560] stances, abuses have arisen. These proposed rules, together with an outline of the procedure adopted at this conference, will be published in the Federal Register.

The proposed rules represent a new approach in that they contemplate abandonment of the attempt to describe varying TOFC services in terms of the "plan-number" terminology now in general use. Instead, they envision two basic kinds of TOFC service: a "joint intermodal" TOFC service and an "all-rail" TOFC service, in which equal charges are made for like services.

"Joint intermodal" TOFC service, dealt with in part B of Appendix III hereto, includes any piggyback service performed jointly by a rail carrier and a motor or water common carrier. Thus, it includes what are now commonly termed Plan I and Plan V TOFC services. "All-rail" TOFC service, which is treated in part C of Appendix III, embraces those services now referred to as Plans II, III, and IV, and modifications thereof, in which traffic moves exclusively at rail rates and on rail billing.

The proposed rules are not intended to curtail the TOFC services represented by the various numbered plans now

in general use. Instead, they represent an attempt to simplify the classification of piggyback services and nomenclature so as to eliminate certain disadvantages of the "plan-number" arrangement. Examples of the disadvantages of this system may be found in the recent proliferation of plans. The institution of Plans II½ and VI indicate that [fol. 561] as new variants of TOFC service develop they cannot be fitted satisfactorily into the present plan-number scheme. This system also seems to result in unduly complex tariff publications, making it difficult for a shipper to determine the essential relationship, if any, between the several plans and thus to compute the least costly transportation service.

The proposed rules do not involve rates as such, but deal only with practices. Furthermore, the proposed rules, as set forth in Appendix III, do not deal with the movement of highway trailers or containers by water carriers subject to part III of the Act in so-called fishy-back service. Finally, the proposed rules do not contemplate the use of TOFC service by motor contract carriers.

[fol. 562] APPENDIX I

PERSONS FILING REPRESENTATIONS

1. The American Short Line Railroad Association
2. Atchison, Topeka, and Santa Fe Railway Company
3. Atlantic Coast Line Railroad Company
4. The Belt Railway Company of Chicago
5. Burlington Lines
   Chicago, Burlington & Quincy Railroad Company
   The Colorado and Southern Railway Company
   Fort Worth and Denver Railway Company
6. Chicago Great Western Railway Company

7. Chicago, Milwaukee, St. Paul and Pacific Railroad Company
8. Chicago and North Western Railway Company
9. Chicago, Rock Island and Pacific Railroad Co.
10. Chicago and Western Indiana Railroad Company
11. Denver and Rio Grande Western Railroad Company
    Rio Grande Motor Way, Inc.
    Carbon Motorway, Inc.
    Larson Transportation Company
12. Great Northern Railway Company
13. Illinois Central Railroad Company
14. The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company
15. Louisville and Nashville Railroad Company
16. Missouri Pacific Railroad Company
17. Northern Pacific Railroad Company
18. Richmond, Fredericksburg and Potomac Railroad Company

[fol. 563]

19. St. Louis-San Francisco Railway Company
    Alabama, Tennessee and Northern Railroad Company
    Quanah, Acme & Pacific Railway Company
    St. Louis, San Francisco and Texas Railway Company
20. St. Louis Southwestern Railway Company
21. Seaboard Air Line Railroad Company
22. Soo Line Railroad Company

23. Southern Pacific Company
    Northwestern Pacific Railroad Company
    Petaluma & Santa Rosa Railroad Company
    Visalia Electric Railroad Company
    Pacific Electric Railway Company
    San Diego & Arizona Railroad Company
    Holton Inter-Urban Railroad Company

24. Southern Railway System

25. Union Pacific Railroad Company

26. The Western Pacific Railroad Company

27. American Trucking Associations, Inc.
    National Motor Freight Traffic Association, Inc.
    Central & Southern Motor Freight Tariff Association, Inc.
    Central States Motor Freight Bureau, Inc.
    The Eastern Central Motor Carriers Association, Inc.
    Indiana Motor Rate & Tariff Bureau, Inc.
    Middle Atlantic Conference
    Middlewest Motor Freight Bureau
    The New England Motor Rate Bureau, Inc.
    Niagara Frontier Tariff Bureau, Inc.
    Pacific Inland Tariff Bureau, Inc.
    Rocky Mountain Motor Tariff Bureau, Inc.
    Southern Motor Carriers Rate Conference
    Southwestern Motor Freight Bureau, Inc.

28. Local and Short Haul Carriers National Conference

29. Regular Common Carrier Conference of American Trucking Associations, Inc.
    Common Carrier Conference—Irregular Route of American Trucking Associations, Inc.

[fol. 564]

    Central & Southern Motor Freight Tariff Association, Inc.
    Central States Motor Freight Bureau, Inc.

Eastern Central Motor Carriers Association, Inc.
Indiana Motor Rate & Tariff Bureau, Inc.
Middlewest Motor Freight Bureau
New England Motor Rate Bureau, Inc.
Ohio Motor Freight Tariff Com., Inc.
Southern Motor Carriers Rate Conference

30. Contract Carrier Conference of American Trucking Associations, Inc.
31. National Automobile Transporters Association
32. Arco Auto Carriers, Inc.
33. Auto Transports, Inc.
34. Bekins Van Lines Co.
35. Be-Mac Transport Co., Inc.
36. Best Way of Indiana, Inc.
37. Carolina Freight Carriers Corporation
38. Consolidated Freightways Corporation of Delaware
    Missouri Consolidated Freightways Corporation
    New York Consolidated Freightways Corporation
39. Cooper Motor Lines, Inc.
40. J. L. Cox & Son, Inc.
    Parkhill Truck Company
    J. O. (Red) Willett Pipe Line Stringing Corporation
    Dunn Bros., Inc.
41. Delta Motor Line, Inc.
42. Eazor Express, Incorporated
43. Fayetteville Transfer Incorporated
44. Gordons Transports, Inc.
45. Herriott Trucking Company, Inc.

[fol. 565]

46. Hires Trucking Co., Inc.
47. Houff Transfer, Inc.
48. Kenosha Auto Transport Corporation
49. Los Angeles-Seattle Motor Express, Inc.
50. M & M Transportation Company
51. McDaniel Freight Lines Incorporated
52. McLean Trucking Company
53. Midwest Haulers, Inc.
54. The Motor Convoy, Inc.
55. Pacific Intermountain Express Co.
56. Pacific Motor Trucking Company
57. Southern Pacific Transport Company
58. Southwestern Transportation Company
59. St. Johnsbury Trucking Company, Inc.
60. Saginaw Transfer Co., Inc.
61. Transamerican Freight Lines, Inc.
62. Freight Forwarders Institute
63. Empire State Shippers Association, Inc.
64. Ford Motor Company
65. General Motors Corporation
66. Manufacturing Chemists' Association, Inc.
67. Minneapolis Traffic Association
68. Thiokol Chemical Corporation

[fol. 566]

69. Transport Leasing Company

70. Harold C. Foreman .

71. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

72. T. J. McCarthy Steamship Company

73. Sea-Land Service, Inc.

[fol. 567]

APPENDIX II

GENERAL SUMMARY OF PIGGYBACK QUESTIONNAIRES.

INTRODUCTION

This general summary is based on questionnaires mailed to selected railroads, motor carriers and freight forwarders. While the survey was not designed specially to develop information for use in Ex Parte No. 230, some of the data are relevant to the issues in that proceeding. Individual replies to these questionnaires are confidential and publication of summary results does not in any way reveal the operations of individual carriers.

I. PARTICIPATION IN PIGGYBACK

Railroads. The survey shows wide railroad participation in piggyback, apart from the movement of automobiles which is considered to be separate for present purposes, and a substantial increase in piggyback traffic from the first 6 months of 1961 to the corresponding period of 1962.

Virtually all of the reporting railroads participate in plans II and III, about three-fourths in plan IV, and somewhat more than half in plan I. While almost as many roads have plan V as plan I, traffic in the former generally is ex-

tremely limited. Based on movement of trailers in January-June, 1962, plan II was ranked first in importance by approximately twice as many roads as those giving first rank to either plan I or plan III. No railroad gave first rank to plan IV, which was in all instances ranked as subordinate to plan II.

[fol. 568] Movements of automobiles involving rail and for-hire motor carriers were reported by almost two-thirds of the reporting railroads, less than half of these railroads having piggyback movements as distinguished from movements using rack or multilevel cars.

Motor carriers. Returns to the questionnaires indicate that somewhat more than one-fourth of the Class I motor carriers participate in piggyback, generally in plan I. Among the larger motor carriers, however, approximately two-thirds report piggyback operations. A limited number of motor carriers participate in plan V, in most instances with no more than a negligible volume of traffic. There is an indication of increased motor carrier interest in this plan.

Piggyback traffic of motor carriers, as that of the railroads, showed a substantial increase in the first 6 months of 1962 compared with the same period of 1961. The percentages of increases reported by individual carriers varied widely. A number of motor carriers showed substantial declines in piggyback movements from the 1961 to the 1962 period.

Traffic in automobiles prior or subsequent to a rail haul is reported by a number of motor carriers, with only a few showing piggyback movements.

Freight forwarders. The returns received from freight forwarders indicate general participation in piggyback; plans II, III and IV are used.

Plan I. Most of the railroads offering plan I to regulated motor carriers, other than to subsidiaries, generally make the plan available to any motor carrier regarded as quali-

fied economically to handle the traffic and to do so within its rights. Some motor carriers cite examples of plan I available to railroad subsidiaries but not to other motor carriers.

[fol. 569] Railroads in most cases show equal plan I charges for all motor carriers between given points, and a number report plan I charges lower than plan III rates. On the other hand, approximately half of the motor carriers reporting with respect to this matter show plan I charges higher than plan III rates.

II. OPERATING RIGHTS

Railroads engaged in plan I generally check the status of the motor carrier, common or contract, and considerably more than half of the railroads check the authorities as to interchange points and routes. Motor carriers, in almost all instances, report piggyback interchange only at authorized points.

In comparing authorized highway route distances with those over direct highway routes between places from and to which piggyback is used, one-fifth of the motor carriers answering this question indicate some instances of circuity in excess of 10 percent.

In regard to the movement of automobiles in piggyback or multilevel service, more than half the railroads report checking the common or contract status of the motor carrier. A lesser number check initial or secondary rights, and only a limited number check the points which the motor carriers are authorized to serve. Motor carriers generally report the handling of automobiles only from or to points within their authorized territories. Some contract carriers, acting as agent of the shipper, deliver automobiles to or receive them from railroads.

Both rail and motor carriers report only isolated instances of motor carrier use of plan III or IV rates.

[fol. 570] III. RATES, CHARGES, AND AUXILIARY SERVICES

Plan I is used by motor carriers on less-than-truckload or truckload traffic between points from and to which rail service is used, as well as from or to more distant points. Plan I charges of some railroads, according to reports from both groups of carriers, are dependent upon the number of trailers moved in a month or similar period. Empty trailers representing some proportion of the loaded movement are returned free by a considerable number of railroads. In some instances all empty trailers or those not returned free are handled at charges less than for loaded trailers.

Under plan I, most railroads report that the charges include the placing of trailers on cars, removal from cars, and the tie-down. Motor-carrier reports show a similar practice. Only a limited number of the railroads with separate charges for these services show the charges in tariffs.

Plan II rates include movement to and from the shippers' loading areas. Pickup or delivery may be performed by either a local contractor or a rail subsidiary, with the returns showing more railroads utilizing local contractors. Many railroads employ both agencies. Railroads generally impose some limitation on free time for loading or unloading of trailers by shippers, with 8 hours being the most prevalent period indicated. Most of the plan II railroads provide pickup and delivery at points within commercial zones but beyond switching limits. Approximately half of these railroads provide the services within switching limits and beyond commercial zones, and a number of others outside either zone.

[fol. 571] In plan III, the railroad service generally is between the points of loading (at the ramp or alongside car) and a parking area at destination, although a number of railroads also receive trailers in a parking area. Movements within parking areas and on and off cars, as well as tie-down, generally are included in the rates.

In connection with plan IV operations, railroads report receiving trailers for loading on cars, or accepting trailers on cars as provided under plan IV rates. A number of railroads make separate charges for placing and removing trailers and for tie-down; most of these railroads report that the charges are named in tariffs. A number of railroads have separate charges for moving plan IV trailers in origin or destination yards.

IV. CONTENTS AND WEIGHT OF TRAILERS

Plan III and IV rates ordinarily are subject to requirements that there be more than one commodity in each shipment. Railroads participating actively in either plan take steps to insure observation of this rule, but for some the steps may be no more than a requirement of shipper certification; a number of the railroads require manifest sheets describing the shipments.

Maximum weights are named in connection with many piggyback charges or rates. Plan I railroads report that they generally accept motor-carrier weights. Plan III participants report arrangements to check shippers' weights, by examination of manifests or otherwise. Somewhat less than half of these railroads weigh at least some of the trailers, a limited number weighing all trailers to the extent practicable. Plan IV railroads likewise take some steps to verify weights, one-third of the carriers weighing some of the trailers.

[fol. 572]

V. EQUIPMENT USE AND LEASING

Trailers owned by railroads, shippers or leasing companies may be used in various piggyback plans.

Under plan II, for example, more than half of the railroads make some use of shippers' trailers and make an allowance for such use. Most of these railroads return the trailer without charge and some return the trailer under load or by lease for a return movement.

Plan III and IV rates generally provide for the return of empty equipment at the same rate as on the loaded units. A majority of the plan III railroads, however, lease trailers to shippers on a one-way or daily basis, and some on a round-trip basis. A number of railroads also lease shippers' trailers to third parties for return under load. A third of the plan III railroads make arrangements for leasing from third parties of trailers for shipper use in plan III.

Under plan IV similar conditions are reported. A third of the plan IV railroads lease trailers to shippers on one-way, per diem, or round-trip bases. A limited number of railroads lease cars to shippers on bases similar to those for trailers.

Free storage of shippers' trailers is provided by a few railroads. A somewhat larger number provide storage at a fee, most of them publishing their charges in tariffs. An equal number store shippers' cars on railroad property but generally report no charges for the service.

VI. AUTOMOBILE MOVEMENTS

Approximately two-thirds of the reporting railroads handle automobiles in connection with movements by for-hire motor carriers, a third of these reporting piggyback of [fol. 573] automobile trailers on flat cars. Plan I or V joint movements in piggyback are reported, as well as plan III movements, some of which are under combinations of rail and motor rates. Very few motor carriers report present piggyback operations, and others indicate that such movements have been superseded by use of rack or multilevel cars. In piggyback movements of automobiles, trailers generally are returned free by the railroads.

Some three-fourths of the railroads with automobile movements use rack or multilevel cars. These railroads generally report loading and unloading of automobiles by them, with some motor-carrier performance of the same functions, and some shipper loading. Reports of motor

carriers in the same service, however, tend to emphasize loading and unloading by them rather than by railroads.

Motor carriers report performing local pickup or delivery of automobiles, or line-haul movements prior or subsequent to the rail haul, but there is no clear showing of greater participation in any one type of service than in the others. However, there is an indication that the services subsequent to the rail haul exceed those prior to it.

[fol. 574]

Appendix III

Proposed TOFC Rules

A.

Definitions

1. "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

2. "Joint intermodal TOFC service" means any transportation of property (the motor and/or water transportation of which is subject to economic regulation under the Interstate Commerce Act) jointly provided by a railroad or railroads subject to Part I of the act and a motor common carrier or carriers subject to Part II of the act or a water common carrier or carriers subject to Part III of the act, and which includes, for the whole[1] or any part of the line-haul movement, the performance of TOFC service as defined in (1) above; except that the term "joint inter-

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[1] See Rule B-7 below.

[fol. 575] modal TOFC service" does not include the transportation of property moving under contract rates as set forth in section 409 of the act.

3. "All-rail TOFC service" means any transportation, other than transportation embraced in (2) above, provided by a railroad or railroads subject to Part I of the act, which transportation includes the performance of TOFC service as defined in (1) above.

[fol. 576] B.

Rules Governing Joint Intermodal TOFC Service

1. Tariffs embracing joint intermodal TOFC rates or charges shall set forth the service covered by the published rates or charges, the routes over which such service will be performed, and the names of the carriers participating therein.

2. Tariffs embracing joint intermodal TOFC rates or charges may be published only by rail, motor, or water common carriers, or their agents, on commodities subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

3. Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon consideration of an appropriate application filed by the motor carrier in which it seeks relief from the percentage pro-
[fol. 577] visions of this section. [Example: In connection with a shipment originating at A and destined to D, a motor common carrier holding authority to transport such shipment from A to D (a distance of 300 miles by its au-

thorized highway routes), serving the intermediate points of B and C, participates in joint intermodal TOFC service in lieu of its authorized over-the-road service in the following manner: The shipment is transported from A to B by the motor carrier over its authorized highway route (a distance of 100 miles), at which point it is placed on a rail car for TOFC movement to C (a distance of 80 miles over the rail route used as compared to 100 miles over the motor carrier's authorized highway route), and at C the shipment is returned to the originating motor carrier for ultimate delivery at D (a distance of 100 miles over the motor carrier's authorized highway route). Although the rail line distance (80 miles) between B and C is less than 90 percent of the motor carrier's authorized highway route between the same points (100 miles), the above rule allows this operation inasmuch as the combined motor-rail-motor route between A and D (280 miles) is more than 90 percent of the motor carrier's authorized highway route (300 miles) between A and D.]

[fol. 578] 4. The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

5. Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

6. The billing carrier participating in joint intermodal TOFC service may refuse to reveal the identities of the shippers or consignees to its connecting carriers, in which event the billing carrier shall assume, with respect to the shippers or freight forwarders, full responsibility for the [fol. 579] complete movement.

7. Tariffs embracing joint intermodal TOFC rates or charges may provide for TOFC service for the entire line-haul movement. [Note: Although this rule is in apparent conflict with Commission decisions in *Substituted Freight Service,* 232 I.C.C. 683, and *Interchange of Traffic at Point of Origin,* 46 M.C.C. 623, it is intended to represent what appears to be a widespread practice under present Plan I operations.]

8. Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

9. Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous transportation service at all points authorized to be served by it.

10. A rail, motor, or water common carrier participating in joint intermodal TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with [fol. 580] the Commission.

11. Railroads participating in joint intermodal TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

[fol. 581]

C.

Rules Governing All-Rail TOFC Service

1. Rates or charges for all-rail TOFC line-haul service, and for any transportation or auxiliary service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent, in either of the following ways:

(a) Publish rates or charges which specifically include pickup from shipper and/or delivery to consignee by the railroad or railroads.

(b) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when all service and equipment is provided by the railroad.

2. (a) Each carrier performing or holding out to perform all-rail TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and rules governing storage, demurrage, detention of highway vehicles, cartage, switching, floating, lighterage, wharfage, weighing, diversion, reconsignment, icing, refrigeration, heat, C.O.D. services, transit services, absorp-
[fol. 582] tions, allowances, and other special or accessorial services or practices, and an explicit statement of all other charges and rules which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of the service to the shipper.

(b) All tariffs containing rates for the all-rail TOFC transportation of property shall specify whether such rates do or do not include pickup or delivery services.

(c) When charges for pickup or delivery service are in addition to line-haul TOFC transportation charges, they shall be published in tariffs as provided in paragraph (a) of this rule.

(d) The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in tariffs as provided in paragraph (a) of this rule. It will be sufficient to state that pickup and delivery service will be performed at all places or locations within the limits of the incorporated cities, towns, or villages, from, to, or between which the rates apply, if that is the only application intended. It is not permissible to refer to decisions of the Commission for the description nor to state that the area [fol. 583] within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(e) All tariffs containing rates for the all-rail TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of the property from the highway vehicle by the carrier (including the number of laborers to be used). When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in tariffs as provided in paragraph (a) of this rule.

(f) If the shipper, freight forwarder, and/or consignee directly or indirectly renders any service connected with such transportation (such as ramping, deramping, and tiedown of trailers on cars), or furnishes any equipment or other instrumentality used therein (such as a trailer, semitrailer or car), the charge or allowance paid to the shipper, freight forwarder, and/or consignee therefor shall be published as provided in paragraph (a) of this rule.

3. Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or [fol. 584] indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

4. A railroad providing all-rail TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

5. Railroads providing all-rail TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

6. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges provided for in Rule C-2 above.

7. The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible under all-rail TOFC tariffs.

[fol. 585]

D.

Billing and Notification Rules

1. No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a bill of lading therefor and received from the shipper or freight forwarder any manifest used in connection therewith.

2. Certification as to the weight and contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) shall be made by the shippers or carriers at the time of its tender to a railroad or connecting carrier.

3. Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks,

trailers, or semitrailers (or the demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

4. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous [fol. 586] articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement.

5. All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:

> "Not more than ..... percent of the articles (or commodities) in this shipment consists of an article or articles embraced by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity) rates do not apply; and the applicable rate on the shipment will be .....

> [In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the Class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."]

[fol. 587]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

In the Matter of:

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (Piggyback Service)

Transcript of Prehearing Conference—October 9, 1962

Hearing Room B,
Interstate Commerce Commission,
Washington, D. C.

Met, pursuant to notice, for prehearing conference, at 9:30 a.m.

Before: Clyde E. Herring, Commissioner, William H. Tucker, Commissioner, and
Richard S. Ries, Examiner, Harold P. Boss, Examiner.

* * * * * *

[fol. 588]

COLLOQUY BETWEEN COMMISSIONER AND COUNSEL

Mr. Morrow: Mr. Chairman, may I address the Bench on a procedural question? It is along the same lines as the gentleman that just spoke. We had considerable apprehension about what the scope of this proceeding was going to be and what it was going to embrace. In view of our apprehension, I have prepared and I have asked the Clerk to pass up to the Bench a statement in the nature of a motion regarding limitation of the issues and clarification of the [fol. 589] issues and it has been distributed to the parties present here. What Your Honors have said has clarified to a large extent the questions raised by this pleading of

mine. However, it has not resolved all of the questions and what Commissioner Tucker just said may indicate that you are not prepared at this time to resolve them. There are some very important issues of law pending in four cases which I have listed on page three of my statement. Two of them are cases referred to by the gentleman who spoke just ahead of me. Two others involve the basic lawfulness of Plan I service and the use by motor carriers of Plans III and IV.

We think we ought to know if the Commission is prepared to tell us at this time whether or not those issues are going to be resolved in the pending cases or in this proceeding and whether or not it would be the purpose of the Commission to withhold decisions in those four cases I have listed until it has the benefit of this investigation.

We think this proceeding shouldn't interfere in any way with the disposition of the other proceedings that I have listed and if it is appropriate I would like to have this motion of mine made a part of the record as an exhibit or otherwise and I would like to make it in the form of a motion that the Commission will not consider the legal issues in the four cases I have listed as a part of this proceeding and will not delay the decision in those cases pending the outcome of this proceeding.

Commissioner Herring: In response to you, I might say [fol. 590] that the issues of the cases listed here are not going to be settled by this proceeding. Certain rules and regulations may be formulated in the process of this proceeding that may ultimately affect the operations which are referred to or which form a basis of the four cases, but this proceeding is not going to determine the four cases that you make reference to.

* * * * * * *

[fol. 591] Mr. Born: May I just be heard, sir, on a question of clarification regarding issues? My name is Robert Born. I represent an automobile hauler actually.

[fol. 592] In the original notice of proposed rule-making

in this proceeding the Commission set forth on page 2, two issues, the first of which asked what is the nature of operating rights of motor carriers required in order to participate in particularly here TOFC Plan I service.

Now, as I read the proposed rules that have been distributed this morning, they do not particularly involve the question of the nature of rights required to be held by motor carriers. Of course, that is one of the issues that we are primarily concerned with in the pending cases and I just wonder if we could have some clarification as to the inclusion of that issue, particularly, sir, as relates to automobile haulers because that is my primary interest.

Commissioner Herring: Well, Mr. Born, the notice that was prepared and circulated July 2nd listed certain specific issues. The proposed rules that have been passed out today have been put forth on the basis of the results of surveys and investigations.

Now, if there is lacking in the proposed rules in this case any particular features that you feel should be included that is the purpose of the verified statements and the replies, for you to offer those suggestions.

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[fol. 593]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (Piggyback Service).

(49 CFR Ch. 1)

In the Matter of Publishing Proposed Rules and Directing Special Procedure

ORDER SETTING DATES FOR FURTHER PLEADINGS, ETC.

—Oct. 11, 1962

Present: Clyde E. Herring and William H. Tucker, Commissioners, to whom these matters have been assigned.

It appearing, That on June 29, 1962, the Commission having issued a Notice of Proposed Rule Making (27 F.R. 6434) in the instant proceeding concerning the need for the promulgation of rules and regulations governing the practices of, and the manner and methods of the performance and use of coordinated and substituted motor-rail service, and all similar and related types of service now provided by or participated in, or to be provided by or participated in, or used by shippers and carriers not subject to economic regulation, and by motor common and contract carriers, rail carriers, water carriers, express companies, and freight forwarders subject to the Interstate Commerce Act for the transportation or shipment of property in interstate or foreign commerce;

It further appearing, That in accordance with the Commission's Notice dated June 29, 1962, a prehearing conference was held on October 9, 1962, and a draft of proposed rules (attached as Appendix A hereto) was distributed to the parties in attendance;

And it further appearing, That consideration has been given to the various views expressed at the prehearing conference with regard to the procedure to be followed by all [fol. 594] parties and that this proceeding is of such a nature requiring special procedure and good cause appearing therefor:

It is ordered, That: (a) The proceeding shall be handled, to the extent practicable, by the filing of verified[1] statements and replies. In order to conserve time and avoid expense, it is strongly urged that persons finding themselves with common interests in the proceeding, to the greatest extent possible, endeavor to consolidate their presentation of verified statements or replies. Individual participation is not precluded; mere casual interest, however, will not justify participation, and will make the preparation and service of verified statements burdensome and impracticable. The Commission desires participation only by those who intend to take an active part in the proceeding.

Copies of the representations heretofore submitted in response to the invitation contained in the order of June 29, 1962, instituting this proceeding, together with copies of the proposed rules and regulations and other material served on those participating in the prehearing conference, and a copy of the opening statement of Commissioner Herring made at such conference, will be on file at the Field Offices listed in Appendix B hereto and during regular office hours will be open to examination by any party or other interested person. Copies of the proposed rules and regulations and other Commission material served on those participating in the prehearing conference held herein also may be obtained, upon request, from the Sec-

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[1] In lieu of verification under oath, the statements and replies may be made subject to the following declaration: "I solemnly declare that I have examined the foregoing statement [or reply] and that, to the best of my knowledge and belief, the representations contained therein are true."

(Signature)

retary, Interstate Commerce Commission, Washington 25, D. C.

[fol. 595] (b) On or before November 16, 1962, any person, *other than those who participated in the prehearing conference,* who desires to participate in the proceeding shall notify the Secretary of the Commission to that effect, giving his name, address, and company, if any represented, and he will become a party to the proceeding. After that date, no additional party will be allowed to participate except by special permission and for good cause shown or except as permitted under special procedural rules as may be issued under (g) below.

(c) As soon as practicable after expiration of the time specified in (b) above, the Commission will serve a list of the names and addresses of all persons parties to this proceeding and upon whom service of all verified statements, replies, or other pleadings permissible hereunder must, unless waived, be made. An original (signed in ink) and 25 copies of each verified statement, reply, or pleading shall be filed with the Commission, and a copy of each such verified statement, reply, or other pleading shall be served on each party named in the list prepared pursuant to this part in accordance with Rule 1.22 of the Commission's General Rules of Practice.

(d) On or before November 16, 1962, each party to this proceeding shall file a special pleading herein (1) setting forth whether it agrees in whole or in part with the proposed Rules and Regulations served on the parties participating in the prehearing conference held herein and concurrently being published herewith, and (2) suggesting changes and modifications of such Rules and Regulations as well as such additional rules as may be deemed appropriate. Such a pleading shall be brief and shall not contain [fol. 596] argument or supporting factual data. Service of such a pleading shall be made on other parties following receipt from the Commission of the list of parties referred to in (c) above. No replies thereto may be filed.

(e) On or before December 10, 1962, all parties to the proceeding shall file verified statements, with or without exhibits attached, with the Commission, and serve the other parties as described in (c) above. Each verified statement shall set forth the position of the party making it with respect to the use of coordinated and substituted service; and may include statements of both fact and arguments. Where both fact and argument are included in the same pleading, they shall be set forth under separate headings in the interest of clarity and understanding.

(f) Replies to the verified statements, if any, shall be filed with the Commission on or before January 28, 1963. Copies of the replies should be served on all persons contained in the list of parties to be furnished by the Commission pursuant to (c) above.

(g) *For good cause shown,* the proceeding may be separated with respect to one or more of the issues or operational areas involved. Any party desiring to request such action shall file with the Commission, on or before February 6, 1963, a separate pleading setting forth (1) each such issue or operational area it wishes separated, (2) whether oral hearing for cross-examination or for other purposes is desired with respect thereto, and (3) the reasons and arguments relied upon in support of such request. A copy of such pleading shall be served on the parties as described in (c) above. No replies may be filed.
[fol. 597] Should it be determined that such separation and oral hearing is desirable or necessary, special procedural rules for the conduct of such hearing will be issued at the time such determination is made.

(h) Only such pleadings as are specifically permitted under these rules or as may be permitted under such special procedural rules as may be issued under (g) above may be filed.

It is further ordered, That all representations filed prior to the prehearing conference and the General Summary of

Piggyback Questionnaires prepared by the Bureau of Transport Economics and Statistics, of this Commission, be, and they are hereby, considered a part of the record.

And it is further ordered; That a copy of this order be served on the Public Utility Commissions or Boards, or similar regulatory bodies, of each State having jurisdiction over the transportation here involved; that a copy be posted in the Office of the Secretary of the Interstate Commerce Commission and the Field Offices of said Commission listed in Appendix B to this order for public inspection; that a copy be served on all parties who attended the prehearing conference and those who have previously filed representations in this proceeding; and that a copy be delivered to the Director, Division of the Federal Register, for publication in the Federal Register as notice to all interested persons.

Dated at Washington, D. C. this 11th day of October, A. D. 1962.

By the Commission, Commissioners Herring and Tucker.

Harold D. McCoy, Secretary.

(Seal)

[fol. 598]

APPENDIX A

Proposed TOFC Rules

A.

Definitions

1. "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

2. "Joint intermodal TOFC service" means any transportation of property (the motor and/or water transportation of which is subject to economic regulation under the Interstate Commerce Act) jointly provided by a railroad or railroads subject to Part I of the act and a motor common carrier or carriers subject to Part II of the act or a water common carrier or carriers subject to Part III of the act, and which includes, for the whole[1] or any part of the line-haul movement, the performance of TOFC ser-
[fol. 599] vice as defined in (1) above; except that the term "joint intermodal TOFC service" does not include the transportation of property moving under contract rates as set forth in section 409 of the act.

3. "All-rail TOFC service" means any transportation, other than transportation embraced in (2) above, provided by a railroad or railroads subject to Part I of the act, which transportation includes the performance of TOFC service as defined in (1) above.

B.

Rules Governing Joint Intermodal TOFC Service

1. Tariffs embracing joint intermodal TOFC rates or charges shall set forth the service covered by the published rates or charges, the routes over which such service will be performed, and the names of the carriers participating therein.

2. Tariffs embracing joint intermodal TOFC rates or charges may be published only by rail, motor, or water common carriers, or their agents, on commodities subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

3. Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of

[1] See Rule B-7 below.

[fol. 600] their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon consideration of an appropriate application filed by the motor carrier in which it seeks relief from [fol. 601] the percentage provisions of this section. [Example: In connection with a shipment originating at A and destined to D, a motor common carrier holding authority to transport such shipment from A to D (a distance of 300 miles by its authorized highway routes), serving the intermediate points of B and C, participates in joint intermodal TOFC service in lieu of its authorized over-the-road service in the following manner: The shipment is transported from A to B by the motor carrier over its authorized highway route (a distance of 100 miles), at which point it is placed on a rail car for TOFC movement to C (a distance of 80 miles over the rail route used as compared to 100 miles over the motor carrier's authorized highway route), and at C the shipment is returned to the originating motor carrier for ultimate delivery at D (a distance of 100 miles over the motor carrier's authorized highway route). Although the rail line distance (80 miles) between B and C is less than 90 percent of the motor carrier's authorized highway route between the same points (100 miles), the above rule allows this operation inasmuch as the combined motor-rail-motor route between A and D (280 miles) is more than 90 percent of the motor carrier's authorized highway route (300 miles) between A and D.]

4. The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

[fol. 602] 5. Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

6. The billing carrier participating in joint intermodal TOFC service may refuse to reveal the identities of the shippers or consignees to its connecting carriers, in which event the billing carrier shall assume, with respect to the shippers or freight forwarders, full responsibility for the complete movement.

7. Tariffs embracing joint intermodal TOFC rates or charges may provide for TOFC service for the entire line-haul movement. [Note: Although this rule is in apparent conflict with Commission decisions in *Substituted Freight Service,* 232 I.C.C. 683, and *Interchange of Traffic at Point of Origin,* 46 M.C.C. 623, it is intended to represent what appears to be a widespread practice under present Plan I operations.]

8. Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

[fol. 603] 9. Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous transportation service at all points authorized to be served by it.

10. A rail, motor, or water common carrier participating in joint intermodal TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for

transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

11. Railroads participating in joint intermodal TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

C.

Rules Governing All-Rail TOFC Service

1. Rates or charges for all-rail TOFC line-haul service, and for any transportation or auxiliary service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent, in either of the following ways:

[fol. 604] (a) Publish rates or charges which specifically include pickup from shipper and/or delivery to consignee by the railroad or railroads.

(b) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when all service and equipment is provided by the railroad.

2. (a) Each carrier performing or holding out to perform all-rail TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and rules governing storage, demurrage, detention of highway vehicles, cartage, switching, floating, lighterage, wharfage, weighing, diversion, reconsignment, icing, refrigeration, heat, C.O.D. services, transit services, absorptions, allowances, and other special or accessorial services or practices, and an explicit statement of all other charges and rules which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of the service to the shipper.

(b) All tariffs containing rates for the all-rail TOFC [fol. 605] transportation of property shall specify whether such rates do or do not include pickup or delivery services.

(c) When charges for pickup or delivery service are in addition to line-haul TOFC transportation charges, they shall be published in tariffs as provided in paragraph (a) of this rule.

(d) The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in tariffs as provided in paragraph (a) of this rule. It will be sufficient to state that pickup and delivery service will be performed at all places or locations within the limits of [fol. 606] the incorporated cities, towns, or villages, from, to, or between which the rates apply, if that is the only application intended. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(e) All tariffs containing rates for the all-rail TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of the property from the highway vehicle by the carrier (including the number of laborers to be used). When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in tariffs as provided in paragraph (a) of this rule.

(f) If the shipper, freight forwarder, and/or consignee directly or indirectly renders any service connected with such transportation (such as ramping, deramping, and tie-down of trailers on cars), or furnishes any equipment or other instrumentality used therein (such as a trailer, semi-

[fol. 607] trailer or car), the charge or allowance paid to the shipper, freight forwarder, and/or consignee therefor shall be published as provided in paragraph (a) of this rule.

3. Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or [fol. 608] indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

4. A railroad providing all-rail TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

5. Railroads providing all-rail TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

6. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges provided for in Rule C-2 above.

7. The handling by a railroad of a motor or water carrier's trailer; empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible under all-rail TOFC tariffs.

D.

Billing and Notification Rules

1. No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a

bill of lading therefor and received from the shipper or freight forwarder any manifest used in connection therewith.

[fol. 609] 2. Certification as to the weight and contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) shall be made by the shippers or carriers at the time of its tender to a railroad or connecting carrier.

3. Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

4. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement.

5. All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:

> "Not more than ..... percent of the articles (or commodities) in this shipment consists of an article or articles embraced by the commodity description of a [fol. 610] single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity)

rates do not apply; and the applicable rate on the shipment will be .....

[In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the Class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."]

[fol. 611]

APPENDIX B

FIELD OFFICES WHERE CERTAIN MATERIAL RELATIVE TO THIS PROCEEDING WILL BE AVAILABLE FOR PUBLIC INSPECTION

Boston 8, Mass.
14-17 Court Square, 11th Floor.
Bureau of Motor Carriers
Interstate Commerce Commission
Martin E. Foley, District Director

New York 13, N. Y.
Room 1111, 346 Broadway.
Bureau of Motor Carriers
Interstate Commerce Commission
Thomas L. McClelland, District Director

Philadelphia 6, Pa.
800 U. S. Custom House Bldg.
Second and Chestnut Streets
Bureau of Motor Carriers
Interstate Commerce Commission
James B. Weber, District Director

Columbus 15, Ohio
236 New Post Office Bldg.
85 Marconi Blvd.
Bureau of Motor Carriers
Interstate Commerce Commission
Roy M. Snetzer, District Director

Atlanta 8, Ga.
680 West Peachtree Street, N. W.
Bureau of Motor Carriers
Interstate Commerce Commission
William Addams, District Director

Nashville 3, Tenn.
Room 706, U. S. Court House
801 Broadway
Bureau of Motor Carriers
Interstate Commerce Commission
Edward A. Moynihan, District Director

Chicago 7, Ill.
852 U. S. Custom House Bldg.
610 South Canal Street
Bureau of Motor Carriers
Interstate Commerce Commission
James J. Werner, District Director

Minneapolis 1, Minn.
448 Federal Bldg. & Court House
110 S. 4th Street
Bureau of Motor Carriers
Interstate Commerce Commission
Charles W. Haas, District Director

[fol. 612]

Kansas City 6, Mo.
1100 Federal Office Bldg.
911 Walnut Street
Bureau of Motor Carriers
Interstate Commerce Commission
H. Joseph Simmons, District Director

Fort Worth 2, Texas
816 T & P Bldg.
Bureau of Motor Carriers
Interstate Commerce Commission
Bernard H. English, District Director

Denver 2, Colorado
502 Denham Bldg.
Bureau of Motor Carriers
Interstate Commerce Commission
Bert L. Penn, District Director

Portland 5, Oregon
538 Pittock Block
Bureau of Motor Carriers
Interstate Commerce Commission
Norman T. Harris, District Director

San Francisco 5, Calif.
602 Sheldon Bldg.
9 First Street
Bureau of Motor Carriers
Interstate Commerce Commission
Marvin W. Van Cleave, District Director

Anchorage, Alaska
P. O. Box 1532
Room 51-52 Federal Bldg.
Bureau of Motor Carriers
Interstate Commerce Commission
Hugh H. Chaffee, District Director

[fol. 613]

BEFORE THE INTERSTATE COMMERCE COMMISSION

REQUEST OF NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR EXTENSION OF TIME TO FILE VERIFIED STATEMENTS AND DENIAL THEREOF

POPE BALLARD & LOOS
Munsey Building
Washington 4, D. C.

October 23, 1962

Honorable Harold D. McCoy
Secretary
Interstate Commerce Commission
Washington 25, D. C.

Re: Ex Parte No. 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*

Dear Sir:

In behalf of The National Industrial Traffic League we respectfully request the following amendments to the order of the Commission, Commissioners Herring and Tucker, under date of October 11, 1962 pertaining to the matter of publishing proposed rules and directing special procedure in Ex Parte No. 230. The National Industrial Traffic League requests that the dates set in the above order be amended as follows:

(1) In paragraph (d) that the date be changed from November 16, 1962 to December 17, 1962.

(2) In paragraph (e) that the date be changed from December 10, 1962 to January 30, 1963.

(3) In paragraph (f) that the date be changed from January 28, 1962 to March 18, 1963.

The National Industrial Traffic League is comprised of shippers throughout the length and breadth of this country. The subject matter of Ex Parte No. 230 is obviously of tremendous importance to shippers who must pay and bear the transportation rates and charges of the carriers. It is the view of The National Industrial Traffic League that a full and complete development of the record in aid of the Commission is of paramount importance. During the very week in which November 16 falls the members [fol. 614] of The National Industrial Traffic League will be convening at Pittsburgh at their Annual Meeting, at which is to be thoroughly discussed the matter of so-called "Piggyback Service", and the proposed TOFC Rates involved in the instant proceeding, Ex Parte No. 230.

It will be all but impossible for the League to express by special pleading its views on such proposed TOFC rules on or prior to November 16th, as contemplated by the order of October 11, 1962. These rules have profound implications for shippers as well as carriers, which need not be elaborated here. Time is needed thoroughly and accurately to evaluate the proposed rules. To this end in this rule making proceeding adequate time should be made available to the parties. The present time allowances are not sufficient.

Accordingly, we respectfully request an extension until *December 17, 1962* for all parties on or before which they shall file a special pleading herein (1) setting forth whether they agree in whole or in part with the proposed Rules and Regulations served on the parties participating in the pre-hearing conference held in Ex Parte 230 and concurrently published in the aforesaid order of October 11, 1962, and (2) suggesting changes and modifications of such Rules and Regulations as well as such additional rules as may be deemed appropriate. The League further requests that the date of *January 30, 1963* be set for the filing of verified statements and that the date of *March 18, 1963* be set for the filing of replies to such verified statements.

It is the view of The League that the granting of this additional time will produce a far more meaningful and helpful record to the Commission and will contribute materially to the submission of fully considered views on the part of all concerned, particularly the members of the shipping public. This request is not made lightly. However, this is a rule making proceeding and the relatively short additional amount of time involved will be far out-weighed [fol. 615] by the much more complete, accurate and incisive record which will be developed.

Respectfully yours,

JOHN F. DONELAN
General Counsel
The National Industrial
Traffic League

JFD:jm

cc: Honorable Clyde E. Herring
Honorable William H. Tucker
Examiner Harold P. Boss
Examiner R. S. Ries
Parties of Record

[fol. 616]

INTERSTATE COMMERCE COMMISSION

Washington 25, D. C.

SERVICE DATE
OCTOBER 26, 1962

October 24, 1962

Mr. John F. Donelan
General Counsel
The National Industrial Traffic League
c/o Pope Ballard & Loos
Munsey Building
Washington 4, D. C.

Re: Ex Parte No. 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

Dear Sir:

A copy of your letter to Secretary McCoy which requests an extension of time for the filing of special pleadings respecting concurrence or disagreement with the proposed rules and regulations and suggested changes and modifications thereof and an extension of time be granted in the filing of verified statements of both fact and argument with respect to the use of co-ordinated and substituted service and an extension of time for the filing of replies to the verified statements has been received.

As a result of the representations made at the pre-hearing conference held October 9, 1962, the procedural rules were altered in part to allow a greater time for participants to reply to the statements of parties. After full consideration of your letter, however, nothing contained therein would justify, in the opinion of Commissioner Tucker and myself, any further extensions. We are fully aware of the primary importance of this proceeding to the shipping public as well as the carriers. For that reason, it is expected

that all participants will give precedence to whatever rep-
[fol. 617] resentations they may feel obliged to make. We are also equally aware that the time factors imposed by the rules of procedure are necessary if the purpose of Ex Parte No. 230 is to be fulfilled so as to benefit the carriers and the shipping public.

Accordingly, the requests contained in your letter are denied.

Yours very truly,

/s/ CLYDE E. HERRING
Clyde E. Herring
Commissioner

cc: Commissioner Tucker
Director Stillwell
Examiner Harold P. Boss
Examiner R. S. Ries
Parties of Record

[fol. 618]

BEFORE THE INTERSTATE COMMERCE COMMISSION

REQUEST OF RAILROADS FOR EXTENSION OF TIME TO FILE VERIFIED STATEMENTS AND DENIAL THEREOF

NEW YORK CENTRAL SYSTEM
466 Lexington Avenue
New York 17, New York

October 23, 1962

Hon. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Re: *Ex Parte 230—TOFC Investigation*

Dear Sir:

The Eastern, Western and Southern railroad respondents hereby respectfully request that the date of Decem-

ber 10, 1962, assigned for the filing of verified statements be postponed for a minimum of 60 days, and that a similar postponement be made with respect to the date of January 28, 1963 for filing reply verified statements. Although a like request was made orally at the pre-hearing conference of October 9, 1962, subsequent developments have rendered favorable action by the Commission even more imperative.

While this proceeding was instituted by the Commission on June 29, 1962, the proposed rules for TOFC service and the special rules of procedure were not issued until the morning of October 9, 1962, immediately preceding the opening of the pre-hearing conference. Because of the wide scope of this proceeding and the substantial impact which the proposed rules may have upon existing TOFC services and revenues, the railroad respondents sincerely believed that they would be severely prejudiced in their efforts unless a substantial extension of time for filing verified statements were granted.

The necessity for the postponement requested was further emphasized by the Commission's own request for the cooperation of the parties with respect to consolidation of presentation in a situation where existing TOFC operations may differ between the railroads themselves. This latter factor alone complicates matters substantially, purely as a matter of mechanics. Obviously, before any industry-wide or even territory-wide presentation could be made, the effect of the rules and any modifications or substitutions must be weighed first individually and then by group. Any [fol. 619] additional time taken in this phase of the proceeding should be more than compensated for in simplifying the Commission's task of resolving the issues.

After hearing the oral representations of the parties, the Commissioners sitting at the pre-hearing conference indicated that they could not "concur on the variance" requested, but the implication was that some relief would

be granted. Other parties also requested a postponement of the January 10th date assigned for the filing of reply verified statements.

By order dated October 11, 1962, the Commission assigned the same date of December 10, 1962, for the filing of verified statements and modified only the date for filing reply verified statements, permitting an additional 18 days in that respect. In short, the railroads to which the proposed rules would apply and those whose traffic and revenues may be substantially affected were granted no additional time whatsoever to prepare and substantiate their position, and the only modification granted is that requested by other parties.

The disability under which the railroad respondents must labor is aggravated by the fact that further hearings in I.C.C. 33133 will begin before Examiner Ries on November 27, 1962, and may confidently be expected to last for the better part of two weeks. Thus, in the two weeks immediately prior to the date now set for filing verified statements, the same legal, traffic and cost personnel normally charged with responsibility for TOFC litigation will be wholly involved in what has already developed into an exhaustive investigation of Plan III rates, charges and practices. When it is realized that many of the same persons are also required to develop similar data for other major cases now pending before the Commission, such as mergers, per diem, cost investigations, etc., the absolute necessity for additional time here must be manifest.

The order of October 11, 1962, moreover, further complicates the matter in that an added pleading is now required from all parties on or before November 16, 1962, such pleading to set forth the position of the party, suggested changes and modifications, and any *additional* rules which may be deemed appropriate. Presumably, new or modified proposed rules may be added to or substituted for those contained in Appendix A of the Commission's

order of October 11. Assuming that any such modifications or changes in the proposed rules would be published by the Commission within 10 days after November 16, it is not only conceivable, but probable, that no railroad would have [fol. 620] more than two weeks to properly prepare its verified statements, and those engaged in I.C.C. 33133 would have no time at all in which to weigh the effect and present testimony on the additional or substituted rules.

No impending crisis nor crushing necessity for any proposed rules appears in the "representations" filed by the parties in September. No objection to the railroads' request was voiced by any of those assembled at the prehearing conference, and in view of the difficult circumstances outlined above, some relief is definitely in order. While the Commission may not agree with the timing originally suggested by the railroads, it is earnestly requested that relief be granted in the form of a postponement of not less than 60 days in the dates now assigned for filing verified statements and replies thereto.

If the Commission is not convinced that the matters stated herein require relief, it is then requested that an informal conference be held in order that the details may be presented orally.

Very truly yours,

E. R. LEIGH
T. A. MILLER
R. F. MUNSELL
J. A. DAILY

JAD:pk

cc: Chairman R. L. Murphy
Commissioner C. E. Herring
Commissioner W. H. Tucker
Examiner H. P. Boss
Examiner R. S. Ries

SERVICE DATE NOVEMBER 1, 1962

INTERSTATE COMMERCE COMMISSION

Washington 25, D. C.

October 31, 1962

Mr. J. A. Daily
Mr. E. R. Leigh
Mr. T. A. Miller
Mr. R. F. Munsell
New York Central System
466 Lexington Avenue
New York 17, New York.

Re: Ex Parte No. 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

Gentlemen:

Your letter to Secretary McCoy requesting a minimum postponement of 60 days of the date for filing verified statements and the replies thereto has been received.

By order of the Commission, Commissioner Tucker and myself have been delegated the administrative handling of this proceeding. We have, therefore, given full consideration to your letter but find that nothing therein justifies any further extension beyond that reflected in the final procedural rules which were issued October 12, 1962.

Therefore the requests contained in your letter are denied.

Yours very truly,

/s/ CLYDE E. HERRING
Clyde E. Herring
Commissioner

cc: Chairman Murphy
Commissioner Tucker
Examiner H. P. Boss
Examiner R. S. Ries
All parties of record

[fol. 622]

BEFORE THE INTERSTATE COMMERCE COMMISSION

WASHINGTON 25, D. C.

Docket No. Ex Parte No. 230

EXCERPTS FROM SPECIAL PLEADINGS OF BEKINS VAN LINES CO.

Comes Now Bekins Van Lines Co., in the matter of publishing proposed rules, pursuant to the Order of the Commission herein dated October 11, 1962, and files this special pleading as required by paragraph (d) thereof:

* * * * * * *

[fol. 623]

IV

A new Rule B. 12., be added as follows:

"12. Any railroad which provides all-rail TOFC service for a shipper's association or freight forwarder in connection with such association's or freight forwarder's household goods traffic shall not refuse to enter into a like arrangement with Motor Common Carriers of Household Goods as defined by the [fol. 624] Commission provided such motor carrier has authority to serve the points involved and such service would not violate Rule B. 3."

Respectfully submitted,

Eldon R. Clawson, Attorney for Bekins Van Lines Co.

[fol. 625]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Washington, D. C.

Ex Parte No. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (PIGGYBACK SERVICE)

EXCERPTS FROM SPECIAL PLEADING OF CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC. SUGGESTING CHANGES AND MODIFICATIONS OF PROPOSED RULES AND REGULATIONS

Comes now Contract Carrier Conference of American Trucking Associations, Inc., a party to this proceeding, for and on behalf of its motor contract members, and by its attorneys hereby respectfully files this special pleading suggesting changes and modifications of the proposed rules and regulations under consideration herein.

• • • • • • •

[fol. 626] An additional Rule B-6(a) should be considered which reads as follows:

[fol. 627] B-6(a). A motor contract carrier participating in intermodal service shall not be required to disclose on the rail bill of lading the identity of its contracting shipper or consignee, in which event the motor contract carrier shall assume full responsibility for the complete movement.

• • • • • • •

[fol. 628] Respectfully submitted,

Contract Carrier Conference of American Trucking Associations, Inc., By Clarence D. Todd, Dale C. Dillon, James W. Williams, James I. Collier, Jr., Its Attorneys.

Of Counsel:

Todd & Dillon, 1825 Jefferson Place, N.W., Washington 6, D.C.

[fol. 629]

BEFORE THE INTERSTATE COMMERCE COMMISSION

REQUEST OF ASSOCIATION OF AMERICAN RAILROADS FOR EXTENSION OF TIME TO FILE VERIFIED STATEMENT AND DENIAL THEREOF

ASSOCIATION OF AMERICAN RAILROADS
Law Department
Transportation Building
Washington 6, D. C.

136836

GREGORY S. PRINCE
Executive Vice President
and General Counsel

November 27, 1962

Honorable Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Re: Ex Parte 230—TOFC Investigation

Petition for Postponement

Dear Sir:

The Association of American Railroads, on behalf of itself and the railroad respondents, hereby respectfully requests that the due date for the filing of verified statements in the above proceeding be postponed from December 10, 1962, to January 24, 1963. This request is designed to allow thirty additional working days for the preparation of these verified statements. Granting this request will, of course, necessitate a postponement of the due date for replies now set for January 28, 1963. It is respectfully requested that the due date for reply statements be postponed from January 28, 1963, to March 29, 1963.

The railroad respondents have made a determined and sincere effort to complete the work needed in preparation of the verified statement due December 10, 1962, and find

that the work that should be completed simply cannot physically be accomplished in the time allowed. The present due date will not permit the railroad respondents to complete the necessary and, in fact, essential factual investigations that would permit them to make an adequate record in this proceeding. No explanation of the purposes or intended construction of the proposed rules accompanied their distribution. The present due date does not allow sufficient time to consider the interplay of one rule with another, to consider the alternative construction or purposes that might be served by the proposed rules, and to reach sound conclusions as to the evidence and arguments that should be presented to the Commission in order to make a satisfactory record. The present due date does not allow adequate time for the necessary consultation between railroads within the respective territories nor within the industry as a whole. That consultation is absolutely essential to the formulation of positions reflecting the common interests of the railroads and the preparation of evidence and arguments in support of those positions. The present time schedule simply does not permit the railroads to carry out that fundamental step in their presentation.

In that respect, we take note of the fact that the Commission's order of November 19, 1962, again urges that persons finding themselves with common interests in the proceeding, to the greatest extent possible, endeavor to consolidate their presentation of verified statements or replies. Compliance with this request by the railroad respondents is physically impossible in the time that has been allowed.

[fol. 630] Attention has previously been called to the potential conflict created for Official Territory, Southern Territory, and Southwestern Territory attorneys, traffic and cost personnel involved in Docket 33133 and eleven other dockets associated therewith. That potential has turned into reality. The qualified people in these territories have

had the heavy burden of defending practically all of the TOFC rates applicable to Plan III operations in Docket 33133. That proceeding has already involved some six weeks of hearings and it is scheduled to be resumed on November 27. The railroads in these territories do not have a corps of trained personnel that can simultaneously handle two major proceedings dealing with directly related matters. Needless to say, the attorneys and other qualified personnel have had to devote part of their time to other pending litigation and corporate matters. The result has been that adequate time for the essential preparations in *Ex Parte* 230 has not been available.

The Commission's order of November 19, 1962, lists 363 parties as those upon whom service must be made in this proceeding. Even allowing for those having common interests, it is perfectly evident that the job of reading all of the verified statements, digesting them, and preparing replies will require more time than is presently allowed. Additional or alternate rules have been suggested that will require consideration and responses. Taking into account the proposed due date of January 24, 1963, for verified statements, and the foregoing facts, it is respectfully requested that the due date for replies be set for March 29, 1963.

We have advised counsel for the National Industrial Traffic League that we are making this request, and they have advised us that they concur in it.

The Freight Forwarders Institute has also advised us, in response to our request, that it concurs.

It has been suggested in prior treatment of the matter of time that the parties should give precedence to whatever representations they felt obliged to make. The railroad respondents have given this case the highest priority and it is after having operated on that basis that they now make this request. Even after having put forward the maximum effort possible, these respondents will not be in

a position to present the record that should be presented in a case of this importance.

Very truly yours,

/s/ GREGORY S. PRINCE

GSP:PFW

cc: Honorable Clyde E. Herring
Honorable William H. Tucker
Examiner Harold P. Boss
Examiner R. S. Ries
Parties of Record

[fol. 631]

INTERSTATE COMMERCE COMMISSION

Washington 25, D. C.

November 30, 1962

Mr. Gregory S. Prince,
Executive Vice President and
General Counsel
Association of American Railroads
Transportation Building
Washington 6, D. C.

Re: Ex Parte No. 230—Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

Dear Sir:

Your letter to Secretary McCoy requesting a postponement of the due date for the filing of verified statements in the above proceeding from December 10, 1962 to January 24, 1963, and a postponement of the due date for replies from January 28, 1963 to March 29, 1963, has been received.

We have given full and careful consideration to the contents of your letter and the reasons which you urge in support of the postponements.

The subject matter of this proceeding, as you are well aware, concerns one of the most significant and far-reaching innovations in transportation in many years. If this Commission is to function effectively, it is essential that whatever rules are eventually adopted be determined at the earliest possible time. This fact was made very clear at the prehearing conference in October, and it is particularly important at this late date. Since this matter was initiated in June of this year, four requests to either limit or postpone the progress of this investigation have been duly considered and denied. We are still convinced that the usefulness of this proceeding depends upon the avoidance of delay and adherence to the established schedule of pleadings.

[fol. 632] The timetable reflected in the procedural rules served October 12 applies equally to all of the 363 parties. We believe it must be maintained if Ex Parte No. 230 is to proceed constructively in the interest of the transportation industry as well as the public.

Therefore, the requests contained in your letter are denied.

Yours very truly,

/s/ CLYDE E. HERRING
Clyde E. Herring
Commissioner

/s/ WILLIAM H. TUCKER
William H. Tucker
Commissioner

cc: Examiner Harold P. Boss
Examiner R. S. Ries
Parties of Record

[fol. 633]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT FILED ON BEHALF OF THE BUREAU OF INQUIRY AND COMPLIANCE, INTERSTATE COMMERCE COMMISSION

[fol. 634] * * * But the Commission's proposed rule C 1, which in essence cancels Plan III and Plan IV, would if adopted by the Commission, act to reduce substantially the activities of independent leasing companies. * * *

[fol. 635]

O. MOTOR COMMON CARRIER USE OF RAIL TOFC SERVICE AS A SHIPPER

Facts

Ringsby Truck Lines, Inc., a motor common carrier, has in the past tendered to a railroad (through an agent) motor carrier freight for a Plan IV TOFC movement. The freight so tendered as a shipper was falsely billed as to weight, in violation of the 60% rule, and not certified as required by the applicable tariff. Ringsby on May 2, 1961 with respect to some of these shipments was fined $10,000 for having aided, abetted, induced and procured its agent, Interstate Express Car Corporation, to solicit, accept and receive unlawful concessions from a railroad. (Exhibit 11, pages 9, 10 and 11 and Appendix D and E of said Exhibit)

Argument

"Repugnant" is a strong word and is defined in *Webster's New Collegiate Dictionary* (6th Edition), published by G. & C. Merriam Co., as follows:

Repugnant

1. Opposed or reciprocally opposed; contradictory; irreconcilable; as a principle repugnant to constitutional law. 2. That offers resistance; hostile; refractory. 3. Distasteful; repellent.

Syn. Repugnant, repellent, abhorrent, distasteful, obnoxious, invidious, mean so unlikeable as to arouse antagonism or aversion. Repugnant implies a nature alien to one's ideas, principles, or tastes, and a stirring up of resistance or loathing; repellent, a forbidding or unlovely quality that causes one to back away; abhorrent, a repugnance that stimulates antagonism; distasteful, a contrariness to one's tastes or inclinations that causes shrinking; obnoxious, an objectionableness so great that one cannot tolerate it; invidious, a character such that it cannot be used, undertaken, etc., without creating ill will, odium or the like.

[fol. 636] The word "repugnant" has been used by the Commission to describe the practice of a motor common carrier as a shipper tendering property of others to a railroad.

> But for it (a motor common carrier) to act as a common carrier by motor vehicle and a shipper by rail as to the same service is just *as repugnant to the act as the reverse situation* (for a railroad to act as a common carrier and a shipper via motor common carriage as to the same service). (Emphasis supplied)
>
> *Substituted Freight Service,* 232 I.C.C. 683, 690.

> Three years later, in *Substituted Freight Service,* 232 I.C.C. 683, 690, we again adverted to this principle and rejected it, observing that the motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service *is repugnant to the act.* See also *Motor-Rail-Motor Traffic in East and Midwest,* supra, page 274. *The view so stated is obviously sound.* It follows, therefore, that if the railroad is on notice that trailers tendered it in this manner are being operated in common-carrier service subject to part II of the act, it should not thus knowingly join with the motor common carrier *in a violation of the law.* (Emphasis supplied)
>
> *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 104-105.

> Thus applicant, (a motor common carrier), in effect, is acting as a common carrier by motor vehicle and a shipper by rail as to the same traffic, *a situation which is repugnant to the provisions of the act.* If applicant desires to continue to substitute rail service in lieu of its own motor-vehicle operations between New York and Boston, or between any points served by it as a motor carrier, it should bring such service into conformity with the tariff provisions of the act in accordance with the views expressed in *Substituted Freight Service,* 232 I.C.C. 683. (Emphasis supplied)
> *Stone's Exp., Inc., Common Carrier Application,* 32 M.C.C. 525, 527.

[fol. 637] The Bureau of Inquiry and Compliance regards a situation in which a motor common carrier acts as both a common carrier by motor vehicle and a shipper by rail as to the same traffic as REPUGNANT TO THE ACT. Accordingly, this bureau has suggested that proposed rule C 7,

> The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is *permissible* under all-rail TOFC tariffs.

be changed to read:

> The handling by a railroad of a motor or water carrier's trailer, loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is *prohibited* under all-rail TOFC tariffs.

Under proposed rule C 7 a motor carrier would be permitted to tender as a shipper to a railroad agricultural commodities moving under an exempt rate. However, this same motor carrier would, we assume, be prohibited

from tendering to the railroad as a shipper agricultural commodities moving under rates published, posted and filed with the Interstate Commerce Commission. A motor carrier authorized to transport electrical appliances would under proposed rule C 7 still be prohibited from tendering them to the railroad as a shipper, (but would another motor carrier, not holding any authority from the Interstate Commerce Commission, "not subject to economic regulation under the Interstate Commerce Act", be permitted occasionally to tender as a shipper to the railroad electric appliances for an all-rail TOFC movement?)

[fol. 638] What proposed rule C 7 will do, if adopted by the Commission, is confuse and render more complicated an already complex situation. Therefore, it is suggested that the Commission re-affirm its previous position that for a "motor carrier to act as a common carrier by motor vehicle and a shipper by rail as to the same service *is repugnant to the act.*"

[fol. 639] (s) HARVEY GOBETZ

(s) JOHN H. FALLON

(s) ASA J. MERRILL

[fol. 640]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT 9

EXCERPTS FROM VERIFIED STATEMENT OF ANTHONY CHIUSANO, DISTRICT SUPERVISOR, BUREAU OF WATER CARRIERS AND FREIGHT FORWARDERS, INTERSTATE COMMERCE COMMISSION

[fol. 641] I the undersigned Anthony Chiusano, do voluntarily make the following verified statement for use by the Bureau of Inquiry and Compliance in proceedings before the Commission in Ex Parte No. 230, Substituted Service—

Charges and Practices of For-Hire Carriers and Freight Forwarders.

I am employed as District Supervisor, Bureau of Water Carriers and Freight Forwarders, Interstate Commerce Commission, at 346 Broadway, New York, N. Y.

In connection with my official duties I made an investigation on July 31, and August 1 and 2, 1962 at New York, of the operational practices, services and facilities provided and utilized by Universal Carloading and Distributing Company in trailer on flat car transportation, in the course of its business as an authorized freight forwarder. Information set forth herein was furnished by Mr. D. J. Pascale, Superintendent of Transportation for the company.

• • • • • • •

[fol. 642] DOES UNIVERSAL OWN TRAILERS OR FLATCARS?

Universal itself does not own any trailers or flatcars. It draws piggyback equipment from Custom Equipment [fol. 643] Rentals, Inc., a wholly owned affiliate of U. S. Freight Company, and Custom Equipment Rentals is part of the U. S. Freight and Universal Family. Universal draws on equipment from the "pot" maintained by Custom Equipment Rentals. As of July 1962, Universal was allocated 443 trailers and 35 flatcars designated as USFX. Custom Equipment Rentals, in turn, leased the cars from Strick Company. Custom Equipment Rentals also enters into long-term leases with car and trailer companies for equipment to supplement its basic pool of owned equipment.

• • • • • • •

[fol. 644] DOES CUSTOM EQUIPMENT RENTALS FURNISH AND LEASE PIGGYBACK CARS AND TRAILERS TO RAILROADS, OTHER FORWARDERS OUTSIDE THE FAMILY, AND PRIVATE SHIPPERS AS PART OF ITS NON-CARRIER PRIMARY BUSINESS OF A LEASING COMPANY?

Yes.

[fol. 645]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF ARTHUR E. BAYLIS (NEW YORK CENTRAL RAILROAD)

My name is Arthur E. Baylis. I am Vice-President—Marketing of The New York Central Railroad Company and the Pittsburgh and Lake Erie Railroad Company, with offices at 466 Lexington Avenue, New York 17, New York.

• • • • • • •

[fol. 646] While Official Territory, and particularly the central region thereof, is densely populated and highly industrialized, the New York Central's traffic flow has steadily declined during the past 15 years, both actually and relatively, and there is no indication that this over-all trend will be reversed in the near future. This severe diminution of railroad freight traffic revenues in the face of an expanding economy is largely attributable to diversion of traffic to competing modes of transportation, including private transportation facilities.

This hard fact is apparent from my Exhibit No. ..... (AEB 1), which sets forth the ton mile distribution of intercity traffic by all modes of transportation for each year during the period 1947 through 1961. In 1947, the ton miles of all of the railroads in the United States amounted to 664,523 million or 65.24 percent of the ton miles of all intercity freight transportation performed. By 1960, the railroads' portion had fallen to 579,130 million or a percentage of 43.66. During the same period, all other modes experienced a substantial increase in their ton miles.

The most dramatic increase, of course, is that shown for highway transportation. In 1947, for-hire motor trucks

operating under Commission authority and private and other motor trucks not subject to economic regulation together performed but 10.02 percent of the total ton miles [fol. 647] performed in the United States. By 1961, that percentage had increased to 22.83 percent, or more than double the 1943 figure.

Of the total ton miles shown for this mode of transportation in 1961, those performed by motor trucks not economically regulated by the Interstate Commerce Commission constituted nearly two-thirds. Accepting the fact that a certain portion of the highway traffic reflected in the Commission's figures would, because of the short distances involved or other circumstances, not be available to rail transportation, the prevailing trend of diversion from rail to highway services is evident.

The figures in the following table taken from Central's Form A report to the Commission demonstrate that the individual ton miles of the New York Central have followed an even more severe declining course than that of the railroad industry generally:

NEW YORK CENTRAL RAILROAD
(Million)

YEAR	TON MILES	INDEX
1947	43,571	100.00
1950	39,065	89.7
1955	38,106	87.5
1958	29,881	68.6
1959	31,792	73.0
1960	32,329	74.2

An even more telling indicia of the railroads' failing trend and the major impact of highway transportation on the national economy is the distribution of the nation's freight bill by mode of carriage. I have made such a com- [fol. 648] parison in my Exhibit No. ..... (AEB 2). It will be seen that the nation's estimated freight bill in-

creased $3.5 billion during the period 1958 through 1961 culminating in a total of $44.1 billion in 1961. Two-thirds of this amount went for trucking service. Railroad service, including mail and express and charges for loading and unloading freight cars, accounted for only 21 percent of the total freight bill.

There is no question but that the prevailing trends in American business, particularly in the last decade, have favored highway carriage. Massive highway construction programs are producing an ever-expanding network of modern, high-speed facilities for motor transit, guaranteeing the means for dependable, all-weather road service. Thus, in decentralizing production facilities, private industry could afford to and did construct its plants and warehouses at off-track locations with no rail connection.

The present practice of strict inventory controls in private industry dictates the use of a fast, flexible method of moving traffic in relatively small volume and on precise door-to-door scheduling. Under such conditions, the conventional railroad service of volume movement with unavoidable delays in switching through congested terminals becomes increasingly less attractive.

The consequent growth of highway carriage may be easily detailed. The tremendous increase in the number of truck registrations in seven states served by the New York Central is shown by my Exhibit No. ..... (AEB 3).

[fol. 649] My Exhibit No. ..... (AEB 4) demonstrates to some extent the depth of available motor carrier service between principal states served by the New York Central. Of course, this exhibit does not include contract carriers, nor the private transportation operations conducted by many industries.

The number of contract motor carriers domiciled at selected points on the New York Central is shown by my Exhibit No. ..... (AEB 5). Nine of the 14 points shown have six or more contract carriers domiciled locally. Thirty-six such carriers are in Chicago alone. While contract carriers are restricted by rights granted by the Com-

mission in their permits, that type of carriage thrives because of the measure of control that the shipper may exert over their services. It is the mode of carriage offering the highest degree of controlled transportation by industry short of ownership and operation of a private highway system.

The broad scope and rate of growth of common and contract motor carrier participation in the transportation of property is apparent from the freight commodity statistics for Class I common and contract motor carriers operating in the New England, Middle Atlantic and Central regions—the principal area served by the New York Central. From the *Motor Carrier Freight Commodity Statistics—Class I Common and Contract Carriers of Property,* published by the Commission's Bureau of Economics and Statistics, I have prepared the following two tables which compare the total tonnages and revenues of those motor carriers in the three regions for each of the commodity groups during 1956 and 1960.

[fol. 650]

TON REVENUE

FREIGHT (T. L.)

	1956	1960	% Increase
Group I (Prod. of Agri.)	$ 549,122	$ 733,176	33.5
Group II (Animals & Prods.)	1,958,263	2,220,297	13.4
Group III (Prod. of Mines)	1,314,014	1,963,650	49.4
Group IV (Prod. of Forest)	262,163	278,864	6.4
Group V (Mfrs. & Misc.)	74,284,058	80,762,820	8.7
Group VI (Forwarder)	383,942	782,601	103.8
GRAND TOTAL	$78,751,562	$86,741,408	10.1

Each of the product groups shows an increase in tonnage in 1960 compared with 1956. Group V manufactures and miscellaneous traffic, because of its relatively high rate and consistent volume characteristics, is the traffic most attractive to the motor carriers. Their concentrated efforts to capture this class of traffic have been extremely successful. Group V increased 6,478,762 tons or 8.7 percent, 1956 compared with 1960. In 1960, manufactures and miscellaneous constituted 80,762,820 tons of the grand total of 86,741,408 tons of revenue truckload traffic carried in intercity service. Over all, the grand total tonnage for all commodity groups increased 10.1 percent in the period shown.

Notice should also be taken of the fact that there were substantial increases in the three regions for commodity Groups I, products of agriculture, and III, products of mines. These commodities on the whole have traditionally been considered to be rail-oriented, but the increases here shown indicate that not even these essentially bulk commodities are free from the inroads of motor carrier competition. From the publication above referred to, I have also taken the total revenues for these carriers:

[fol. 651]

GROSS FREIGHT REVENUE

	1956	1960	% Increase
Group I (Prod. of Agri.)	$ 7,311,402	$ 10,261,794	40.4
Group II (Animal & Prod.)	31,147,474	35,031,862	12.5
Group III (Prod. of Mines)	6,141,013	8,791,613	43.2
Group IV (Prod. of Forest)	2,809,194	3,725,928	32.6
Group V (Mfrs. & Misc.)	730,664,185	916,987,038	25.5
Group VI (Forwarder)	4,039,347	11,643,995	188.3
GRAND TOTAL	$782,112,615	$986,442,230	36.1

Here again, the upward trend prevails within each commodity group. Revenue from manufactures and miscellaneous traffic was up 25.5 percent in 1960 as compared with 1956. Moreover, the revenue received by these carriers for the transportation of manufactures and miscellaneous traffic in 1960 was $916,987,038 as compared with the grand total revenue for all intercity truckload traffic of $986,442,230.

Contrary to the upward trends in the tons and revenues of our common and contract motor carrier competition, we have suffered heavy losses in both tons and revenues for each of the commodity groups. To facilitate a comparison of Central's experience with that of its highway competition, I have prepared the following table, the figures in which are taken from the Central's Form A reports to the Commission.

NYC CARLOAD FREIGHT
TONS AND GROSS REVENUE

	1956	1961	% Decrease
I Prod. of Agri.			
Tons	11,852,000	10,463,000	11.7
Revenue	$ 48,292,000	$ 44,065,000	8.8
II Animal & Prod.			
Tons	2,117,000	1,390,000	34.3
Revenue	$ 31,362,000	$ 23,170,000	26.1
[fol. 652]			
III Prod. of Mines			
Tons	95,947,000	69,969,000	27.1
Revenue	$167,381,000	$136,022,000	18.7
IV Prod. of Forest			
Tons	4,051,000	2,856,000	29.5
Revenue	$ 17,089,000	$ 13,192,000	22.8
V Mfrs. & Misc.			
Tons	50,616,000	37,523,000	25.9
Revenue	$308,923,000	$253,623,000	17.9

Commodity Group	1956	1961	% Decrease
VI Forwarder			
Tons	630,000	527,000	16.4
Revenue	$ 13,214,000	$ 10,446,000	21.0
GRAND TOTAL			
Tons	165,213,000	122,728,000	25.7
Revenue	$586,261,000	$480,518,000	18.0

Of particular significance is the decline which the New York Central has suffered in the transportation of manufactures and miscellaneous traffic. From 1956 through 1961 M&M tons dropped 25.9 percent and the revenue declined 17.9 percent. The adverse consequences of this decline are obvious when it is borne in mind that in 1961, M&M revenue constituted 52.8 percent of Central's total revenue and 30.6 percent of its tonnage. The loss of this highly rated traffic has had a particularly serious effect on Central's net revenues since, as a common carrier, it must continue to transport many low value commodities, some under prescribed rate structures, that make only marginal contributions, if any, to net income. The accompanying decline in the Central's net income between 1956 and 1961, as shown below, is thus more than mere coincidence.

[fol. 653]

	Net Railway Operating Income (Millions)	Net Income (Millions)
1956	$58.3	$39.1
1957	29.5	8.4
1958	11.8	4.1
1959	24.0	8.4
1960	16.2	1.0
1961	(.5)	(12.5)
*1962	5.5	(8.5)
(Deficit)		

* First nine months.

Above and beyond the growth of the regulated highway industry described above, the railroads have been faced with an accompanying increase in private and non-regulated for-hire carriage. The Commission itself has expressed its concern in this matter upon a number of occasions. A recent such expression appears in the Commission's Supplement to the *75th Annual Report*:

> "Just how serious the public carriers' position was becoming showed up in a Commission study which followed the trends in total inter-city ton-miles from 1939 up to the present and then projected the data on to 1970. The study showed a decline in the common carriers' share of total inter-city ton-miles from the 75.4 percent which they had in 1939 to only 67.5 percent in 1959.
>
> "More ominous were the projections of current trends to 1970. They forecast a decline in the common carriers' share to between 60.8 percent and 63.8 percent." (P. 9)

Any attempt at an exhaustive enumeration of existing private carriage operations is necessarily limited by the difficulty of identification. From our own records, I have prepared certain exhibits which give a partial indication of the private carriage known to be operating in the area [fol. 654] served by the New York Central. My exhibit No. ..... (AEB 6) shows the number of such private operations headquartered in the selected points shown. Ten of the fourteen points have ten or more private carriers headquartered therein. Five cities have 20 or more. The number of such carriers at Detroit (77), Chicago (67), Indianapolis (27), and Columbus (21) are indicative of the extensive use of such service by shippers in Central Territory.

Another indication of the size and depth of non-regulated private and for-hire carriage being performed within the New York Central service area is the showing in my Ex-

hibit No. ..... (AEB 7). These figures were compiled from the Commission's safety regulations mailing list which includes all carriers which the Commission has identified as being subject to its safety regulations.

It is not to be assumed that all of these private motor carrier operations are small, stand-by services merely employed as an adjunct to common or contract carriage. Many of these operations are extensive and employ equipment of the largest, most modern types. My Exhibit No. ..... (AEB 8) is a statement showing for the year 1961 the distribution of trucks between private and for-hire purposes by vehicle type and use. It will be noted that during the period of the exhibit, there were employed in private carriage a far greater number of the larger combination-type vehicles and single-unit trucks than in for-hire service. It is axiomatic, of course, that the larger combination-type vehicles provide the maximum of cubic space; [fol. 655] hence, the designation "high cube." The heavy investment required for such equipment would make its use prohibitive on any except consistent, longer road-haul, low empty return movements. It will also be noted that while the percentage of these types of vehicles to the total employed in private operations is slightly more than 3 percent, the total number 365,260 is 33,352 vehicles greater than the total number of such vehicles used in for-hire service which accounts for almost 35 percent of that total. Considering all three classes of combination vehicles shown on the exhibit, the total number employed in private service exceeds the number in for-hire service.

My Exhibit No. ..... (AEB 9) is an alphabetical list of the private motor carriers providing service between two or more of 14 selected points served by the New York Central. The scope of the operations is self-evident.

I need not burden this record with a detailed description of the competition which we are presently required to meet from carriers operating on publicly maintained inland waterways, the Great Lakes and the St. Lawrence Seaway, except to say that these carriers have made substantial

inroads in the New York Central's bulk traffic of prior years which is largely non-regulated in water service.

* * * * * * *

[fol. 656] Throughout this period of declining freight tonnage and revenue described above, railroad management had not sat idly by. Revisions in rates became an almost daily process in an effort to compete with other modes of transportation. During the period October, 1960, through May 29, 1961, the New York Central either published alone or joined with other rail carriers in 810 rate reductions, 793 of which were published to meet truck competition. Increases and new charges were proposed and established on various unremunerative accessorial services. Substantial sums were invested in an effort to meet the public demand for more sophisticated special equipment, such as the bi-level and tri-level automobile cars which permit transportation of a greater number of automobiles at substantially reduced cost. In 1961, we had 700 such cars in this service. Installation of centralized traffic control and automated yards at a cost in the millions were all part of the same pattern.

Despite all of these steps, the continuing decline in tonnage and revenue made it more and more obvious that traditional railroad service methods and price structures would have to be revised if the adverse traffic trends were to be halted, particularly with respect to M&M traffic. Trailer-on-flatcar service, combining the speed and convenience of short-haul motor carrier service with low-cost intercity volume movement by rail, seemed a natural solution.

[fol. 657]

The simple guide lines laid down by the Commission in 1954 for TOFC service provided a measure of permanence which encouraged the expansion of this type of service. It was not until 1958, however, with the amendments to the Interstate Commerce Act providing a greater leeway in competitive pricing, that TOFC service began the major strides which have brought it to the present state.

The New York Central began its Flexi-Van service in 1958. The physical operation of that service is fairly well known throughout the transportation industry and need not be described at length herein. Briefly, it involves the movement of the box without the highway wheels.

The first published rates for this service were Plan II rates which, in general, meet the rates then maintained by the motor common carriers. Since that time, we have proposed several hundred different Plan II commodity rates providing a lower rate per unit in connection with higher required minimum weights, the basic purpose of which was to encourage maximum loading of the equipment.

While Plan II rates, under which door-to-door service is offered at a single charge, have been successful to some extent and while Plan II traffic is still growing, the spectacular expansion of the Flexi-Van business is due to the institution of Plan III rates covering only the ramp-to-ramp movement of equipment furnished by the shipper. The growth of the traffic is shown below.

[fol. 658]

VANS

Year	*Plan II*	*Plan III*
1958	2,279	2,594
1959	12,810	10,528
1960	18,426	22,532
1961	19,139	33,710
*1962	22,063	33,790

* First ten months

While we do not offer the so-called Plan I service, we do handle a small volume of Plan IV service, and within recent months have instituted a program of publishing Plan V joint rail-motor rates with interested motor carriers. We expect this coordinated movement to grow, but no Plan, in my opinion, holds the potential for regaining M&M traffic, and in particular that moving in private carriage, to the extent promised by Plan III.

In Plan III we have at last developed a proven weapon with which to attract traffic moving in private transportation, and, while it is difficult to divert such traffic back to regulated carriage once a shipper has made the investment and begun private operations, it should, in any event, forestall any further expansion of private carriage in intercity service.

Plan III service is attractive to the shipping public for several reasons. The rates themselves reflect the railroads' inherent advantage of volume low-cost intercity movement. It eliminates, insofar as railroad cost is concerned, the expensive switching operations in high-cost terminals which have plagued conventional railroad service to an [fol. 659] ever-increasing degree. The shipper has been given the option and the responsibility of providing its own equipment and its own service to and from the railroad ramps at its own cost. Having control of both the equipment and the pickup and delivery service, the shipper may use whatever methods are best suited to his individual operation. This flexibility is unknown to any other form of railroad service, and, in my opinion, is largely responsible for its overwhelming acceptance by the shipping public.

* * * * * * *

The New York Central and P&LE have already invested $12.1 million in Flexi-Van equipment. The Central's wholly owned subsidiary, The New York Central Transport Com- [fol. 660] pany, has invested $16.7 million in trailers, bogies and supporting ground equipment. Another $1.3 million has been invested in Flexi-Van loading sites. Thus, we have invested a total of almost $30 million in this service and this does not include any investment in the Flexi-Van terminals themselves. Since approximately 60 percent of our present Flexi-Van volume is in Plan III service, the disastrous results which would obtain should the Commission intentionally or otherwise enact any rules which would curtail or require modifications in our existing service, are obvious.

[fol. 661]

EXHIBIT AEB-1 TO VERIFIED STATEMENT OF ARTHUR E. BAYLIS

(See opposite) ☞

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PAGE

TON-MILE DISTRIBUTION AMONG INTERCITY FREIGHT CARRIERS -- FOR HIRE AND PRIVATE TRAFFIC: 1947 TO 1961

(IN MILLIONS OF TON-MILES)

Year	RAILROADS			FOR-HIRE MOTOR TRUCKS[a]			PRIVATE AND OTHER MOTOR TRUCKS[b]			TOTAL - ALL TRUCKS			TOTAL INLAND WATERWAYS			PIPELINES (OIL)			AIRWAYS			TOTAL	
	Ton-Miles[1]	% of Total	Index	Ton-Miles[2]	% of Total	Index	Ton-Miles[2]	% of Total	Index	Ton-Miles[2]	% of Total	Index	Ton-Miles[3]	% of Total	Index	Ton-Miles	% of Total	Index	Ton-Miles[4]	% of Total	Index	Ton-Miles[5]	Index
1947	664,523	65.24	100	37,693	3.70	100	64,402	6.32	100	102,095	10.02	100	146,714	14.40	100	105,161	10.32	100	158	0.02	100	1,018,651	100
1948	647,267	61.94	97	46,706	4.47	124	69,339	6.64	108	116,045	11.11	114	161,846	15.49	110	119,597	11.44	114	223	0.02	141	1,044,978	103
1949	534,694	58.38	80	47,891	5.23	127	78.745	8.60	122	126,636	13.83	124	139,396	15.22	95	114,916	12.55	109	235	0.03	149	915,877	90
1950	596,940	56.17	90	65,648	6.18	174	107,212	10.09	166	172,860	16.27	169	163,344	15.37	111	129,175	12.16	123	318	0.03	201	1,062,637	104
1951	655,353	55.63	97	72,292	6.14	192	115,720	9.82	180	188,012	15.96	184	182,216*	15.47	124	152,115	12.91	145	379	0.03	240	1,178,075	116
1952	623,373	54.48	94	70,843	6.19	188	123,764	10.82	192	194,607	17.01	191	168,367	14.71	115	157,502	13.76	150	415	0.04	263	1,144,264	112
1953	614,199	51.01	92	76,510	6.36	203	140,653	11.68	218	217,163	18.04	213	202,439*	16.81	138	169,884	14.11	162	413	0.03	261	1,204,098	118
1954	556,557	49.56	84	72,301	6.44	192	140,924	12.55	219	213,225	18.99	209	173,679*	15.46	118	179,203	15.96	170	397	0.04	251	1,123,061	110
1955	631,385	49.53	95	82,906	6.50	220	140,348	11.01	218	223,254	17.51	219	216,508	16.98	148	203,244	15.94	193	481	0.04	304	1,274,872	125
1956	655,891	48.40	99	83,015	6.12	220	165,831	12.24	257	248,846	18.36	244	219,978	16.23	150	229,959	16.97	219	563	0.04	356	1,355,237	133
1957	626,222	46.89	94	84,408	6.32	224	169,766	12.71	264	254,174	19.03	249	231,792	17.36	158	222,728	16.68	212	572	0.04	362	1,335,488	131
1958	558,738	45.98	84	84,339	6.94	224	171,205	14.09	266	255,544	21.03	251	189,016	15.55	129	211,289	17.39	201	579	0.05	366	1,215,166	119
1959	582,497	44.97	88	101,377	7.83	269	187,142	14.45	291	288,519	22.28	283	196,559	15.18	134	226,991	17.53	216	739c	0.06	468	1,295,305	127
1960	579,130	43.66	87	104,200	7.86	276	193,462	14.58	300	297,662	22.44	292	220,253	16.60	150	228,626	17.24	217	778c	0.06	492	1,326,449	130
1961e	563,360	42.87	85	105,000	7.99	279	195,000	14.84	303	300,000	22.83	294	215,000	16.36	147	235,000	17.88	223	870	0.06	551	1,314,230	129

1 Includes mail and express.

2 Includes operations between cities and between cities and rural areas, but not between rural areas without passing through cities and not city delivery or city movements to and from contiguous suburbs. Includes turnpike movements.

3 Coastwise and Intercoastal deep sea ton-miles NOT included; however, Great Lakes ton-miles are included.

SOURCE: Bureau of Transport Economics and Statistics, Interstate Commerce Commission, Tables 1 and 5, Statement No. 6103, "Intercity Ton-Miles, 1939-1959," April, 1961; Transport Economics, March 1962; American Trucking Association, Inc., and Association of American Railroads, Bureau of Railway Economics.

4 Domestic revenue service;; including express, mail and excess baggage.

5 When components do not add to total, due to rounding.

* Includes coverage of waterways previously existing but not previously included.

a Intercity ton-miles of Class I, II and III intercity common and contract motor carriers of property operating under ICC authority.

b Intercity ton-miles of all private trucks, and for-hire trucks not subject to economic regulation by the ICC, as well as intercity ton-miles of local ICC regulated carriers.

c Include Alaska and Hawaii.

e Estimated.

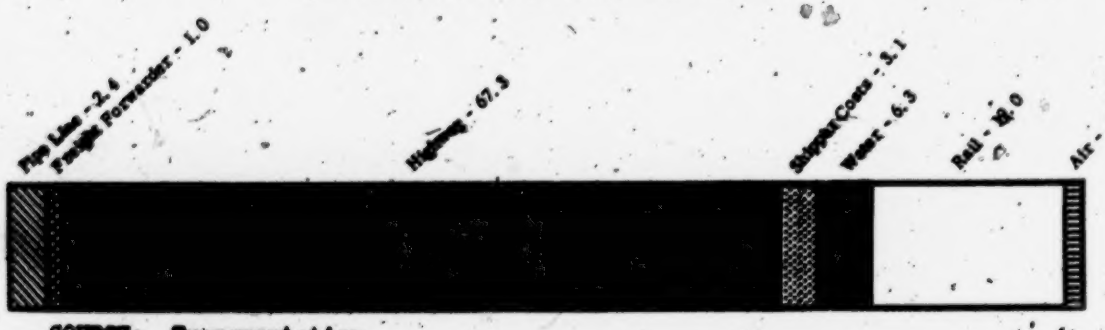
THE NATION'S ESTIMATED FREIGHT BILL
(In Millions of Dollars)

	1958		1959		1960		1961	
Highway								
Truck - Intercity								
ICC Regulated	6,081		7,087		7,155		7,216	
Non-ICC Regulated	10,784		11,374		11,388		11,798	
Truck - Local	9,335		9,965		10,131		10,631	
Bus	31		37		42		46	
		26,231		28,463		28,716		29,691
Rail								
Railroads	8,347		8,598		8,321		8,053	
REA Express*	353		367		344		342	
		8,700		8,965		8,665		8,395
Water								
International	1,331		1,515		1,515		1,410	
Coastal, Intercoastal & Non-Contiguous	683		702		699		692	
Inland Waterways	436		453		432		411	
Great Lakes	224		224		280		249	
		2,674		2,894		2,926		2,762
Oil Pipe Line								
ICC Regulated	721		765		770		788	
Non-ICC Regulated	228		242		243		249	
		949		1,007		1,013		1,037
Freight Forwarder@		413		445		437		428
Air								
Domestic	128		147		165		183	
International	92		102		115		136	
All-Cargo & Supplemental	54		56		57		63	
		274		305		337		382
Other Shipper Costs								
Loading & Unloading Freight Cars	1,109		1,173		1,137		1,128	
Operation of Traffic Departments	220		232		238		245	
		1,329		1,405		1,375		1,373
GRAND TOTAL		40,570		43,484		43,469		44,068

* Includes mail and express ** Excludes air express

@ Domestic ICC regulated carriers. Figures are total revenues before payments for other carriers' services.

DISTRIBUTION OF THE 1961 FREIGHT DOLLAR



SOURCE: Transportation Association of American Washington, D.C.

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[fol. 663]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF ROY L. MILBOURNE
(NEW YORK CENTRAL RAILROAD)

My name is Roy L. Milbourne. I am Director of Flexi-Van Sales and Service of The New York Central Railroad Company with offices at 466 Lexington Avenue, New York 17, New York. I have held my present position since the inception of Flexi-Van operations on the New York Central in 1958. Prior to that time, I held various positions in the Traffic Department of the New York Central and affiliated lines over a period of approximately 38 years.

The New York Central presently provides TOFC service in Plans II, III, IV and V. Flexi-Van operations were initiated under Plan II tariffs, the first movement taking place in April, 1958, between Chicago and New York. In August, 1958, we began our Plan III service. Plan IV service was instituted in 1961, and during the same year we [fol. 664] commenced Plan V joint rail-motor operations in movements with certificated motor common carriers.

In 1961, Plan II and Plan III revenue amounted to $6.9 million and $9.5 million, respectively. For 1962, the same services will return $8.3 million and $10.9 million.

While the Flexi-Van system is well known throughout the transportation industry, a brief description of the physical service seems appropriate here. The Flexi-Van cars are capable of handling two Flexi-Vans, each ranging from 35 to 40 feet in length. The Flexi-Vans are equipped with detachable rear wheel assemblies, or "bogies", for handling beyond the Flexi-Van loading and unloading sites. These units can be loaded or unloaded from either side of the car in approximately four minutes. The rear wheel assembly is dropped when the van is loaded onto the car,

and the van body thus has a lower center of gravity than that encountered in the movement of standard highway trailers. Flexi-Van trailers with the bogey attached are inter-lined with other railroads not having special Flexi-Van cars just as any other standard highway trailer.

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[fol. 665] Section C

Rule C.1

Proposed Rule C.1, in and of itself and in connection with certain other rules proposed in Section C, would require wholesale changes in our present Flexi-Van tariff and would eliminate Plan III and Plan IV traffic, the former now accounting for the majority of Flexi-Van revenues.

What reason could there possibly be for this proposed rule other than to squeeze Plan III rates out of existence? Significantly, no such rule is proposed in Section B.

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[fol. 666] In Plan III, however, where the shipper is responsible for whatever cartage is necessary beyond the Flexi-Van sites, some shippers, from time to time, will request that that service be performed by the New York Central Transport Company, a wholly-owned subsidiary of the New York Central. Most of this cartage is performed by other local cartage agents who have no connection with common carriers and have no published rates. The Transport Company, in performing this non-regulated, local cartage, simply acts as the agent of the shipper at a system-wide rate of $7.75 an hour for the use of the driver and tractor.

Transport Company's drivers engaged in that service perform solely according to the direction of the shipper and have no responsibility to the railroad whatsoever. The shipper may thus direct that such service be performed in whatever method is most convenient.

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[fol. 667] * * * The New York Central Flexi-Van tariff specifically defines the terminal areas within which it will provide pickup and delivery service under published Plan II rates. Plan III rates do not include pickup or delivery, but the Transport Company's local service for the shipper is restricted, as are all other local cartage operations, to the commercial zone as defined by the Commission. * * *

* * * At the present time, our Plan II rates specify the extent to which loading or unloading of the property to and from the vehicle is included. The Plan III rates, by their terms, do not encompass such service. The shipper may thus hire any local cartage company to load or unload his freight or may have it done with his own employees.

* * * * * * *

[fol. 668] The same situation would obtain in the case of pickup and delivery. A flat allowance based on the carrier's average cost of performing pickup and delivery [fol. 669] within a commercial zone would over-compensate the shipper who is located only a short distance from the ramp and under-compensate the shipper located at the outer-most limit of the service area. A just and reasonable allowance, moreover, could in no case exceed the highest cost of performing the service within the area, and this would be wholly insufficient to compensate shippers and receivers which, with their own equipment, handle leased trailers up to several hundred miles over the road beyond the TOFC sites at origin and destination. A substantial number of shippers now engage in such a practice, the result of which is to concentrate the traffic at major terminals in the most efficient and economical method possible, thus facilitating the long-haul intercity service by the railroad.

* * * * * * *

[fol. 670] Rule C.3

While the majority of the proposed rules appear designed to stifle and eventually eliminate existing Plan III and Plan IV rates and service, the most inimical of all is the measure proposed as Rule C.3, which would prohibit leasing of equipment to or from shippers by railroads or their subsidiaries. The fact that any such measure would actually be put forward, even as a trial balloon, is a matter of grave concern to the New York Central.

As I have previously stated, approximately 60 percent of the New York Central's present Flexi-Van traffic is composed of Plan III movements. Practically all of this traffic moves in specially-equipped Flexi-Vans leased by [fol. 671] the shippers from the New York Central Transport Company, our wholly owned subsidiary. The prohibition against such leasing would, therefore, be disastrous, eliminating a source of revenue now amounting to $11 million annually. It is difficult for me to understand how the Commission could seriously propose such a measure when the summary presented to the Commission in Appendix II to its order of October 9, 1962, specifically recognizes that a majority of the Plan III railroads trip-lease trailers to shippers and when the Commission itself has stated that "the proposed rules are not intended to curtail the TOFC services represented by the various numbered Plans now in general use."

It is the position of the New York Central Railroad Company that the Commission has no authority whatsoever under the Act to prohibit leasing of equipment to or from shippers or freight forwarders. I shall point out here, however, certain factors which, as a matter of common sense, railroad safety and practical operations, militate strongly against the adoption of proposed Rule C.3, particularly as it applies to the New York Central.

The Flexi-Van system requires specially designed vans and cars. Millions of dollars have already been invested by the New York Central and its subsidiary Transport

Company in making this equipment available to the public. While a few other railroads have also made substantial investments in this type of equipment, notably the Mil-
[fol. 672] waukee Road, the fact is that this particular type of equipment is not readily available to the shipping public from non-railroad sources. The New York Central has taken every possible step to expand its equipment inventory so that it will be sufficient for all, but the supply is minute when contrasted with the supply of standard highway trailers and TOFC cars now in existence.

Accordingly, the prohibition against leasing which would restrict the methods by which Flexi-Van equipment is now made available to the shipping public would redound only to the benefit of other non-railroad affiliated leasing companies, most all of whom lease only standard highway equipment to the general public, not suitable for use on the New York Central. In short, our specialized equipment makes it essential that the railroad or its subsidiary be permitted to make it available to the shipping public in the same manner as the public can now secure standard highway trailers from other non-railroad, and, of course, non-regulated, sources.

The elimination of the railroads and their subsidiaries from the leasing field would obviously represent the coming of the millennium for private, non-carrier affiliated non-regulated sources.

The same disability would occur in connection with the publication of an allowance for shipper-owned Flexi-Vans apparently contemplated under Rule C.2(f). Since only a few shippers own Flexi-Vans, any such allowance system, even if it were otherwise palatable to the shipping public, would mean that the great bulk of the New York Central's
[fol. 673] Plan III traffic would be immediately diverted to other railroads—assuming it stayed with the railroads instead of turning to private carriage or other regulated modes. Those shippers who might decide to make investments in highway equipment at any time in the future would hardly be inclined to invest in specialized Flexi-Van

equipment which would tie their potential down to a very few railroads, when standard highway trailers at approximately the same cost could be used over most any other railroad in the country.

There is no practical economic reason, moreover, why a railroad or its subsidiary should be forced to abandon its trailer leasing business to privately owned leasing companies. As Plan III service expands, leasing-revenue will become more and more valuable to financially-pressed railroads such as the New York Central. Cutting out this source of revenue in favor of private leasing companies hardly seems in keeping with the Commission's responsibility to promote financial stability in the transportation industry.

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[fol. 674] The effect on trailer and car utilization is obvious. Plan III with trip-leasing of trailers has provided the New York Central—and, of course, other railroads—with an effective weapon with which to reduce its empty mileage, heretofore one of the worst economic barriers to increased railroad net revenues. At the present time, the New York Central's Flexi-Van service operates on an empty-return ratio of approximately 10 percent. • • •

[fol. 675] At the present time, our subsidiary, the New York Central Transport Company, trip-leases vans to shippers at charges ranging from $20 to $44 per local trip, depending upon the type of van. Additional charges ranging from $10 to $22 per day, again depending upon the type of equipment, are assessed for detention at either origin or destination. • • •

• • • • • • •

[fol. 676] On the other hand, the trip-lease provides shippers with ready access to whatever type of van or trailer is required and releases them from responsibility when the trip is completed, thus making the trailer again available for railroad use. Trip-leasing, therefore, elimi-

nates the necessity of shipper investment, either in purchase or long-term lease, and constitutes the most effective weapon with which to prevent further expansion of private carriage. I know of no shipper who has ever diverted his traffic from Plan III into private carriage.

Any shipper desiring to lease trailers from the New York Central Transport Company for use in Plan III may do so by first entering into a "master lease" with the Transport Company under the same provisions available to other shippers. The charges are the same for all shippers on any given type of equipment. All Flexi-Vans are subject to being used in either Plans II, III, IV or V on a first come-first served basis. Some shortages do develop from time to time from an unexpected demand for service at a particular [fol. 677] point, but the New York Central and its subsidiary have taken all possible steps to satisfy all requests for service in the order made. They have invested substantial sums in Flexi-Van equipment and are prepared to invest a great deal more, unless the service itself is restricted by thoughtless administrative measures.

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[fol. 678]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM THE VERIFIED STATEMENT OF AMERICAN BILTRITE RUBBER COMPANY, INC.

Comes now the American Biltrite Rubber Company, Inc., a party to this proceeding under provisions of the Commission's order of October 11, 1962, and presents, pursuant to said order, the following statement of facts in support of its position with respect to the proposed rules and regulations of this order.

[fol. 679] The American Biltrite Rubber Company manufactures a variety of rubber products such as hose, V-belts, conveyor belts, insulating tape, rubber carpeting, floor tile, heels, soles, soling and synthetic resins at nine plants in six states in Eastern United States. Distribution of products is made throughout the United States as well as in foreign countries. We presently utilize all forms of public transportation, and in addition, engage in private over-the-road transportation with our own employees and equipment in the transportation of our products. Our current transportation bill exceeds $2 million annually.

We began operating in private carriage in 1955 with one truck. This operation expanded until in 1960 we were operating with 36 pieces of equipment and carried almost 60 million pounds of freight both out and in that year. The operation was primarily that of carrying outbound freight to Chicago, St. Louis, and Atlanta for further distribution by motor common carrier. All trucks returned to origin loaded with raw materials. We engaged in private carriage for combined considerations of cost and service. The latter factor is extremely important in that our products must be available to meet the production schedules of our customers. The necessity for swift and consistent service, moreover, has been heightened in recent years when our customers have generally turned to maintaining minimum inventories. In the case of belting or soling, the failure of these products to arrive on time may well hold up the operation of an entire production line. Under the circumstances, speedy and reliable service at reasonable cost is essential.

• • • • • • •

[fol. 680] Our Company began using Plan III in August, 1961 to some extent. We began disposing of our own equipment until presently we are down to two tractors and three trailers. All of our freight which formerly moved in private carriage to Chicago and St. Louis now moves in Plan

III. The volume from September, 1961 through October, 1962 has been 583 loads weighing 22,750,070 pounds. Most of our former return haul which moved private carriage now moves Plan II at less cost than private carriage. However, from September, 1961 through October, 1962, we did move 50 loads weighing 2,057,736 pounds via Plan III.

Our major consideration for displacing private carriage with Plan III rail service was cost. However, we have maintained service to St. Louis and Chicago similar to that which we were performing ourselves. With Plan III we have the advantage of performing and controlling our own pick up and delivery at Boston, and being able to load and unload at our convenience at Boston and destination. A point of great concern is our ability to lease trailers and return them to lessor at destination when unloading is completed. Were we required to furnish our own equipment, this would probably prevent us from using [fol. 681] Plan III.

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The combined considerations of flexibility, cost and service have enabled us to displace private carriage with Plan III railroad service. In the event that these rates and services were either discontinued or substantially modified in any fashion so as to make the service more expensive or less flexible, we would simply resume our private over-the-road operation.

• • • • • • •

[fol. 682] Vincent C. Borman Jr., Assistant Traffic Manager, American Biltrite Rubber Company, Inc:

[fol. 683]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENTS OF
BOSTON AND MAINE RAILROAD

* * * * * * *

[fol. 684]

TESTIMONY OF C. F. YARDLEY

My name is Charles F. Yardley, General Manager-Piggyback, Boston and Maine Railroad.

* * * * * * *

Piggyback service is becoming an increasingly important part of the total operation of the Boston and Maine. While railroads throughout the country are experiencing ever increasing competition from motor carrier service, both regulated and non-regulated, that competition is particularly severe in New England. Thus, the significance to New England railroads such as the Boston and Maine of a service like piggyback which can provide the customer with the same flexibility as highway services is especially great. The attractiveness of piggyback service to the shipping public in our service area is evidenced by the growth of this service since its inception on the Boston and Maine in 1956. These figures are set forth below, separated according to Plans:

Year	Plan I	Plan II	Plan III	Total
1956	—	325	—	—325
1957	1,885	1,370	—	3,255
1958	1,165	2,490	312	3,967
1959	2,250	3,905	3,227	9,382
1960	2,689	5,340	8,686	16,715
1961	2,516	5,263	9,928	17,753
1962 (Dec. est'd)	5,872	6,142	12,344	24,358

* * * * * * *

[fol. 685] This increase in piggyback traffic is in direct contrast to the general decline suffered by this Railroad in its carload freight tonnage and revenue. This decline commenced immediately following World War II and has continued ever since. The institution of piggyback service is one of the most important steps by the industry in seeking to arrest that decline and, if possible, to reverse the trend. The Boston and Maine, which has suffered deficits in net income in excess of $3 million annually in each of the last four calendar years, has an even greater interest than most in the advancement of progressive new transportation services which will increase its traffic revenues. Its interest in piggyback is not only demonstrated by the statistics referred to above but also by the major investments it has made in equipment and facilities. The Boston and Maine now owns or leases in excess of 500 trailers which are devoted to piggyback service and participates in trailer leasing plans with R E A Leasing Corporation and XTRA, Inc. In the last two years the railroad has constructed a new, modern piggyback yard in East Cambridge, Mass., and has purchased two mobile straddlelift cranes for use in loading and unloading trailers, at a cost of approximately $150,000. By their use the railroad is able to load and unload piggyback cars at East Cambridge in a minimum of time eliminating circus-type handling over ramps. At smaller volume points elsewhere on our system the depressed track and ramp type methods are used. The Boston and Maine now

has piggyback facilities at ten points in addition to East Cambridge.

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[fol. 686]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF CHARLES E. RAGLAND, VICE PRESIDENT-FREIGHT TRAFFIC, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

My name is Charles E. Ragland and my business address is 54 Meadow Street, New Haven 6, Connecticut. My statement is presented on behalf of Richard Joyce Smith, William J. Kirk and Harry W. Dorigan, Trustees of the property of The New York, New Haven and Hartford Railroad Company. My position with the railroad is Vice President-Freight Traffic and I am responsible, among other duties, for the trailer-on-flat-car operations of the railroad.

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[fol. 687] The New Haven presently participates in various TOFC plans. We provide Plan I service both locally and interline. This of course involves a substitution of rail-for-motor over a portion or all of the line-haul transportation for which the motor carrier has assumed an obligation.

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The New Haven Railroad instituted Plan I TOFC in 1937 and during the past 25 years of operation has increased gross revenues from this traffic to the present level, which for the year 1961 amounted to $1,475,000.

The equipment utilized by the New Haven for Plan I TOFC conducted between local points on our line consists of 85 Clejan "center sill" type flat cars, 79 feet in length. These cars are operated primarily between Boston and Providence on one hand and (Harlem River) New York

City on the other. These cars are leased on a long term basis from General American Transportation Co. and rep- [fol. 688] resent a total investment of well over $1 million. We are now engaged in negotiations for approximately 50 G-85 flat cars, which are of the most recent design for TOFC use, at a total investment of $740,000.

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The only requirements made of motor common carriers for their use of the New Haven's Plan I service is that they be properly certificated by this Commission and that they be financially responsible carriers. I am unaware of any instance where we have refused to accept trailers of qualified motor common carriers for movement in Plan I.

Our interline Plan I service is provided to such points as Chicago, Illinois, St. Louis, Mo., Kansas City, Missouri, and Cleveland, Ohio. The equipment owned by the New Haven for use in this service consists of 241 flat cars, [fol. 689] 40'6" in length, equipped with tie-down gear. We also utilize the equipment of connecting carriers for TOFC traffic routed over their lines.

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[fol. 690] The underlying motivation of the railroads in establishing TOFC was an attempt to find a realistic solution to the problem of the erosion of the longer haul intercity freight traffic from rail service to the highway.

The seriousness of this problem to the railroad industry is clearly demonstrated in my Appendix B* attached hereto, which is entitled "Ton-Mile Distribution Among Intercity Freight Carriers—For Hire and Private Traffic: 1947 to 1961." The appendix is a statistical comparison based on figures published by the Commission's Bureau of Transport Economics and Statistics, American Trucking Asso-

* Appendix A is attached to Special Pleading of the Trustees of the property of The New York, New Haven and Hartford Railroad Company and is incorporated herein by reference.

[fol. 691] ciation, Inc. and Association of American Railroads.

In 1947, the ton miles of all of the railroads in the United States amounted to 664,523 million or 65.24 percent of the ton miles of all intercity freight transportation performed. By 1960, the railroads' portion had fallen to 579,130 million or a percentage of 43.66. During the same period, all other modes experienced a substantial increase in their ton miles.

The most dramatic increase, of course, is that shown for highway transportation. In 1947, for-hire motor trucks operating under Commission authority and private and other motor trucks not subject to economic regulation together performed but 10.02 percent of the total ton miles performed in the United States. By 1961, that percentage had increased to 22.83 percent, or more than double the 1943 figure.

Of the total ton miles shown for this mode of transportation in 1961, those performed by motor trucks not economically regulated by the Interstate Commerce Commission constituted nearly two-thirds. The prevailing trend of diversion from rail to highway service is evident.

The appendix merely substantiates the fact of decline in the railroad industry that has been well-known to us who are close to its competitive problems. The problems are brought into better focus with the fact of the drastic diversion of the higher-rated heavier density traffic from rail to highway service. This diversion has been almost complete on the shorter hauls, such as the whole of the New England territory served by the New Haven and has reached [fol. 692] drastic proportions on the hauls of intermediate distances and gradually to transcontinental movements spanning the continent. This diverted traffic has been the life-blood of the railroad industry, producing in large measure the net revenues which enabled the railroads to handle many articles of commerce, primarily raw materials, at marginal or submarginal earnings. This diversion is the source of the present financial anemia of most of the Eastern railroads, and certainly of the New Haven.

Following World War II, the efforts of the railroads to cope with the intense competition of motor carriers for freight traffic which had traditionally moved on the rails were concentrated in the modernization of box car service. In part, this took the form of speeding up road-haul schedules as well as modernization, to some degree, of the conventional box car fleet, including the introduction of specially-designed and equipped cars. However, progress in these areas was impeded by the rails' inability to obtain equity capital or other recognized methods of reasonably low cost financing. The introduction of a more realistic approach to the problem of competitive pricing helped the railroads and the widespread use of incentive pricing permitted the rails to exploit their inherent advantage of heavy loading at low unit cost.

These initial efforts have not been entirely successful but undoubtedly prevented the diversion of an even greater volume of traffic to highway service than is indicated in Appendix B. In my judgment, box car service alone will [fol. 693] never provide a complete solution and other newer types of service must be developed to, at least, stabilize the railroad industry and keep pace with the evermore exacting requirements of commerce. This does not mean that efforts to modernize conventional box car service should not be pushed with renewed vigor but this alone is not the answer. This judgment is based on the experience of the New Haven in a new pricing approach with respect to pricing box car traffic and the institution by us of an expedited box car service between New Haven points and Chicago and St. Louis. The box car rates to which I refer are all-commodity rates in straight or mixed shipments based on a graduated scale. The high end of the scale applies to loads of 20,000 pounds and the low end to 70,000 pounds. The 70,000 pound rates are applicable only on shipments loaded into a single box car and are constructed on the basis of total costs to the shipper for handling a 70,000 pound shipment in Plan III. Incidentally, these rates have been considered by the Commission in I. & S.

Docket No. 7131 but were found to be in violation of the classification requirements of the Act. The railroads have appealed to a three-judge court. Despite our best efforts to improve our box car rates and pricing, we still find that the shipper prefers a flexibility which cannot be provided by conventional rail service and this more flexible service. Additionally, there are many aspects of highway service which reduce the overall cost of transportation to the user, wholly apart from any difference which may exist in the actual motor carrier and rail charges. Another factor of particular importance in the present era of inventory con- [fol. 694] trol is that highway service lends itself more readily to the expedited movement of freight in smaller quantities. Fundamentally, box car service, even under favorable circumstances, can only be made fully competitive with highway service in instances where the receivers are in position to purchase in relatively large quantities. In some such instances, the railroads are in position to provide a rate incentive which is in sufficient amount to overcome the additional cost of using rail service. However, the flexibility of highway transportation frequently makes it impossible to compete regardless of incentive rates.

As previously stated, Plan II type of piggyback service was originally established on the New Haven in 1955. This was our second TOFC service, our Plan I service having been in successful operation since 1937. While the Plan II service has since been substantially broadened in scope and has now been in effect for about 7 years, we do not consider Plan II pricing to provide the complete answer to truck competition and particularly not to private carrier competition. We have learned that this type of piggyback service is generally not profitable on the shorter hauls and that the terminal trucking expense must be closely controlled. We have likewise learned that loaded movements must be reasonably balanced in order to avoid excessive movement of empty trailers. We have also learned that this type of service is not fully competitive with motor carrier service, as it lacks the same degree of flexibility in

a number of respects. Its traffic potential would appear to be largely limited to industries located within reasonable [fol. 695] local trucking distance of the terminal ramps.

The volume of traffic handled by the New Haven under this plan has shown a relatively steady growth and for the twelve-month period ending on September 30, 1962 our gross revenues totaled $738,000 on a volume of 6,106 trailers.

For purposes of review, there are a number of reasons familiar to the Commission for the establishment by the New Haven and other railroads of Plan III TOFC and the companion Plan IV service. These are:

1. A desire to experiment with all promising methods of coordinating rail and highway transportation—the railroad industry has been severely criticized for years for their seeming unwillingness to adopt new methods.

2. A desire to round out their experience in the piggyback field which had been gained through their earlier introduction of the Plan I and Plan II services.

3. The realization that neither Plan I nor Plan II had been successful in halting the continuing erosion of the high-rated manufactured and miscellaneous traffic to highway service.

4. Recognition that the Plan II service would not be a wholly effective means of meeting motor truck competition, due to its lack of the same degree of flexibility in a number of respects.

5. The realization that neither the Plan I nor Plan II service provided a medium of stemming the rapidly [fol. 696] growing diversion of the more desirable types of traffic to private transportation, that is, highway movement in motor vehicles directly operated by private shippers.

It has been recognized by the Commission in its Annual Reports, and indeed it is generally recognized that the growth of private transportation is the most important threat to the stability and long-range solvency of the for-hire transportation industry. The growth and the continuing threat of private transportation has a particularly vicious impact upon the railroads in that it affects the most desirable traffic movements. Where established, it means the loss of substantial regular movements of finished products as well as movements of raw materials which are handled as return loads in the reverse direction. The New Haven considers it imperative to its survival that a service be offered which will prevent a further loss of traffic to private operations.

We on the New Haven Railroad firmly believe that the various TOFC services will provide a deterrent to private transportation and will enable the rails to meet regulated competition as well. We know that some of our shippers have been dissuaded from entering private carriage because of Plan III. On the other hand, we are not aware of any instance where a shipper has abandoned his private operations because of Plan III. This is a clear indication that once a shipper is committed to private transportation he is not easily persuaded to abandon those operations.

[fol. 697] In order to show the relative importance to the New Haven Railroad of its trailer-on-flat-car services, the total number of trailers handled under each plan for the 12-month period ending on September 30, 1962 is shown below, together with the gross revenues for each plan for the period.

	Trailers	Revenue
PLAN I Local	26,445	$1,229,800
PLAN I Interline	5,178	290,897
	31,623	$1,520,697
PLAN II (Flexi-Van, Interline and Local)	6,106	$ 737,013
PLAN III Interline	12,506	885,104
Total	50,235	$3,142,814

It is obvious that the greatest proportion of the revenue is derived from Plan I traffic and that the second greatest is Plan III, which has produced the most favorable growth of any segment of traffic on our line.

The foregoing portion of my statement has two purposes: first, to present to the Commission a brief recapitulation of the critical need of the railroads following World War II to find a means of survival; and second, to show wherein that need is being met in part, at least, by the various forms of TOFC. The survival of the New Haven, as this Commission is aware, depends in major part upon its ability to attract a somewhat greater traffic volume than it is now handling. The railroads, and this includes the New Haven, are making progress in meeting the intense competition from both highway and water carriers, but this [fol. 698] progress depends upon a freedom to provide a flexible combination of TOFC services.

Certain of the rules proposed by the Commission and attached to its order dated October 11, 1962 as Appendix A, would be detrimental to our efforts to improve.

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The rail TOFC service as a substitution of rail for truck, for example, is ordinarily utilized only in instances where [fol. 699] an economic gain to the trucker is feasible. * * *

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[fol. 700]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF FRED CARPI
(PENNSYLVANIA RR Co.)

My name is Fred Capri. I am Vice President-Sales of The Pennsylvania Railroad Company.

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[fol. 701] The Pennsylvania Railroad is engaged in every one of these types of operations. Our participation in Plan V operations is rather limited at present, since it began only within the last six months. The important thing, however, is that every one of these operations fulfills a definite need in today's transportation picture, and should not be hampered by any artificial restrictions imposed by the Commission. For example, although Plan I has many of the features of Plan V, it does afford motor carriers who are not yet convinced that outright partnership with the railroads is sufficient protection to them, the opportunity to engage in coordinated activities to the advantage of the public and themselves.

[fol. 702] In order to grasp the increasing importance of trailer-on-flatcar service to the Pennsylvania Railroad, one need only be aware of a few basic facts. In 1955, the Pennsylvania Railroad transported in Plan I service slightly over 17,000 trailers. In 1961, we handled over 54,500 trailers in Plan I and it is estimated that in 1962, that number will approach 80,000. Plan II service began in mid-1954, and for the balance of that year the Pennsylvania handled slightly under 15,000 trailers. In 1961, that figure had grown to almost 35,000 and for the year 1962 will probably hit 55,000. 1959 was the first full year of Plan III operation, and saw the Pennsylvania handle approximately 10,500 trailers. By 1961, that total had grown to over 43,000 and we estimate that by the end of this year the figure will reach 65,000. Traffic handled in Plan IV and certain other

miscellaneous types of operations such as traffic moving under Section 22 quotations and in substitution for box car service, while a small portion of the total, will probably reach 5,000 trailers this year.

The revenue from trailer-on-flatcar operations has grown from $5,700,000 in 1955 and .8 of 1% of the total freight revenue to over $24 million in 1961 and 4% of total freight revenue. For this year, it is estimated that from all trailer-on-flatcar service, the Pennsylvania will realize somewhere in excess of $34 million and it is estimated that this will comprise from 5 to 5½% of total freight revenue. Consequently, it is not difficult to say that trailer-on-flatcar service is extremely important to The Pennsylvania Railroad Company.

[fol. 703] The policies of our Company with respect to piggyback operations are not difficult to state or explain. We are willing to explore any utilization of trailer-on-flatcar service for which there appears to be a reasonable demand and which will result in reasonable compensation to our Company for the service we perform.

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[fol. 704]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF R. W. TALBOT
(PENNSYLVANIA RR Co.)

My name is R. W. Talbot. I am General Manager-Freight Rates of The Pennsylvania Railroad Company. My business address is Six Penn Center Plaza, Philadelphia 4, Pa. My responsibilities include general direction over the establishment of freight rates and charges which will promote maximum use of our services and, at the same time, produce a reasonable rate of return on our investment.

I have taken an active part in the establishment of all forms of Piggyback service on our Railroad since their in-

ception with primary responsibility for the pricing of these services. As has Mr. Carpi, I will use the "Plan" designations in my testimony in describing the various trailer-on-flatcar services.

Plan I service, which is restricted to the line-haul movement of motor common carrier trailers, was begun on our Railroad in March of 1955. This service offered a means of quickly building up a volume of piggyback traffic and thus provide more intensive utilization of the terminal facilities and special flat car equipment which had already been made available. Since its inception Plan I traffic has been characterized by sharp peaks and valleys but has [fol. 705] shown substantial growth, as can be seen from the total number of trailers handled in Plan I for the last five years.

1958	-	32,363
1959	-	42,736
1960	-	36,836
1961	-	54,699
1962	(Estimated)	80,000

In Plan I the rail carrier participates in the published motor common carrier rates and charges under a substituted service arrangement. The motor carriers solicit the traffic for movement in their own trailers, which, in the absence of shipper's forbidding the use of TOFC service, may then be tendered to the railroad for line-haul transportation between designated rail termini. The railroad's compensation is based upon a division of the motor carrier's published charges. In the past, the rail carrier's portion of the charges were submitted to the Commission under the Fourth Section requirements of Part I of the Interstate Commerce Act. However, recently certain Motor Carrier Associations have obtained from the Commission so-called "blanket Fourth-Section relief," which has eliminated the necessity of filing a new Fourth Section application for every little change in these divisional agreements. This has incidentally been quite satisfactory to both the rail-

roads and the motor carriers because it has permitted us to make changes in these arrangements to meet new conditions with much greater speed than was previously possible.

In Plan I the Railroad has no knowledge of the traffic being handled, except for the total weight of lading in each trailer. In my opinion, this has been one of the most im- [fol. 706] portant factors contributing to the growth of this form of motor-rail coordination. The railroads and motor carriers can and will cooperate much more readily when each can protect his own interest to the greatest extent possible. The motor carrier naturally knows that the railroads offer their own TOFC service, and hence wish to protect their traffic sources. If the railroad were to know the exact nature of the commodity in the Plan I trailer, the growth and development of Plan I would be seriously retarded. This is because in many instances when a traffic solicitor knows the general area in which traffic originates and also the commodity involved, he knows the name of the shipper.

The Pennsylvania Railroad currently has Plan I arrangements with 151 motor carriers. This is in itself impressive evidence of the coordination which can be obtained through voluntary cooperation. More impressive, however, I believe, is the fact that the Pennsylvania Railroad has Plan I arrangements with every single responsible motor carrier which has requested such an arrangement, has had the requisite authority to enter into the arrangement, and has been willing to meet the same terms and conditions as all other motor carriers similarly situated. This does not mean, however, that the Pennsylvania would thus have no objection to rules which would compel these arrangements or measure the charges to be made against published rates. Governmental compulsion of two parties getting together does not insure greater cooperation than can be achieved through free negotiation. I believe that an example of this can be found in the field of labor relations. The greater the [fol. 707] amount of governmental intervention that is possible the less the individual parties do in the way of genuine negotiation. With respect to the level of the charges for

Plan I, I believe that a motor carrier can presently ask for relief from the Commission on divisions of joint rates, both joint motor or motor rail rates, if it can show after a hearing that what is being taken by other parties to the rate is not fair or equitable. I certainly don't think that such particular problems are appropriately solved by general rules.

Nor can the duty of policing a motor carrier's compliance with its certificate restrictions be placed upon the railroads. Certainly a rail carrier can satisfy itself in a general way as to the authority of the motor carriers with which it makes joint arrangements. In fact, the Pennsylvania has refused in the past to enter into Plan I arrangements with certain motor carriers because it was convinced that the motor carrier did not have the requisite authority. However, to place the primary responsibility for this task upon a railroad is completely unrealistic. The motor carrier itself knows its certificate better than anyone else. It knows what traffic it is permitted to handle and between what points. The Commission has the duty of insuring compliance with certificate requirements, and has full authority to make checks to carry out this duty. It would be an impossible task for the railroads to be required to ascertain in every case that the motor carrier has authority to transport specific commodities. To carry out this duty the railroad would have to break the seal on every trailer tendered [fol. 708] to it by a motor carrier to insure that the trailer does not contain some commodity the motor carrier is not authorized to transport. From the standpoint of Plan I, such a departure from commodity authority could only occur if the motor carrier chose to operate not only in violation of its certificate, but in complete disregard of its published tariffs. This is because the railroad provides substituted service only in connection with the motor carrier's published tariffs, and if the motor carrier is publishing rates on commodities it has no authority to transport, certainly the Commission can remedy that problem without reference to whether or not TOFC service is involved at all.

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[fol. 709]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF R. L. HAYES
(EXCELSIOR TRUCK LEASING COMPANY, INC.)

My name is Roy L. Hayes. I am employed as General Manager of Excelsior Truck Leasing Company, Inc.

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[fol. 710] In July of 1958, a joint study was made by the Railroad and Excelsior to determine the flow of Plan II traffic between terminals on the Pennsylvania Railroad. The purpose of the study was to determine if trailers could be made available to patrons on a trip lease basis for movement in Plan III service.

The study developed that the flow of Plan II traffic inbound to certain terminals exceeded the outbound; therefore, at certain terminals it was necessary for the railroad to regularly move empty trailer equipment back to other locations for loading. One such terminal was Rose Lake, Ill. (East St. Louis, Ill.). In August 1958 it was jointly decided that surplus empty trailer equipment at this terminal would be returned to the control of Excelsior, who would in turn make it available to Plan III patrons for one way trip lease on a first-come-first-served basis, to areas where trailers were needed by the railroad for Plan II loading. While the trailer is under lease to the shipper and Excelsior is collecting leasing charges from the shipper, the railroad was given a credit against its monthly rental charges.

After an experimental period, it was found that the plan accomplished the following:

1. Substantial reduction of empty trailer movement.
2. Lower cost to the railroad of the trailers it had from Excelsior for T.O.F.C. Service.
3. Availability of trailers to the shipping public for movement in Plan III service.

[fol. 711] In September 1958 it was decided that due to the success of the original experiment in trip leasing of trailers to Plan III patrons, surplus trailer equipment would be made available to the shipping public at all terminals on the Pennsylvania Railroad. This plan has been continued to date and has also been expanded to include certain interline movements with other railroads.

The high utilization of trailer equipment made possible through the flexibility of using a common fleet in Plan II and Plan III T.O.F.C. service has made it economically feasible for Excelsior to expand its fleet and provide trailer equipment for use by the railroad and the shipping public at the lowest possible cost. The expansion of the trailer fleet and the controlled per diem and/or leasing charge has proved to be mutually advantageous to all concerned and has provided an adequate return to Excelsior on its capital investment.

If it becomes necessary for the railroad and/or Excelsior to discontinue the lease of equipment to the shipping public for use in what is now known as Plan III T.O.F.C. service, the following will result:

1. Shippers who have a small volume or one way movement will be deprived of the availability of trailer equipment at a low trip lease rate. Such shippers will not be in a position to take advantage of published Plan III rates. Commercial trailer leasing companies have not thus far been in a position to supply trailers on a one way lease basis at a reasonable cost.
2. Shippers who have a large or balanced movement between given points can supply their own trailers or

lease on a long term arrangement at a reasonable cost, and due to this can take advantage of Plan III rates.

[fol. 712] 3. If an arrangement is developed whereby the railroad would be required to pay an allowance to a shipper when the shipper provides its trailers for movement in T.O.F.C. service, the same situation would result as described in Items 1 and 2. The cost to shippers with small volume and one way movement to supply their own trailers would exceed the allowance the railroad would pay. The allowance made to shippers with large volume or two way movement would equal or exceed cost to shipper to provide its own trailers.

4. Recent joint studies made by the railroad and Excelsior indicate that approximately 50% of all trailers moved on the Pennsylvania Railroad in present Plan III service are owned or controlled by the shipper, and are not supplied in any way by Excelsior or the Railroad.

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[fol. 713]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF R. H. HOLTER
(B & O RR Co.)

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Statement of R. H. Holter

My name is R. H. Holter. I am employed by The Baltimore and Ohio Railroad Company as Freight Traffic Manager, with offices at Two North Charles Street, Baltimore 1, Maryland. I have had 34 years of service with The Baltimore and Ohio Railroad Company beginning July 1, 1928, [fol. 714] when I entered the Passenger Traffic Department of the Company. I served in the Passenger Department in various capacities until December 1, 1959, when I was ap-

pointed General Freight Agent of the Baltimore and Ohio with authority over its trailer-on-flat-car rates and charges. On August 1, 1962, I was promoted to Freight Traffic Manager, again in The Baltimore and Ohio Railroad Company's Marketing (Rate) Department.

The Baltimore and Ohio offers Plans II, III, IV and V trailer-on-flat-car service.

Plan II is an all-inclusive type of service under which the Baltimore and Ohio performs the complete service with railroad equipment from the actual shipping point to the final delivery at consignee's premises on railroad billing. It was first offered on the Baltimore and Ohio beginning July 20, 1954. The first publication of Plan II encompassed six major terminals on the Baltimore and Ohio, namely, Baltimore, Philadelphia, Pittsburgh, Cincinnati, Chicago and East St. Louis. Plan II service has increased with additional points being added, so that at the present time there are 24 TOFC terminals on the Baltimore and Ohio located at major cities on the Baltimore and Ohio system.

Plan III on the Baltimore and Ohio was inaugurated October 1, 1958. Plan III, of course, is the ramp-to-ramp transportation of shipper owned or leased trailers on rail flat cars. Plan III service started on the Baltimore and Ohio with publication of rates between New York, on the [fol. 715] one hand, and St. Louis and Chicago, on the other. This service likewise has expanded so at the present time Plan III service is offered at 17 cities. Moreover, in both Plan II and Plan III service the Baltimore and Ohio has interchange arrangements with connecting carriers; thus enabling the Company through the medium of joint or combination arrangements to serve destinations on connecting lines in other territories.

Plan IV service on the Baltimore and Ohio was inaugurated February 1, 1959, between Jersey City, New Jersey, on the one hand, and Baltimore, East St. Louis and Chicago, on the other. This service, too, has expanded so at the present time it is offered between 11 cities. Plan IV

service on the Baltimore and Ohio is the origin to destination transportation of shipper owned or leased containers on shipper owned or leased flat cars.

The Baltimore and Ohio does not offer Plan I service at the present time and has only recently begun Plan V service. On September 14, 1962, the Baltimore and Ohio began Plan V service with a motor common carrier serving generally New Jersey, Delaware and eastern Pennsylvania. These Plan V arrangements enable shippers and receivers in the area served by the motor common carrier to use joint motor-rail service from or to Baltimore and Ohio Railroad TOFC points located west of Pittsburgh, Pennsylvania.

The growth of TOFC service on the Baltimore and Ohio and its consequent importance to that Company is best illustrated by reference to Exhibit 1 with my verified state-
[fol. 716] ment. That exhibit shows the tremendous growth of both Plans II and III, the two major plans on the Baltimore and Ohio, since their inauguration. For example, in the first full year of operation of Plan II, 1955, the Baltimore and Ohio secured gross revenues from this service of $490,352.70. In 1961, only six years later, the gross revenues had increased to $3,150,704.28. In the ten-month period ending October 31, 1962, the Baltimore and Ohio already had secured gross revenues of $3,708,614.58.

Plan III has also shown a corresponding increase. For the first full year of operation, gross revenues from Plan III totalled $664,590.27. In 1961 this amount had increased to $2,861,386.83 and for the first ten months of 1962 gross revenues amounted to $3,592,335.58.

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[fol. 717] If these Rules are adopted by the Commission, it will, of course, require the cancellation of all existing Plan III and Plan IV rates.

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The level of the Plan III and Plan IV rates is designed to attract traffic presently moving in private carriage or

to retain traffic susceptible of diversion from the railroads. The Commission has recognized that private carriage has increased tremendously in the post-war years and I am, therefore, not going to cite any statistics concerning that growth.

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[fol. 718] In fact, the Commission has issued certificates of public convenience and necessity to motor carriers offering a through service although existing inter-line service was available, recognizing that it was not the obligation of a motor carrier to enter into joint arrangements with another motor carrier.

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[fol. 719]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF C. M. WRIGHTSON
(B. & O. R.R. Co.)

My name is C. M. Wrightson. I am employed by The Baltimore and Ohio Railroad Company as Manager Tofcee and Highway Operations, with offices at Two North Charles Street, Baltimore 1, Maryland.

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The Baltimore and Ohio Railroad Company, due to the growth of TOFC service, has acquired by lease or purchase 760 trailers of various types and sizes ranging from 24 ft. to 40 ft. in length. Moreover, the Baltimore and Ohio will shortly acquire an additional 217 trailers, again of various sizes and types. The number of flat cars assigned to TOFC service total approximately 450 cars, of which 277 are Baltimore and Ohio ownership and the remainder are leased from TTX Corporation.

The figures I have cited are to be contrasted with the TOFC equipment owned by the Baltimore and Ohio in 1955, [fol. 720] the first full year of its TOFC operation. At that time the Baltimore and Ohio had only 150 trailers and

75 flat cars. Moreover, the trailers were all dry vans of 24 ft. in length. I estimate the Baltimore and Ohio's total investment in its trailers and flat cars, excluding leased equipment, at the present time to be $2,638,029. The Baltimore and Ohio has constructed ramp facilities in 24 cities located on its system. The investment in these ramp facilities is conservatively estimated to be $670,000. In addition to our investment in the ramp facilities, the Baltimore and Ohio has also purchased cranes which are used at Jersey City, Philadelphia, St. Louis and Chicago for handling trailers and containers on and off flat cars. The investment of the Baltimore and Ohio in these cranes totals $186,550.

As stated by Witness Holter, the Baltimore and Ohio at the present time offers Plans II, III, IV and V TOFC service. Under Plan II the Baltimore and Ohio is responsible for the entire service beginning with pick-up at the shipper's place of business and delivery to the consignee at destination. All of the equipment in Plan II service is railroad owned or leased equipment or equipment on per diem from other railroads. In Plan II service the origin pick-up and the terminal delivery are effected by independent draymen who are under contract to The Baltimore and Ohio Railroad Company. These draymen, in addition to performing TOFC pick-up and delivery, usually handle the Baltimore and Ohio's less carload traffic where pick-up and delivery is requested on that traffic. The draymen charge [fol. 721] the Baltimore and Ohio an hourly rate varying in each city for this service. The draymen will load and unload freight for the shipper in Plan II service pursuant to provisions of Item 1110 of Agent Daugherty's Tariff ICC 2 and Items 2530, 4240 and 10280 of B&O Tariff 478-G, ICC 24542.

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[fol. 722] The Baltimore and Ohio does not provide any pick-up or delivery of Plan III trailers either at origin or destination. Shippers must arrange for their own pick-up or delivery service.

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[fol. 723] * * * The trip leasing of trailers on the Baltimore and Ohio has been of benefit to the Company from a trailer utilization standpoint. By trip leasing the Baltimore and Ohio has on numerous occasions secured revenue freight for trailers which would have had to have been moved empty to a point where Plan II traffic was available for [fol. 724] loading. I have no special study of the extent to which trip leasing has enabled us to reduce the number of empty trailer miles, but a 7 day test study conducted by the Interstate Commerce Commission in connection with loaded and empty car miles to determine the empty return ratio for flat cars used in TOFC service indicates that the Baltimore and Ohio's empty return ratio has been drastically reduced, 1961 versus 1956. In 1956 the ratio was 30.02% and in 1961 it was 7.42%. Under the Commission's rules, the Baltimore and Ohio reported as a loaded car a car holding either two loaded trailers or one empty and one loaded trailer. Cars hauling empty trailers were reported as empty cars. I believe the substantial reduction noted above is indicative of the extent to which trip leasing of trailers in Plan III has enabled the Baltimore and Ohio to more effectively utilize its equipment.

* * * * * * *

[fol. 725]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF JAMES H. SUTHANN
(C & O RWY. CO.)

My name is James H. Suthann and my address is Room 1015 Terminal Tower, Cleveland, Ohio. I am Manager of Piggyback Services of The Chesapeake and Ohio Railway Company and am responsible for the development of piggyback traffic for our Company.

* * * * * * *

The Chesapeake and Ohio Railway Company performs trailer-on-flatcar or TOFC service. Presently it participates in three types of TOFC service which are commonly referred to as Plans I, II, and III.

We first inaugurated TOFC service in March, 1959, beginning in Plan I with the handling of trailers of motor common carriers between Staunton, Virginia, and Charleston, West Virginia. During the same month, we also began Plan I service between Detroit-Chicago and Cincinnati-[fol. 726] Chicago. While our initial participation in trailer-on-flatcar service was limited entirely to the Plan I type of service between points served by the Railway Company, our Company has continually expanded participation in Plan I service so that it is now available between many local stations as well as to and from stations on other railroads throughout the country. Our Plan I operation has now grown to the point that we presently participate with nearly 100 motor common carriers.

Subsequently we expanded our TOFC operations to include the Plans II and III type of service. It was necessary that we offer the service provided under those plans in order to reach industries and shippers not served by rail and to provide a more complete transportation service required by the shipping public. Unless we were able to provide the shipping public with the flexibility of TOFC service, we could not keep abreast of the current transportation demands and trends. Since we began performing this type of service, TOFC has become of great importance to the C&O. The first year that we offered TOFC service, we handled 13,000 revenue trailers. In 1962 we will handle approximately three times that number of revenue trailers. This demonstrates how TOFC has grown on the C&O and why it is now such an important part of our transportation service to the public.

[fol. 727]

Chesapeake and Ohio Railway Company's Investment in TOFC Equipment and Facilities

Our total investment in TOFC equipment and facilities approximates $2,800,000. * * *

* * * * * * *

[fol. 728]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF P. W. JOHNSTON, JR., FREIGHT TRAFFIC MANAGER OF ERIE-LACKAWANNA RAILROAD COMPANY

My name is P. W. Johnston, Jr., Freight Traffic Manager, Piggyback—Forwarder—L.C.L. Traffic, Erie-Lackawanna Railroad Company, 140 Cedar Street, New York 6, New York. * * *

* * * * * * *

[fol. 729] As will be shown by facts given below, piggyback traffic is a very important segment of the Erie-Lackawanna's total freight traffic and revenue. * * * It likewise has given the Erie-Lackawanna Railroad a new competitive tool in its efforts to halt the diversion of its high-rated boxcar traffic to all three categories of over the road motor carrier service, namely, common, contract and private carriers.

Facts

Piggyback is an increasingly important part of the freight business of the Erie-Lackawanna Railroad. Since the inception of Plan II piggyback in 1954, we have increased our participation to all of the five basic Plans of service.

Revenues for 1962 will be about $15,000,000. with the dollars divided about one-third Plan I, one-third Plan II, and one-third Plan III and IV combined. While Plan V is not a significant revenue producer at this time, we believe that there will be developments in this area as well.

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[fol. 730]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY (NICKEL PLATE ROAD)

Preliminary Statement

Comes now The New York, Chicago and St. Louis Railroad Company, hereinafter referred to as the Nickel Plate, respondent in the above-captioned proceeding, and, in compliance with the Commission's order of October 11, 1962 requiring that all parties to this proceeding file on or before December 10, 1962 a verified statement setting forth the position of the party with respect to the use of coordinated and substituted service, respectfully submits as follows:

• • • • • • •

[fol. 731] Statement of Facts

I. TOFC Service in General

TOFC service represents to the Nickel Plate a carefully considered program to bring about the coordination which the Commission and transportation experts for years have been advocating as a path to a stronger, more efficient and economical National Transportation System. Specifically, TOFC service rounds out and supplements conventional rail service and enables the railroad to compete directly with the over-the-road trucker in the matter of service and

charges, particularly as to off-track locations. This service comes as a source of vital support to the railroad industry, particularly in Official Territory, which territory has been long saturated with ever increasing highways, more developed waterways, pipelines and regulated and unregulated truck and water carriers, and at a time when industry is tending toward private carriage and, through decentralization and for other reasons, is tending toward locations off rail facilities.

* * * * * * *

[fol. 732] II. TOFC Service of Nickel Plate

The Nickel Plate participates in four types of TOFC service. The first is so-called Plan I under which are handled trailers of motor common carriers in substituted service between ramps on the Nicket Plate. There are also joint arrangements under which motor common carrier trailers are handled between ramps on the Nickel Plate and ramps on connecting railroads.

Under Plan II Nickel Plate handles trailers on flatcars locally and also jointly with other rail carriers. This is a complete door-to-door service with rail carriers furnishing the trailers and performing free pick-up and delivery service. Some substituted service is performed in connection with this type of service between ramps and rail stations not equipped with ramps. This substitute service is performed by motor common carriers.

Concerning Plan III, the Nickel Plate has local and joint rates under which shipments loaded in trailers owned or leased by shippers are transported from origin ramp to destination ramp. All service beyond the ramp is performed by shippers and consignees and at their expense.

With respect to coordinated service (Plan V) Nickel Plate maintains a joint TOFC rail-truck and truck-rail service. This service is identical to Plan II except that a connecting motor common carrier is used in lieu of a connecting rail carrier.

The general order of importance of these plans as far as Nickel Plate is concerned in terms of volume of shipments is Plans II, III, I and V. The Nickel Plate has had no experience with Plan IV although Nickel Plate has Plan IV rates in effect.

[fol. 733] The growth of piggy-backing on the Nickel Plate is illustrated by the increase in the number of our revenue trailers handled from 11 in August of 1954 to well in excess of 5,000 trailers in October, 1962. This growth reflects the fact of favorable reaction by the shipping public to a satisfactory TOFC service meeting its needs. TOFC service has brought about the more economical, efficient and satisfactory handling of traffic which the Commission itself recognized could be gained from coordinated use of rail and motor vehicles.

III. TOFC Equipment of Nickel Plate

Nickel Plate's investment in TOFC facilities and equipment is as follows:

Trailers	437 owned	Cost: $2,165,488
	184 leased	
	621 Total	
Flatcars	386 owned	Cost: $1,837,823

[fol. 734]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF J. W. PLANT
(A.C.L. R.R. Co.)

My name is J. W. Plant. I am employed by the Atlantic Coast Line Railroad Company as Manager—Trailer Train Service, with headquarters at 500 Water Street, Jacksonville, Florida.

[fol. 735] The only carriers with which Coast Line has tariff arrangements are motor common carriers and a list of those carriers is attached hereto as Exhibit No. 1. Thus, Coast Line is a party to substituted service tariffs under Plan I, as reflected in the Substituted Freight Service Directory of Southern Motor Carriers Rate Conference. Where such arrangements are in effect with individual motor carriers who publish their own tariffs, Coast Line is a party to those tariffs only in so far as the tariff names [fol. 736] this Company as the substituted carrier.

All five basic plans are in effect on Coast Line and every effort is being made to extend the application of those plans to the extent possible. Based upon the traffic originated by this Company, I would rank the plans by order of importance as II, III, I, V and IV. Therefore, I shall discuss those plans in that order.

* * * * * * *

[fol. 737] Under Plan III, the Coast Line transports shipper-owned or leased trailers between TOFC terminals on railroad-owned flatcars. * * * This plan is extremely important to Coast Line as it is designed to divert traffic from private to regulated carriage and is generally utilized by shippers to the extent they are permitted to lease the trailers from the railroads with the right to return said trailers to the railroads at destination. * * * Elimination of the leasing practices heretofore sanctioned by the Interstate Commerce Commission would effectively put the Coast Line out of business in so far as Plan III traffic is concerned. Therefore, the Commission's Rule C-3 should certainly be eliminated as it would detrimentally affect the economic interest of Coast Line.

* * * * * * *

[fol. 738] Under Plan I, Coast Line holds itself out to all certificated motor carriers subject to the usual managerial

discretion as to the individual carrier's financial responsibility, public demand and the economic necessity for such operations. Plans II, III and IV are not held out to common carriers. Plan V is held out to motor carriers with which Coast Line is able to properly negotiate joint rates, service and divisions suitable to both. We have no objection to contract motor carriers utilizing Coast Line under a substituted service arrangement in Plan I or III since for all intent and purposes the movement remains the operation of the motor carrier from primary origin to final destination.

• • • • • • • •

[fol. 739] Of all the Plan I movements over Coast Line for account of certificated motor carriers, by and large the bulk of such movements have been shipments loaded in trailers leased by the motor carriers from Coast Line. In only a few cases, notably with one exception, have motor carriers utilized their own trailer equipment for Plan I operations.

• • • • • • • •

[fol. 740]

EXHIBIT No. 1 TO VERIFIED STATEMENT OF J. W. PLANT

LIST OF MOTOR CARRIERS

Operating Plan I TOFC With Coast Line

Akers Motor Lines, Inc.
Allied Van Lines
Alterman Transport Lines, Inc.
Associated Transport, Inc.
Belford Trucking Co., Inc.
Carl Subler Trucking, Inc.
Carolina Freight Carriers Corp.
Central Truck Line
Clay Hyder Trucking Lines
Cooper Motor Lines
Dixie Transport Co.

Georgia-Florida Motor Express
Harper Motor Lines, Inc.
Hennis Freight Lines, Inc.
Herrin Transportation Co.
Johnson Motor Lines, Inc.
McDowall Transport, Inc.
Mason & Dixon Lines, Inc.
McLean Trucking Company
Mercury Motor Express, Inc.
Miller Motor Express, Inc.
New Dixie Lines, Inc.
North American Van Lines
Overnite Transportation Company
Pilot Freight Carriers, Inc.
R-C Motor Lines, Inc.
Refrigerated Transport, Inc.
Ryder Truck Lines, Inc.
Terminal Transport Co., Inc.
Thurston Motor Lines, Inc.
United Van Lines, Inc.
Watkins Motor Lines, Inc.
Weathers Bros. Transfer Co.

[fol. 741]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF J. G. MIDDLETON
(ACL RR Co.)

My name is J. G. Middleton. I am employed by the Atlantic Coast Line Railroad Company as Assistant Freight Traffic Manager, with headquarters at 500 Water Street, Jacksonville, Florida.

* * * * * * *

[fol. 742]

Rules to Govern Piggyback Services Generally

* * * * * * *

With the inauguration of its piggyback service in 1959, Coast Line relied upon the ground rules which the Commission laid down in *Movement of Highway Trailers by Rail,* 293 ICC 93, and has made every effort to expand and ultimately realize the full potential of this new form of transportation; not so much to discover a means for the elimination of competition but to set up a new service in conformity with the public demand for a door-to-door service through the utilization of different types of carriage within their most economic sphere.

* * * * * * *

[fol. 743]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF WADE M. RICHARDS, GENERAL COMMERCE AGENT, ILLINOIS CENTRAL RAILROAD COMPANY

My name is Wade M. Richards, General Commerce Agent of the Illinois Central Railroad Company, 135 East Eleventh Place, Chicago, Illinois.

* * * * * * *

[fol. 744] The Illinois Central is a 6,500-mile railroad located in the middle of the United States. Its rails generally may be stated to form the shape of a large "7" with main lines between Chicago and New Orleans and running westward from Chicago to Omaha, as well as between Chicago and Birmingham, and Chicago and St. Louis. The Illinois Central Railroad first inaugurated so-called "piggy-back" service in June 1955. The first TOFC plan operated by it was Plan II. This service has grown to where it ranks

first among the various piggy-back plans in order of importance based on number of trailer units originated. In May 1959 Plan I piggy-back service was inaugurated and it now ranks third in importance of the five general classifications of piggy-back. In August 1960 Plan III service was first established. Since then it has grown so rapidly that it now ranks second in order of importance in the Illinois Central piggy-back operation. We are now participating or have participated in Plans IV and V piggy-back service. TOFC business of the Illinois Central is continuing to grow by leaps and bounds and we would object to any rule which would hinder the continuing growth of this segment of our traffic.

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PAGE

MOTOR COMMON CARRIERS HAVING PIAN I AGREEMENTS WITH ILLINOIS CENTRAL RAILROAD

COMMON CARRIER AND HEADQUARTERS	BETWEEN	AND
Admiral - Merchants St. Paul, Minn.	Chicago, Ill.	Council Bluffs, Iowa Waterloo, Iowa
Allied Van Lines, Inc. Broadview, Ill.	Chicago, Ill.	E. St. Louis, Ill. Memphis, Tenn. Birmingham, Ala. Jackson, Miss. New Orleans, La. Greenville, Miss. (Florida points) (VIA: IC-Birmingham-ACL or ACL-FEC)
	E. St. Louis, Ill.	Memphis, Tenn. Jackson, Miss. New Orleans, La. Birmingham, Ala. Greenville, Miss.
	Memphis, Tenn.	Jackson, Miss. New Orleans, La. Birmingham, Ala. Greenville, Miss.
	Jackson, Miss.	New Orleans, La.
Alterman Transport Lines, Inc.	Chicago, Ill.	Jacksonville, Fla. Lakeland, Fla. Orlando, Fla. Sanford, Fla. Tampa, Fla. (VIA: IC-Birmingham-ACL)
	Chicago, Ill.	Miami, Fla. (VIA: IC-Birmingham-ACL-FEC)
	Chicago, Ill. Evansville, Ind. Louisville, Ky.	Jacksonville, Fla. Miami, Fla. Orlando, Fla. Tampa, Fla. (VIA: IC-Birmingham-CofGa-SAL)
Argo-Collier Truck Lines Corp. Martin, Tennessee	Chicago, Ill.	Fulton, Ky. Memphis, Tenn. New Orleans. La. Birmingham, Ala.
	Fulton, Ky.	New Orleans, La. Birmingham, Ala.
Barber Transportation Co. Rapid City, S. D.	Chicago, Ill.	Sioux City, Ia.

MOTOR COMMON CARRIERS HAVING PIAN I AGREEMENTS WITH ILLINOIS CENTRAL RAILROAD

COMMON CARRIER AND HEADQUARTERS	BETWEEN	AND
Belford Trucking Co., Inc. Miami, Fla.	Chicago, Ill.	Jacksonville, Fla. (VIA: IC-Birmingham-ACL or SAL-C of Ga-SAL) Miami, Fla. (VIA: IC-Birmingham-ACL or FEC)
Bos Freight Lines, Inc. Marshalltown, Iowa	Chicago, Ill.	Waterloo, Iowa
Brady Motorfrate, Inc. DesMoines, Iowa	Chicago, Ill.	Council Bluffs, Iowa Ft. Dodge, Iowa Sioux City, Iowa
Briggs Transportation Co. St. Paul, Minn.	Chicago, Ill.	Council Bluffs, Iowa Dubuque, Iowa Ft. Dodge, Iowa Waterloo, Iowa
	Waterloo, Ia.	Council Bluffs, Ia.
Burlington-Chicago Cartage, Inc. Kewanee, Ill.	Chicago, Ill.	Council Bluffs, Ia.
Campbell Sixty-Six Express, Inc. Springfield, Mo.	Chicago, Ill. E. St. Louis, Ill.	E. St. Louis, Ill. Birmingham, Ala. Jackson, Miss. Memphis, Tenn. New Orleans, La.
	Memphis, Tenn.	Birmingham, Ala. Jackson, Miss. New Orleans, Ia.
	Jackson, Miss.	New Orleans, Ia.
Cole, Jack Co., Inc. Birmingham, Ala.	Chicago, Ill. Birmingham, Ala.	Birmingham, Ala. Memphis, Tenn.
Crouch Bros., Inc. St. Joseph, Mo.	Chicago, Ill.	Council Bluffs. Ia.
Deaton Truck Line, Inc. Birmingham, Ala.	Birmingham, Ala.	Memphis, Tenn.
Delta Motor Lines, Inc. Jackson, Miss.	Chicago, Ill.	Memphis, Tenn. Jackson, Miss. New Orleans, La. E. St. Louis, Ill.
	E. St. Louis, Ill.	Memphis, Tenn. Jackson, Miss. New Orleans, La.

[fol. 746]

MOTOR COMMON CARRIERS HAVING PIAN I AGREEMENTS WITH ILLINOIS CENTRAL RAILROAD

COMMON CARRIER AND HEADQUARTERS	BETWEEN	AND
Delta Motor Lines, Inc. Jackson, Miss. (Cont'd)	Peoria, Ill.	Memphis, Tenn. New Orleans, La. Jackson, Miss.
	Memphis, Tenn.	Jackson, Miss. New Orleans, La.
	Jackson, Miss.	New Orleans, La.
Dixie Highway Express, Inc. Meridian, Miss.	E. St. Louis, Ill.	Birmingham, Ala. Paducah, Ky. Atlanta, Ga. (VIA: IC-Birmingham-SAL) Jackson, Miss. New Orleans, La.
	Louisville, Ky.	Birmingham, Ala. Jackson, Miss. New Orleans, La. Paducah, Ky. Atlanta, Gal (VIA: IC-Birmingham-SAL)
	Paducah, Ky.	Birmingham, Ala.
	Jackson, Miss.	New Orleans, La.
Dohrn Transfer Co. Rock Island, Ill.	Chicago, Ill.	Dubuque, Iowa
Ellis Trucking Co., Inc. Indianapolis, Ind.	Indianapolis, Ind.	Memphis, Tenn.
Gateway Transportation Co., Inc. LaCrosse, Wis.	Chicago, Ill.	E. St. Louis, Ill. Dubuque, Iowa Ft. Dodge, Iowa Waterloo, Iowa
Glendenning Motorways, Inc. St. Paul, Minn.	Chicago, Ill.	Sioux Falls, S. D.
Gordons Transports, Inc. Memphis, Tenn.	Chicago, Ill.	Birmingham, Ala. Atlanta, Ga. (VIA: IC-Birmingham-SAL) E. St. Louis, Ill. New Orleans, La. Memphis, Tenn. Jackson, Miss.
	E. St. Louis, Ill.	Jackson, Miss. Memphis, Tenn. New Orleans, La. Atlanta, Ga. (VIA: IC-Birmingham-SAL) Birmingham, Ala.

MOTOR COMMON CARRIERS HAVING PLAN I AGREEMENTS WITH ILLINOIS CENTRAL RAILROAD

COMMON CARRIER AND HEADQUARTERS	BETWEEN	AND
Gordons Transports, Inc. Memphis, Tenn. (Cont'd)	Memphis, Tenn.	Birmingham, Ala. Jackson, Miss. New Orleans, La.
	Kansas City, Mo.	New Orleans, La. (VIA: IC-E.St.Louis-WAB)
	Jackson, Miss.	New Orleans, La.
Haeckl's Express, Inc. Terre Haute, Ind.	Chicago, Ill.	Council Bluffs, Iowa
Harper Motor Lines, Inc. Elberton, Ga.	Chicago, Ill. Indianapolis, Ind.	Bradenton, Fla. Lake Wales, Fla. Orlando, Fla. Tampa, Fla. (VIA: IC-Birmingham-ACL or SAL-C of Ga.-SAL) Lakeland, Fla. (VIA: IC-Birmingham-ACL)
Hayes Freight Lines, Inc. Winston-Salem, N. C.	Chicago, Ill.	Memphis, Tenn.
Hoover Motor Express Co., Inc. Nashville, Tenn.	Chicago, Ill.	Birmingham, Ala. E. St. Louis, Ill. Memphis, Tenn. Atlanta, Ga. (VIA: IC-Birmingham-SAL)
	E. St. Louis, Ill.	Birmingham, Ala. Memphis, Tenn.
Huber & Huber Motor Express, Inc. Louisville, Ky.	Chicago, Ill.	Atlanta, Ga. (VIA: IC-Birmingham-SAL)
H&W Motor Express Co. Dubuque, Iowa	Chicago, Ill.	Dubuque, Iowa Waterloo, Iowa
Interstate Motor Freight System Grand Rapids, Mich.	Chicago, Ill.	Council Bluffs, Iowa Sioux City, Iowa
Jones Truck Lines, Inc. Springdale, Ark.	Chicago, Ill.	E. St. Louis, Ill. Memphis, Tenn.
Lee-American Freight System, Inc. St. Louis, Mo.	E. St. Louis, Ill.	Memphis, Tenn.
Midwest Emery Freight System, Inc. Chicago, Ill.	Chicago, Ill.	Council Bluffs, Ia. Dubuque, Ia. Ft. Dodge, Ia. Sioux City, Ia. Waterloo, Ia.

MOTOR COMMON CARRIERS HAVING PLAN I AGREEMENTS WITH ILLINOIS CENTRAL RAILROAD

COMMON CARRIER AND HEADQUARTERS	BETWEEN	AND
Missouri-Consolidated Freightways Corp. Menlo Park, Cal.	Chicago, Ill.	Waterloo, Iowa
Motor Freight Corp. Terre Haute, Ind.	Chicago, Ill.	E. St. Louis, Ill.
Nebraska Short Line Carriers, Inc. Omaha, Neb.	Chicago, Ill.	Council Bluffs, Ia.
Nolte Bros. Truck Lines Farnhamville, Iowa	Chicago, Ill.	Council Bluffs, Ia. Ft. Dodge, Iowa
North American Van Lines, Inc. Ft. Wayne, Ind.	Chicago, Ill.	E. St. Louis, Ill. Memphis, Tenn. Birmingham, Ala. Jackson, Miss. New Orleans, La. Greenville, Miss. Jacksonville, Fla. (VIA: IC-Birmingham-ACL)
	E. St. Louis, Ill.	Memphis, Tenn. Jackson, Miss. New Orleans, La. Birmingham, Ala. Greenville, Miss.
	Memphis, Tenn.	Jackson, Miss. New Orleans, La. Birmingham, Ala. Greenville, Miss.
	Jackson, Miss.	New Orleans, La.
Pacific Intermountain Express Co. Oakland, Calif.	Chicago, Ill.	Council Bluffs, Iowa Ft. Dodge, Iowa Sioux City, Iowa Waterloo, Iowa
Pre-Fab Transit Co. Farmer City, Ill.	Memphis, Tenn.	Carbondale, Ill. Champaign, Ill. Chicago, Ill. Clinton, Ill. Louisville, Ky.
Premier Trucking Service Co. Sioux City, Iowa	Chicago, Ill.	Council Bluffs, Iowa Sioux City, Iowa
Red Ball Express Co. Omaha, Nebr.	Chicago, Ill.	Council Bluffs, Iowa Sioux City, Iowa
Refrigerated Transport Co., Inc. Atlanta, Ga.	Chicago, Ill.	Jacksonville, Fla. (VIA: IC-Birmingham-ACL or C of Ga.-SAL)

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MOTOR COMMON CARRIERS HAVING PIAN I AGREEMENTS WITH ILLINOIS CENTRAL RAILROAD

COMMON CARRIER AND HEADQUARTERS	BETWEEN	AND
Roadway Express, Inc. Akron, Ohio	Chicago, Ill.	Birmingham, Ala. Atlanta, Ga. (VIA: IC-Birmingham-SAL)
Silver Fleet Motor Express, Inc. Louisville, Ky.	Chicago, Ill.	Birmingham, Ala. (1) Atlanta, Ga. (VIA: IC-Birmingham-SAL)
Sioux Transportation Co. Sioux City, Iowa	Chicago, Ill.	Sioux City, Iowa
Southern-Plaza Express, Inc. Dallas, Texas	Chicago, Ill.	E. St. Louis, Ill. Memphis, Tenn.
	E. St. Louis, Ill.	Memphis, Tenn.
Strickland Transportation Co., Inc., Dallas, Texas	Chicago, Ill.	E. St. Louis, Ill. Memphis, Tenn.
	E. St. Louis, Ill.	Memphis, Tenn.
Subler, Carl, Trucking, Inc. Versailles, Ohio	Chicago, Ill. E.St.Louis, Ill. Evansville, Ind. Indianapolis, Ind. Peoria, Ill. Louisville, Ind. (2) E.St.Paul, Minn.	Various Florida, Georgia and South Carolina points on ACL, C of Ga., FEC, and SAL (VIA: IC-Birmingham-Connections)
Takin Bros. Freight Lines, Inc. Waterloo, Iowa	Chicago, Ill.	Council Bluffs, Iowa Sioux City, Iowa Waterloo, Iowa
Terminal Transport Co., Inc. Atlanta, Ga.	Chicago, Ill.	Birmingham, Ala. Atlanta, Ga. (VIA: IC-Birmingham-SAL)
T.I.M.E. Inc. Lubbock, Texas	E. St. Louis, Ill.	Memphis, Tenn.
Transamerican Freight Lines, Inc. Detroit, Mich.	Chicago, Ill.	Council Bluffs, Iowa Sioux City, Iowa E. St. Louis, Ill.
United-Buckingham Freight Lines DesMoines, Iowa	Chicago, Ill.	Council Bluffs, Iowa

(1) In connection with Mason & Dixon Lines, Inc., The

(2) Located on C&NW; IC serves as intermediate carrier between Chicago and Birmingham.

MOTOR COMMON CARRIERS HAVING PLAN I AGREEMENTS WITH ILLINOIS CENTRAL RAILROAD

COMMON CARRIER AND HEADQUARTERS	BETWEEN	AND
United Van Lines, Inc. St. Louis, Mo.	Chicago, Ill.	E. St. Louis, Ill. Memphis, Tenn. Birmingham, Ala. Jackson, Miss. New Orleans, La. Greenville, Miss. Jacksonville, Fla. Orlando, Fla. St. Petersburg, Fla. Tampa, Fla. Miami, Fla. (VIA: IC-Birmingham-ACL or ACL-FEC)
	E. St. Louis, Ill.	Memphis, Tenn. Jackson, Miss. New Orleans, La. Birmingham, Ala. Greenville, Miss.
	Memphis, Tenn.	Jackson, Miss. New Orleans, La. Birmingham, Ala. Greenville, Miss.
	Jackson, Miss.	New Orleans, La.
Watson-Wilson Transportation System (Watson Division) Omaha, Neb.	Chicago, Ill.	Council Bluffs, Iowa Sioux City, Iowa Waterloo, Iowa
Watson-Wilson Transportation System (Wilson Division) Nashville, Tenn.	Chicago, Ill.	Atlanta, Ga. (VIA: IC-Birmingham-SAL)
Western Transportation Co. Chicago, Ill.	Chicago, Ill.	Ft. Dodge, Iowa Waterloo, Iowa
Wilson Storage & Transfer Co. Sioux Falls, S. D.	Chicago, Ill.	Atlanta, Ga. (VIA: IC-Birmingham-SAL)

CHICAGO
62126
JRB

MF-ICC 258
Cancels
MF-ICC 246

SUBSTITUTED FREIGHT SERVICE DIRECTORY 29-H

Cancels
Substituted Freight Service Directory 29-G

CENTRAL AND SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, INCORPORATED, AGENT

FOR ACCOUNT OF

PARTICIPATING CARRIERS NAMED ON PAGES 2 AND 3.

This directory applies only in connection with tariffs making specific reference hereto by MF-ICC Number

This Directory Applies Only On Interstate Traffic

SUBSTITUTED FREIGHT SERVICE DIRECTORY

ISSUED FEBRUARY 12, 1962

EFFECTIVE MARCH 20, 1962
(Except as otherwise provided herein)

Form of publication authorized; I.C.C. Permission No. M-18719 (Amended).

The provisions of this directory contravene the long-and-short-haul provisions of Section 4(1) of the Interstate Commerce Act. Relief has been granted by Fourth Section Order No. 19597, and supplemental Fourth Section Orders thereto as shown in Items 50 thru 390. Further relief has been requested by Fourth Section Application No. 72 of February 12, 1962.

ISSUED BY

R. L. WECK, Managing Director
2722 CRITTENDEN DRIVE
P. O. BOX 21143
LOUISVILLE 9, KENTUCKY

Communications regarding provisions published herein should be addressed to the traffic officials of the carriers parties to this directory.

WADE M. RICHARDS

(R)(A)NOTICE

Carriers, items, rules and regulations shown in the directory canceled by this issue and not shown in this directory have been eliminated, names have been changed, or carriers have ceased operation or no longer participate herein.

SUSPENDED MATTER HEREIN.

Portions of Item No. 120 are under Suspension in I.& S. Docket No. M-15074 (First Supplemental Order)(Substituted Rail Service Between Jackson, Miss. and New Orleans, La.).

THE MOTOR CARRIERS PARTIES TO THIS DIRECTORY ARE AS SHOWN BELOW UNDER POWER OF ATTORNEY TO THE CENTRAL AND SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, INCORPORATED, AGENT.

NAME AND ADDRESS OF PARTICIPATING MOTOR CARRIERS	CERTIFICATE OR APPLICATION NO. MC-	POWER OF ATTORNEY MFXA3 NO.	TYPE OF CARRIER
Adkins Transfer Company, Inc., Indianapolis, Ind.	74718	9	R
Alterman Transport Lines, Inc., Miami, Fla.	107107	5	I
Belford Trucking Co., Inc., Miami, Fla.	105813	6	I
Campbell Sixty-Six Express, Inc., Springfield, Mo.	75320	12	I,R
Cole, Jack, Company, A Corporation, Birmingham, Ala.	73464	3	I,R
Dance Freight Lines, Inc., Cincinnati, Ohio	107475	1	I,R
Delta Motor Line, Inc., Jackson, Miss.	105957	10	I,R
Dixie Highway Express, Inc., Meridian, Miss.	108185	4	I,R
Dixie Ohio Express, Inc., Akron, Ohio	30352 43654	5	I,R
Ellis Trucking Co., Inc., Indianapolis, Ind.	108298	1	I,R
Gordons Transports, Inc., Memphis, Tenn.	11220	4	I,R
Harper Motor Lines, Inc., Elberton, Ga.	504	3	I,R
Hayes Freight Lines, Inc., Winston-Salem, N.C.	4 [illegible]	20	I,R
Hennis Freight Lines, Inc., Winston-Salem, N.C.	64994	1	I,R
Hoover Motor Express Company, Inc., Nashville, Tenn.	78632	14	R
Huber & Huber Motor Express, Inc., Louisville, Ky.	52629	10	R
Jones Truck Lines, Inc., Springdale, Ark.	111231	7	I,R
Lee Transportation Company (A Missouri Corporation), St. Louis, Mo.	33278	9	I,R
McLean Trucking Company, Winston-Salem, N.C.	31389	11	I,R
Mason & Dixon Lines, Incorporated, The, Kingsport, Tenn.	59583	7	I,R
Refrigerated Transport Co., Inc., Atlanta, Ga.	107515	5	I
Roadway Express, Inc. (A Delaware Corporation), Akron, Ohio	2202	18	I,R
Service Lines, Inc., St. Louis, Mo.	879	5	R
Silver Fleet Motor Express, Inc., The (An Indiana Corporation), Kingsport, Tenn.	40858	9	R
Smith's Transfer Corporation of Staunton, Virginia, Staunton, Va.	110683	10	I,R
Southern-Plaza Express, Inc., Dallas, Tex.	10928	2	I,R
Strickland Transportation Co., Inc., Dallas, Texas.	59680	6	I,R
Super Service Motor Freight Company, Inc., Nashville, Tenn.	106456	5	I,R
T.I.M.E. Freight, Inc., Lubbock, Texas	35320	7	R
Terminal Transport Company, Inc., Atlanta, Ga.	22229	11	I,R
Wilson Truck Company, Inc., Nashville, Tenn.	65967	1	I,R

I - Irregular Route Carrier. R - Regular Route Carrier.
For explanation of references and abbreviations, see last page of this directory.

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SUBSTITUTED FREIGHT SERVICE DIRECTORY 29-H.

THE RAIL CARRIERS PARTIES TO THIS DIRECTORY ARE AS SHOWN BELOW UNDER POWER OF ATTORNEY TO THE CENTRAL AND SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, INCORPORATED, AGENT.

NAME AND ADDRESS OF PARTICIPATING RAIL CARRIERS	FA2 NO.
Atlantic Coast Line Railroad Company, Wilmington, N.C.	14
Carolina, Clinchfield and Ohio Railway; Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees: Atlantic Coast Line Railroad Company; Louisville and Nashville Railroad Company; Erwin, Tenn. . . .	16
(R)Central of Georgia Railway Company, Savannah, Ga.	30
Chesapeake and Ohio Railway Company, The, Richmond, Va.	19
Chicago & Eastern Illinois Railroad Company, Chicago, Ill.	13
Detroit, Toledo and Ironton Railroad Company, Dearborn, Mich.	14
Florida East Coast Railway Company, St. Augustine, Fla.	11
Illinois Central Railroad Company, Chicago, Ill.	24
Louisville and Nashville Railroad Company, Louisville, Ky.	30
Piedmont and Northern Railway Company, Charlotte, N.C.	9
Monon Railroad, Chicago, Ill.	14
Pennsylvania Railroad Company, The, Philadelphia, Pa.	52
Seaboard Air Line Railroad Company, Richmond, Va.	19
Wabash Railroad Company, St. Louis, Mo.	27

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[fol. 755]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF DARACE M. PEDIGO, MANAGER—PIGGYBACK RATES, LOUISVILLE AND NASHVILLE RAILROAD COMPANY

[fol. 756] My name is Darace M. Pedigo. I am Manager-Piggyback Rates, Louisville and Nashville Railroad Company (hereinafter referred to as L. & N.), with offices at 908 West Broadway, Louisville, Ky. I have direct supervision of the establishment of rates and charges involving TOFC traffic. I have held my present position since November 1, 1959.

* * * * * * *

[fol. 757] In spite of all the tremendous sums of money spent on improvements, etc., the traffic of motor carriers has continued to show an upward trend while that of the [fol. 758] rail carriers has continued to decline. Exhibit 2, attached hereto, shows the volume and percentage distribution of inter-city traffic handled for account of railroads and motor carriers in the United States for the period 1940-1960, the latter year being the last for which statistics are available.

As a result of this steady decline in rail traffic and the concomitant growth of motor carrier traffic, it became apparent that immediate steps must be taken to arrest the decline in rail tonnage, especially the high class merchandise traffic, which, to a large extent, has been due to the rapid growth of private and unregulated motor carriers. The Commission itself has taken cognizance of the increasing trend to private carriage in its annual reports, *e.g.* 72nd Annual Report, Page 3, and 74th Annual Report, Page 2. After careful consideration by management, the L. & N. entered into various forms of TOFC service which have made tremendous strides in arresting the decline of this

Company's traffic. Therefore, any drastic change in the rules governing TOFC service, particularly those involving Plan III, would have an adverse effect on our tonnage and revenues and would deprive the shipping public of a service which it has expressed a desire and need for, and which it has been using extensively.

The L. & N. favors the use of coordinated and substituted service with responsible motor carriers when mutually satisfactory arrangements can be made. This is evidenced by the fact that it now has substituted service arrange- [fol. 759] ments with well over fifty motor carriers and has recently entered into a joint arrangement (Plan V) with a motor common carrier and is currently negotiating with other motor common carriers for like joint arrangements.

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[fol. 760] As an indication of the importance of substituted service to the railroad industry as a whole, and the L. & N. in particular, the Commission's attention is respectfully called to Exhibit No. 1, attached hereto, which shows that for 1961 the L. & N. handled 1771 trailers with estimated revenue of $150,388 under Plan I, which is substituted service, and for the first eight months of 1962, 1590 trailers producing estimated revenue of $135,007. It is expected that substituted service will continue to grow for this Company is regularly, almost daily, receiving requests from additional motor carriers for the establishment of new substituted service arrangements, and from motor carriers with whom we already have limited arrangements for an extension of the arrangements to cover additional origins and destinations.

• • • • • • •

[fol. 761] The L. & N. participates in numerous joint intermodal substituted service arrangements at the present time under agreed divisions established by mutual agreement with the motor carriers. These agreed divisions were

based on several factors including the amount of service performed by the L. & N. and in most, if not all, instances the compensation received by the L. & N. for its portion of the transportation is less than received by it under any all-rail TOFC terminal-to-terminal rates between identical points. By a tariff scheduled to become effective December 12, 1962, the L. & N. has entered into its first so-called Plan V joint rate arangement with a motor carrier. In consummating this arrangement, divisions were agreed to that allow both the L. & N. and the involved motor carrier proportions commensurate with the services performed. These divisions are in the form of percentages that will be applied against the total revenue on any particular shipment.

* * * * * * *

[fol. 762] 1. This rule as proposed requires any rail carrier which provides TOFC service jointly with any motor or water common carrier to enter into like or similar arrangements with all motor or water carriers desiring to enter into such arrangement. We feel that the decision as to whether a rail line will join any motor or water common carrier in joint rates should be left to the managerial discretion of the rail carriers as there may be occasions when the motor or water carrier desiring to enter into joint arrangements is not financially responsible and in those cases we certainly should not be required to enter into joint arrangements with such carriers.

We have entered into joint Plan I (substituted service) arrangements with many motor carriers in connection with which we were able to work out satisfactory arrangements and have every intention of continuing the expansion of this part of our TOFC program by establishing such arrangements with additional motor carriers; however, we feel very strongly that we should have the right to decide [fol. 763] for ourselves whether we will or will not join any particular motor carrier. The Commission's proposed rule would require us to give any motor carrier that requests us to establish such arrangements even though that motor

carrier was not financially responsible or would not agree to the same conditions as worked out jointly with other motor carriers.

We have just embarked on a limited program of establishing joint Plan V rates with motor carriers. We prefer to proceed with caution on this part of our TOFC program, considering the possible effects of such rates on the overall transportation picture. If the Commission's proposed rule went into effect we could expect to be swamped with requests from numerous motor carriers for the establishment of joint Plan V rates and we wouldn't even have the manpower to comply with such requests and still keep up with the other necessary work keeping our TOFC program moving in an orderly manner.

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[fol. 764] While the L&N RR participates in the so-called Plan IV service only to a very limited extent, Plan III has been the fastest growing form of TOFC service on the L&N RR, now representing a very substantial part of our total TOFC traffic. The potential traffic available for such service has not even remotely been developed and we firmly believe that this form of TOFC service will, within the foreseeable future, become a very important component of our overall traffic. Our experience has been that such services offer the most effective means yet developed for the recovery of traffic from industries engaging in private transportation.

As a matter of fact, the primary objective in publishing Plan III and IV rates was to retain and recapture traffic threatened by or actually lost to private transportation.

[fol. 765]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF JOHN A. PARSONS, DIRECTOR OF PIGGYBACK TRAFFIC, LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

My name is John A. Parsons, and I am Director of Piggyback Traffic for the Louisville and Nashville Railroad Company, with offices located at 908 West Broadway, Louisville 1, Kentucky.

• • • • • • • •

[fol. 766] This check showed that the ratio of loaded to [fol. 767] empty trailer miles was 58.5 per cent to 41.5 per cent in August, 1960, whereas in August, 1962, the ratio improved to 68.4 per cent loaded trailer miles and only 31.6 per cent empty trailer miles in August, 1962.

I might add that the L & N's ratio of loaded to empty miles for its trailers is even better than the loaded to empty ratio for its box cars. The L & N's most recent check of the box car ratio indicates that the ratio of loaded to empty miles is 66 per cent to 34 per cent. Furthermore, the L & N gets greater utilization from its trailers than it does from its box cars. Experience has shown that the L & N receives approximately four loads per month in its trailers, whereas it receives only about two loads per month in its box cars. This is in part caused by the fact that box cars are often detained for substantial periods of time in terminals, whereas the more flexible TOFC service does not experience such delays.

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With regard to the L & N's Plan III service and its trip-leasing of trailers, the L & N has recaptured, through such services, traffic which previously moved in private car-

riage. Further, I consider Plan III and trip-leasing a strong deterrent to the trend toward private trucking, about which the Commission has expressed concern. (See 74th Annual Report of the Commission, p. 2.)

[fol. 768]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF H. T. HARRELL
(SEABOARD AIR LINE RR CO.)

Q. Please state your name, address, and occupation.

A. My name is H. T. Harrell. I am employed as Commerce Agent, Seaboard Air Line Railroad Company, 3600 West Broad Street, Richmond, Virginia.

Q. Please outline briefly your experience with the Seaboard.

A. I have been employed in the Freight Traffic Department of Seaboard for the past 36½ years. The first 26 years were mostly spent in analyzing and arranging freight rates in connection with conventional rail service and the divisions of revenue obtained therefrom. Effective December 16, 1952, I was appointed Commerce Agent and until June 1959 handled matters involved in litigation before this Commission and the various State Commissions within the states through which Seaboard operates. During June 1959 I was assigned to the study of the potentialities of "piggybacking," and soon thereafter given the task of arranging for the publication of rates, rules and regulations in connection with the various "Plans" of TOFC service.

[fol. 769] Q. What are your duties in your present position, Mr. Harrell?

A. Analyzing the value of, establishing the measure of, defending the level of and interpreting the application of

freight rates, rules and regulations in connection with all "Plans" of TOFC traffic in which Seaboard participates.

Q. Does the Seaboard participate in TOFC, or so-called piggyback service?

A. It does.

Q. How long has the Seaboard been offering that type of service?

A. We have been active in that field since late 1959.

Q. What type of TOFC service does the Seaboard offer?

A. We offer and participate in all five of the commonly known plans of TOFC service.

Q. To what extent has it actually participated in TOFC service?

A. I think you can judge best by the figures for the 4 years 1959-1962. We began our TOFC services in October 1959, and for that year handled 3 cars with revenue to the Seaboard of $837. In 1960 the two figures were 2,328 cars and $491,675; in 1961, 8,076 cars and $2,187,650. For the first 10 months of 1962 the figures were 14,907 cars and $3,655,138; projected to the full year 1962, the figures would be 17,884 cars and $4,386,166. Total revenue to the Seaboard for October 1959-October 1962 was $6,335,300.

Q. What is the most important of the five general TOFC plans to the Seaboard?

[fol. 770] A. Plan III is the most important to us, closely followed by Plan II. Plan I has grown rapidly, however, and now would have to be ranked along with Plan II in importance.

Q. Does the Seaboard consider its piggyback service to be an important part of its railroad operations?

A. Very much so. It has enabled us to recapture traffic once hauled by the railroads in conventional service and then lost to other forms of transportation, including motor common carriers and private carriage. We find that TOFC gives the shippers a service which they need and which they are willing to use. In so far as the Seaboard is con-

cerned, TOFC traffic has given us an added and important source of revenue.

Relying upon the Commission's 1954 decision in the so-called *New Haven* case, as well as upon subsequent decisions of the Commission, the Seaboard has expended a tremendous amount of money, as well as effort, in expanding its TOFC service. You would be surprised, for example, at the amount of money it takes to build just one ramp. Eight of our ramps have cost in excess of $47,000 each, and range from $47,600 at Charlotte, N. C., to as much as $150,000 at Jacksonville, Fla. We now have completed construction of 54 ramps throughout our system and still others are either under construction or on the drawing boards. At the present time Seaboard has invested $1,147,000 in these added facilities and necessary clearances to accommodate trailer-on-flatcar operations. We [fol. 771] are also a member of the Trailer-Train Company, a costly but necessary venture in order that we might have an adequate supply of freight cars capable of handling trailers in piggyback service. We have also expended a large amount of money in the acquisition of trailers which are necessary for the purpose of making TOFC service available to the great number of small shippers and receivers throughout our territory. One of the companies in which we have an interest, Fruit Growers Express, also has expended a large amount of money in the acquisition of refrigerated trailers which can be used for the transportation of perishable freight, a commodity of particular interest to those of us serving the southeastern states. Train service specially designed for TOFC movements has been established and is being constantly expanded as required for the handling and developing of additional traffic.

Q. Mr. Harrell, please describe the Seaboard's methods of participating in the handling of TOFC traffic. Inasmuch as the commonly used plan numbers are understood by all those having an interest in piggyback service, you might,

in answering this question, comment upon the Seaboard's method of participation in each plan.

A. As I mentioned earlier, we do participate to some extent in each of the five plans. These are my comments with respect to each of them:

Plan I: The Seaboard's participation in this service, so-called substituted service, is increasing. In this type of operation the motor carrier, or its agent, files the neces- [fol. 772] sary tariff or supplement defining the extent the substituted rail service may be used, together with the required Fourth Section application. When the latter is approved by the Commission, our Seaboard Plan I service is available to that motor carrier on the effective date. The Seaboard has joined in the publication of substituted rail-for-motor provisions only in connection with those carriers holding motor common carrier authority to perform the entire service from primary origin to final destination. Such motor carriers are solely responsible to consignors and consignees for the proper assessment of motor carrier rates, schedules, damage claims, etc., to the same extent as on shipments they transport entirely by highway. The Seaboard performs an intermediate service between ramp points to the extent desired by the motor carrier and specifically provided for in the latter's tariffs on file with the Commission. Beyond that, it is not the Seaboard's responsibility to police the authority of another carrier under the Commission's jurisdiction. In fact, this would not be practical since the motor carrier is not required to, nor does it, divulge the names of consignors or consignees or their respective locations. The Seaboard is responsible only to the motor carriers for damages to the trailer or its contents while in its possession, which is as it should be.

This railroad's charges between the specified ramp stations as well as the complete set of rules and regulations governing the responsibilities of each class of carrier in [fol. 773] this substituted rail service are published by the

railroad. These are not filed with the Interstate Commerce Commission or State regulatory bodies. The charges are stated in dollars and cents per trailerload and per flat car of two trailerloads, without regard to the contents of each loaded trailer, provided such articles are not specifically prohibited by the publications. Charges are also provided to cover the transportation of empty trailers. These publications are available to all motor common carriers authorized by the Commission to use the services embraced thereby.

The Seaboard's Plan I charges do not include the cost of placing and removing trailers from flat cars. This service is performed by the motor carrier and, of course, the responsibility for that part of the operation belongs with the motor carrier.

The Seaboard mails brochures and copies of its published schedules of charges, rules, and regulations to all known motor common carriers that might be in a position to use its services. We want Plan I business, and we think that its continuance will assure the public an important and useful transportation service. At present we operate Plan I in connection with 55 motor common carriers, with four more pending I.C.C. approval, and this list is being increased continually.

[fol. 774] *Plan II*:

* * * The Seaboard does not use motor common carriers in substituted highway carrier-for-rail service in line haul transportation along its line. Motor carriers of various classes, including local cartage companies, are employed as the Seaboard's agents only in the performance of the following terminal services, where included in the rates assessed, which the Seaboard could perform with its own equipment and personnel, should it elect to do so: (a) load and unload trailers on and off flat cars; (b) move

trailers, loaded and empty, between railroad ramp and consignors' or consignees' place of business; and (c) load or unload lading into or out of the trailers. These services are covered by written contract between the Seaboard and the motor carriers involved. In some cases the shippers perform their own p.u.d. service, for which allowances are made as provided in our tariffs on file with the Commission.

Plan III:

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[fol. 775] It is my feeling, and the conclusion of our TOFC Department, that the Commission's proposed TOFC rules would destroy our Plan III service. This would mean a substantial financial blow to us, and would result in a loss of service to our shippers and receivers—particularly to our smaller shippers.

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[fol. 776] Strangely enough, too, the Commission's rules for special procedure in this case have not made any provision for the service on us of the position of our motor carrier competitors in time to prepare this verified statement with their position in mind.

Over the past years, particularly since 1954, the railroads, often in coordination with motor common carriers, have developed and provided shippers with various piggyback services tailored to meet their particular needs. In this way, the railroads have regained much traffic which had been lost to them, particularly the traffic which had been lost to private carriage. There have been very few complaints by shippers of our TOFC services which would in any way indicate the need for the harsh regulations now being proposed by the Commission. In fact, the shipper response in this proceeding is to the contrary; they recognize the fact that the proposed rules would hamstring the growth and flexibility of TOFC services.

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[fol. 777]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (PIGGYBACK SERVICE)

* * * * * * *

EXCERPTS FROM VERIFIED STATEMENT OF WILLIAM C. SCHAFER (WESTERN MD. RWY. CO.)

I have been employed by the Western Maryland Railway Company for the past 42 years all of which time has been spent in the Traffic Department. During the past 20 years, I have been engaged exclusively in the handling of various rate matters, including the rates on coal and coke, and in addition thereto, have supervision over all rate matters for the Western Maryland Railway. I have participated in formal proceedings before the Interstate Commerce Commission as well as various state commissions where rate or general traffic matters were involved. My first position was that of a rate clerk and since that time I have advanced through the various positions until I was appointed General Traffic Manager on May 1, 1959.

[fol. 778] Western Maryland Railway Company is a Class I railroad operating between its eastern termini of Baltimore, Maryland, and York, Pennsylvania, on the one hand, and its western terminus, Connellsville, Pennsylvania, on the other. The Western Maryland does not publish any TOFC rates which apply locally on the Western Maryland but does publish rates applying on TOFC traffic interchanged with the Western Maryland's connecting railroads. The Western Maryland, for example, is an integral part of a fast service route commonly known in the railroad industry as the "Alphabet Route." This route extends between points on the Western Maryland in the east and Chicago, Illinois, and St. Louis, Missouri, in the west in

Official Territory. The Western Maryland also participates in Plan II traffic with the Alphabet Route to various gateways such as Chicago, Illinois, St. Louis, Missouri, Louisville, Kentucky, to destinations in Southern Freight Association Territory, Southwestern Territory, Western Trunk Line Territory and Transcontinental Territory, as the case may be. The so-called "Alphabet Route" affords second morning delivery in Chicago, Illinois, and fifth morning delivery in San Franscisco, California, and is competitive as to rate, service and transit time with direct route rail carriers from and to the same territories.

Inasmuch as the Western Maryland presently offers only Plans II and III trailer-on-flat-car service, this statement will be directed only to these Plans.

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[fol. 779]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF
JOSEPH A. KIRKMAN (SOUTHERN RWY. SYSTEM)

My name is Joseph A. Kirkman. I am General Manager of Southern Railway System's Rail-Highway Services. * * *

The Southern's Rail-Highway Services are completely dedicated to making Southern completely useful to the shipping public. Over the years, much traffic has left the railroad and gone into private carriage. We have been successful in returning some of this private carriage traffic, as well as some traffic lost to regulated motor carriers, to the Southern by use of the Plan III rates. * * *

* * * * * * *

[fol. 780] The leasing of trailers under Plan III, both for round trips and one-way movements makes it possible for the shipping public to use our over-the-road service regardless of whether the shipper is large or small. It allows them to provide services for their customers which they have not been able to do under the common carrier tariffs, whether it be rail or motor. It permits the small company

to compete with the larger organization by servicing customers in a like area in the same manner. We, therefore, strongly urge that the Interstate Commerce Commission's proposed Rule C-3 not be adopted.

The Southern Railway does not believe that we should provide a substituted service for the long haul motor carrier, our competitor, at a cost cheaper than he can perform such service himself. We, therefore, do not provide Plan I or substituted service for the motor carrier. We do not believe it is proper for the Southern to haul an unknown quantity of freight from an unknown shipper to an unknown destination for a carrier who is in direct competition with our own service.

Southern participates in Plan II service, but does not maintain pickup and delivery tractors of its own. We elect to use either a local cartage carrier or a short-haul motor carrier.

[fol. 781] The so-called Plan V coordinated joint motor carrier and rail services, under joint rates and through routes, provides the shipping public with a more efficient and dependable service which has not been heretofore equaled. It combines the motor carrier's inherent advantage in providing pickup, delivery, segregation and distribution service with the inherent advantage of the railroad in providing the most efficient and economical line haul service.

The Southern Railway System is presently negotiating with numerous motor carriers to join in providing such a service and is willing to solicit jointly for traffic moving under such an arrangement. The concept of coordinated rail and motor service provides the answer to many of the shippers' problems.

Plan V coordinated TOFC service affords the shipping public a service which utilizes the best of the existing modes of transportation in a combined endeavor. In this manner, both the motor carrier and the railroad jointly share in the efforts to solicit traffic and jointly share in the servicing of this traffic. The customer reaps the benefits.

[fol. 782]

BEFORE THE INTERSTATE COMMERCE COMMISSION

STATEMENT No. 1

Ex Parte No. 230—Substituted Service—
Charges and Practices of For-Hire Carriers
and Freight Forwarders (Piggy-back Service)

VERIFIED STATEMENT OF LEVI STRAUSS AND COMPANY

William C. Wirth, traffic manager of Levi Strauss and Company deposes and says:

1. Prior to January 1962 we were transporting cotton denims in our own proprietary motor carrier equipment from Greensboro, North Carolina to Knoxville, Tennessee. The volume of the movement was such as to require about 50 per cent use of one tractor-trailer combination transporting 35,000 pounds per load. This had to be supplemented by additional loads where common motor carrier service was used.

2. As the volume of movement was increasing we were contemplating putting on an additional proprietary tractor-trailer combination.

3. On January 23, 1962 a representative of the Southern Railway System contacted our factory at Knoxville, Tennessee suggesting that they were interested in furnishing us trailer-on-flat-car service for this movement. This resulted in the establishment of rates by the Southern Railway System for transportation from Greensboro, North Carolina to Knoxville, Tennessee which when taken together with the cost of the trailers which could be rented from the Southern as well as the cost of pulling trailers to and from loading ramps at origin and unloading ramp at destination performed by local cartage companies made such a total transportation service compare favorably cost-wise with a proprietary operation.

4. Upon our expressed interest in such service the Southern established charges in its tariff 183-B, I.C.C. A-11558 effective April 15, 1962 and also entered into a trailer lease contract with us.

5. We discontinued operation of our proprietary equipment in this haul and cancelled plans for the addition of more proprietary equipment. We commenced using the Southern trailer-on-flat-car service during the week of April 23, 1962 and simultaneously leased trailers from the Southern sufficient to take care of 100 per cent of our transportation needs for the movement of cotton denims from Greensboro, North Carolina to Knoxville, Tennessee.

6. Were the Interstate Commerce Commission to put regulations in effect which would prohibit the Southern from furnishing us trailers and trailer-on-flat-car service, we would return to our former proprietary operation.

William C. Wirth

[fol. 783]

BEFORE THE INTERSTATE COMMERCE COMMISSION

STATEMENT NO. 2

EXCERPTS FROM VERIFIED STATEMENT OF M. J. LANIER

(GLAZER'S WHOLESALE DRUG COMPANY, INC.)

* * * * * * *

My name is M. J. Lanier, General Traffic Manager of Glazer's Wholesale Drug Co., Inc., wholesale liquors dealers, with headquarter in Dallas, Texas.

Our company operates 13 branches in Texas, Louisiana and Arkansas, distributing liquors to all retail out-lets in this three state area.

At the present time we are using Plan III TOFC Service from the New York and Kentucky areas to several of our

warehouses. We sincerely urge the continuation of Plan III TOFC Service and the continuation of one way leasing of trailers or containers for the following reasons.

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3. By utilizing Plan III TOFC, we make a considerable saving in our over all freight cost, as well as a saving in our pick up and distribution cost.

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[fol. 784]

BEFORE THE INTERSTATE COMMERCE COMMISSION

STATEMENT No. 3

EXCERPTS FROM VERIFIED STATEMENT OF HERBERT SLATERY, JR. (EAST TENNESSEE PACKING COMPANY)

1—My name is Herbert Slatery, Jr., and I am President of East Tennessee Packing Company, P. O. Box 200, Knoxville, Tennessee.

2—We presently use Plan III TOFC service,

3—Meat products are being shipped in Plan III service between Knoxville, Tennessee and Washington, D. C., and Knoxville, Tenn., and Philadelphia, Pa.

4—We have been using this service since June, 1962. Traffic was moved by commercial carrier and our own equipment prior to that date.

• • • • • • • •

[fol. 785] 9—If we were not able to lease trailers from the rail carriers the traffic would be moved by our own equipment or by commercial carrier.

10—This is a real advantage to a company of our size in using piggyback service due to the fact that we are able to retain capital by leasing equipment from the rail carrier.

11—The short time we have used piggyback service we have been able to reduce our delivery costs by roughly 25%.

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[fol. 786]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 4

EXCERPTS FROM VERIFIED STATEMENT OF HERMAN L. TAYLOR
(J. M. Tull Metal & Supply Co., Inc.)

My name is Herman L. Taylor, Traffic Manager for the J. M. Tull Metal & Supply Co., Inc., Atlanta, Georgia. The J. M. Tull Company has branch warehouses located in Birmingham, Alabama, Greenville, South Carolina, New Orleans, Louisiana and Miami, Jacksonville and Tampa, Florida.

During the past few months, we have had occasion to use Plan III TOFC service and have found it to be very satisfactory. Thus far, this is the only TOFC plan that we have used, however, we are investigating the service, economics and feasibility of using some of the other services offered under the various TOFC plans.

• • • • • • •

[fol. 787] 3. The carriers being unable to lease equipment would give some companies an unfair advantage over the other companies. For example:—

(a.) Many small companies could not afford to purchase trailers and therefore, would be unable to use Plan III service. The railroads would be put in a position of having to discriminate against these small shippers.

(b.) Companies having an ideal situation, that is movements in both directions, would have an advantage over the companies who do not have this ideal situation.

(c.) The above two situations can be avoided as long as the railroads can lease equipment to all companies who want to use Plan III service.

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The traffic that we have been able to ship via Plan III TOFC service is traffic that would have moved in our private truck had we not been able to trip lease trailers from the railroads. We have found, through the trip lease [fol. 788] method, that generally it is cheaper than our private trucks.

* * * * * * * *

During the past several years and even now, there is a lot of controversy about private carriage in regards to the grey area that many people believe surround that type of transportation. Private carriage is made necessary, in many instances, because the for hire transportation industry will not—or cannot—supply the shipper with the equipment necessary to move his merchandise.

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[fol. 789]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 6

EXCERPTS FROM VERIFIED STATEMENT OF
WILLIAM H. COLLISTER
(DEERING MILLIKEN SERVICE CORPORATION)
SERVICE CORPORATION)

1. Name: William H. Collister
Company: Deering Milliken Service Corporation
Position: Traffic Manager

2. We are presently using Plan III TOFC service and, to date, have not used any of the other Plans.

3. We are shipping unfinished woolen piece goods from the South to the East.

4. We have been using Plan III for approximately four months.

5. The present approximate monthly volume is 280,000 pounds. This is our initial movement by TOFC and we

anticipate an increase of several hundred per cent in another year.

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9. Our traffic would move by private carriage if this Plan were not available or, if this would not be practical, the finishing operation would be accomplished in the South eliminating the haul altogether.

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[fol. 790]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 7

EXCERPTS FROM VERIFIED STATEMENT OF P. W. CUTSHALL
(SOUTH-WESTERN PUBLISHING CO.)

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For about thirty months we have used Plan III service for volume shipments of books NOIBN and School Blanks and Forms between Cincinnati and such points as New Rochelle, New York; Atlanta, Georgia; Jacksonville, Florida; New Orleans, Louisiana and Dallas, Texas. This service enables us to distribute our publications from our home plant to branches and depositories at a satisfactory rate and at a profit for the railroads. We now lease trailers from the railroads. To be deprived of this service would place us at a distinct disadvantage with shippers who, because of larger volume or greater financial strength, could provide their own trailer equipment.

Before we used Plan III service we used common carrier trucks or freight forwarders. To find it necessary to go back to those would be a move in the wrong direction be- [fol. 791] cause of our increasing volume and satisfactory service under Plan III. Our present volume will average better than 150,000 pounds per month and there is every prospect it will increase.

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[fol. 792]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 8

EXCERPTS FROM VERIFIED STATEMENT OF
WM. M. BLACKISTON (PROGRESS MFG. CO., INC.)

—1— Wm. M. Blackiston, Traffic Manager
Progress Mfg. Co., Inc.
Castor Avenue & Tulip Street
Philadelphia 34, Pennsylvania

—2— We presently use Plan III TOFC service, and at times also Plan II TOFC service.

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—4— We have been using Plan III service since May, 1960. Previously this freight moved in our private carriage operation.

—5— Present monthly volume moving in Plan III is twelve trailerloads, which would compare favorably with prior periods.

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[fol. 793]

—9— If we could not lease trailers from railroad, we would have to work these trailerloads into our private operation.

—10— The leasing of trailers from railroad has enabled us to slash our private carriage operation (leased equipment).

—11— The use of Plan III in our case is more economical than private carriage.

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[fol. 794]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 9

EXCERPTS FROM VERIFIED STATEMENT OF JAMES C. NICHOLS
(BEAUNIT CORPORATION)

Testimony of Witness James C. Nichols, Beverly, New Jersey, Manager, Trucking Department, Beaunit Corporation, Penna. & Bentley Aves., Beverly, New Jersey.

—We Are presently using Plan III service, and no other plans.

—Our shipments are Textile Products, and move between Bristol, Va.; Gastonia, N.C.; and Charlotte, N.C. *to* Phila., Pa.; Kearny, N.J.; and Providence, R.I.

—We have been using Plan III since July 12th, 1962, previous to this All our freight moved via our own Private Carriage system, in our own trailers, and any overage moved via common carrier (motor).

• • • • • • •

—Plan III is More economical than private carriage, that is why we use it, if running time was better, we'd use it even more, but so far, we use it only at the weekend, or on huge shipments when arrival time is not critical.

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[fol. 795]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 10

EXCERPTS FROM VERIFIED STATEMENT OF EUGENE MCHARGUE
(NUTONE, INC.)

My name is Eugene McHargue and I am Traffic Manager for NuTone, Inc., Cincinnati, Ohio.

NuTone manufactures Electrical Built-In products for homes and distributes these products throughout the United

States and Canada under very competitive conditions, therefore Plan III T O F C service is used wherever possible because of the resultant economy and this is the only Plan used for outbound shipments.

All of our Plan III shipments originate at Cincinnati, Ohio destined for Newark, N. J., Atlanta, Ga., and Dallas, Texas. NuTone is not a Plan III shipper in and of itself. Our loads are married with loads from other Cincinnati shippers in conjunction with a non-profit Shippers Association of which we and other Cincinnati shippers are members.

NuTone has used this Plan since July of 1961. The traffic prior to that time moving LTL or LCL via common carriers.

NuTone moves at least 15 van loads per month which is about 225,000 pounds to the three destinations listed above. None of this tonnage moved under Plan III prior to July, 1961.

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[fol. 796]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 11

EXCERPTS FROM VERIFIED STATEMENT OF T. H. KENNEDY, TRAFFIC MANAGER, KORDITE CORPORATION, MACEDON, NEW YORK

Please be advised that the Kordite Corporation presently uses Plan III, TOFC service in shipping our commodities which are basically plastic bags and plastic film or sheeting. The only TOFC service that we use is Plan III. The total tonnage involved in this plan originates in our Macedon, New York plant and is destined to one of two points—either Atlanta, Georgia or Dallas, Texas.

We have been using this service since May of 1962, and prior to this time we utilized motor carriers for the tonnage moving to Atlanta, however, prior to this time we had no sizable tonnage moving to Dallas because since May of 1962 we opened a warehouse facility in Dallas, thus affording us

the opportunity to move in volume to this point. At the present time our average monthly tonnage totals 153,000 lbs; naturally, this is nearly double the tonnage that was involved prior to May of 1962 because, as is pointed out previously, we have opened a new warehouse in Dallas.

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[fol. 797] There is no question but that Plan III, in our operation, is much more economical than private carriage and goes a long way in curtailing any expansion of our private carriage.

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[fol. 798]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 12

EXCERPTS FROM VERIFIED STATEMENT OF DAVIS CRICKENBERGER (Barber and Ross, Inc.)

My name is Davis Crickenberger, Executive Vice President of Barber and Ross, Inc., 2323 Fourth Street, Northeast, Washington, D. C. My company manufactures packaged homes in Leesburg, Va. These homes are distributed to such points in the Southeast as Knoxville, Tenn., Charlotte and Asheville, N. C., and Danville, Va. Our present plans are to increase our distribution area in the Southeast with an accompanying increase in volume.

About a year ago, we started using the railroads' Plan III TOFC service. Prior to that time our shipments moved exclusively in private carriage. Our present monthly volume in TOFC service is approximately two containers but as our sales increase we have hopes of increasing our use of Plan III.

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[fol. 799] The rail carriers have provided a service which is tailored to meet our needs. Container shipping in Plan III service and the economies which we have experienced in

connection with this method of transportation have enabled us to open new markets much further afield than our previous distribution area.

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[fol. 800]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 13

EXCERPTS FROM VERIFIED STATEMENT OF JOHN W. JONES, JR.

"Testimony of Witness John W. Jones, Jr."

I am the Administrative Manager of Southern Dyestuff Company Division of Martin Marietta Corporation, Charlotte, North Carolina. My duties in this position include that of Company Traffic Manager.

We are presently using Plan III TOFC service and have been using this service since July, 1962.

Beginning in July, 1962, we began to use this service for the shipment of our own manufactured goods from our plant near Charlotte, North Carolina to various customers and/or warehousing points in the New York, New Jersey, Providence, Rhode Island area. We return from these same areas bringing raw materials back to our plant used in the processes of our regular production schedule. These items formerly moved by our own company equipment to the extent of approximately 85% with the remaining 15% divided equally between common carrier truck and rail service.

We move an average of 6 inbound and 6 outbound truck loads per month which compares equally with prior period movements on our own vehicles as mentioned above.

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[fol. 801]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 14

Ex Parte 230—TOFC Investigation

EXCERPTS FROM VERIFIED STATEMENT OF B. H. ZIMMERMAN, EXECUTIVE VICE PRESIDENT GATE CITY TABLE COMPANY, ATLANTA, GEORGIA

My name is B. H. Zimmerman, Executive Vice President of Gate City Table Company, Inc., Atlanta, Georgia, and we would like to see the continuance of the Plan III Piggyback service, inasmuch as this has been of great benefit and value to us. For the past several months we have been using this service from Atlanta to Mobile, Alabama and also from Atlanta to Memphis, Tennessee, shipping furniture knocked down, with extremely good results.

Prior to the time of the inauguration of this type service, we were using our own tractors and trailers; however, we have found that by use of the piggyback service it has reduced our cost to us and also allows us to have our own equipment available for delivery of merchandise to other customers into areas where there is no piggyback service available.

We do not feel that the continuance of this service will in any way have any effect on other types of transportation, as if we do not continue using this service we would resort back to using our own equipment.

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[fol. 802]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 15

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF J. WAYNE BRAZEAL
(Butler Manufacturing Company)

My name is J. Wayne Brazeal. I am General Traffic Manager of Butler Manufacturing Company, a corporation organized and existing under the laws of the State of Missouri, with principal offices at 7400 E. 13th Street, Kansas City 26, Missouri. I have been employed by that concern for 36 years; the last 12 of which have been in my present capacity.

Butler Manufacturing Company is a metal and plastics fabricator with factories at Galesburg, Illinois; Grandview, Missouri; Kansas City, Missouri; Minneapolis, Minnesota; Pratt City, Alabama and Richmond, California. Our principal products are Pre-fabricated Metal Buildings; Structural Steel, Metal and Plastic Panels for the Construction Industry; Grain Bins, Silos, Feeders, Waterers and Shelters for the Farm; Metal Tanks; Tank Trailers for handling liquid and bulk products; Steel Containers and Airplane Landing Mats. Piggyback service is used in shipping some of each of those products.

* * * * * * *

[fol. 803] Approximately 75% of our trailer production now moves via TOFC. Prior to the availability of TOFC, approximately 50% of our trailers moved by private carriers; which meant that the purchasers picked up the trailers at our plants with their own tractors. Now no more than 12½% of our trailers move via private carriers. Therefore, we can see no reason for the limiting the movement of empty trailers in TOFC service to the return movement only. Such a limitation would be certain to in-

crease the use of private carriage in the movement of our trailers.

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[fol. 804]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 17

I.C.C. Ex Parte 230—Substituted Service

Charges and Practices of For-Hire
Carriers and Freight Forwarders
(Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF BERT ROMBERG
(Commercial Metals Company)

"Testimony of Witness Bert Romberg"

My name is Bert Romberg, residing in Dallas, Texas, and am employed as Manager, Non-Ferrous Department by Commercial Metals Company with general offices and principal place of business in Dallas, Texas. Since I have responsibility for most of the non-ferrous metals sold by this company, I am familiar with the accumulation, preparation, sale and shipping of non-ferrous metal scrap. This Company maintains and operates scrap metal warehouses in Shreveport, La., Beaumont, Dallas, Ft. Worth, and Houston, Texas, also several other points in the Southwest. Similar warehouses are also operated in Jacksonville, Orlando and Tampa, Florida. The function of these warehouses is to accumulate, prepare and ship non-ferrous scrap metal, the sale of, which including shipping directions, is under the supervision of this office.

In the past year, at the direction of this office, shipment averaging approximately 200 tons per month have been made from the above named Texas and Florida origins utilizing Plan III, including carrier-leased equipment, of-

fered by the Southern Ry and its connections to destinations in the Southeast and also to East St. Louis, Illinois. The Southeastern destinations include Birmingham, Dearmandville and Decatur, Alabama. There are other consuming points in the Southeast to which shipments will be made if and when TOFC service is made available.

[fol. 805] Prior to using TOFC service, shipments were made either in conventional box car service or in trucks operated by us or the buyer, predominately in buyer's trucks or possibly no shipments were made. In other words, The Southern's TOFC Plan III in all of its aspects has enabled us to develop new markets and increase sales and movements to already existing markets.

It is the considered opinion of this company that proposed rule C-3 should not be approved and adopted by the ICC for the following reasons:

a) The non-ferrous scrap industry is characterized by intense competition and, obviously, to remain competitive with other dealers in scrap, we must control costs of operations including transportation. The Plan III services available is one of the means of achieving this goal. If the ability to lease carrier-owned equipment is denied us, we either would forego certain sales or purchase over the road equipment at heavy capital cost. If such a purchase is made necessary, it is quite likely that shipments would move over the highways. We cannot hope to compete successfully with those shippers using their own equipment if we had to depend entirely on box car service. Piggy back services provide us with a flexibility that cannot be achieved using conventional equipment.

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[fol. 806]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 19

EXCERPTS FROM VERIFIED STATEMENT OF E. D. GOODFELLOW CO., INC.

Comes now the E. D. Goodfellow Co., Inc., and files this statement of position in the above matter.

This company is presently using Plan III TOFC service. In addition to this service shipments are made by commercial carriers.

The commodities being shipped in the Plan III service consist of factory assembled, steel cooling towers. Shipments are made to all sections of the United States, and where possible in Plan III service.

This company has been using Plan III service since it was inaugurated by the Southern Railway System. Prior to that shipments were made by LTL, LCL, and private contract carriers.

This company does not own its own trailers. They are leased from the rail carriers. Rates and terms of lease are as set forth in the Plan III contract of the Southern Railway System.

It is strictly to our advantage to trip lease trailers from the rail carriers for the savings involved, namely, the initial cost, maintenance, taxes, insurance, etc.

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[fol. 807]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 20

VERIFIED STATEMENT OF D. F. BLACKWELDER
(SEYDEL-WOOLLEY & COMPANY)

November 30, 1962

Re: Ex Parte 230—TOFC Investigation

Testimony of D. F. Blackwelder, Secretary of Seydel-Woolley & Company, 748 Rice Street, N.W., Atlanta 18, Georgia.

We ship both outbound and inbound utilizing common carriers and our own motor trailer equipment. Part of our common carrier service includes utilization of Plan III TOFC Service. This service has proven effective for us to meet competitive situations and actually improve our own service to customers enabling us to enhance our position as a vendor-customer relationship.

Our method of utilization, Plan III Service, has enabled us to use our own tractor or tractors for delivery of our chemicals at the point of destination. This enables us to use our own truck drivers who actually act as ambassadors to our customers. This method of utilization, of course, enables us to keep the size of our owned equipment to a minimum.

Of course, the practical feature to the whole item of Plan III is economy. Freight costs under Plan III actually are comparable to our own delivery system.

I solemnly declare that I have examined the foregoing statement and that to the best of my knowledge and belief, the statements contained herein are true.

D. F. Blackwelder.

[fol. 808]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 12

EXCERPTS FROM VERIFIED STATEMENT OF R. R. WEIST
(MAGNAVOX COMPANY)

My name is R. R. Weist. I am General Traffic Manager of The Magnavox Company with General Offices at 2131 Bueter Road, Fort Wayne, Indiana. I submit the following statements in opposition to the adoption of Rule C-3 as proposed in Ex Parte 230 prohibiting railroad leasing of equipment for use in TOFC service.

Our present participation in TOFC operations is strictly in Plan III wherein the economical interests are compatible and attractive to our type of operation. The commodities we ship under this plan consist mainly of radios, television sets, tables, phonograph sets and parts concurrent thereto, from our points of manufacture in Tennessee to our consumer market concentration on the East Coast.

We have been using Plan III for the past eight (8) months, and its inception was commenced only after a vigorous survey and all factors analyzed, that we realized its equitable potential in our transportation program. Prior to our utilization of this plan, this traffic moved via common motor carriers and in our own fleet of trucks.

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[fol. 809]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 23

VERIFIED STATEMENT OF WM. L. DOLS
(EASTERN PRODUCTS CORPORATION)

November 30, 1962

Ex Parte 230
Testimony of Witness
Wm. L. Dols, G.T.M.
Eastern Products Corporation
1601 Wicomico Street,
Baltimore 30, Maryland.

At present we are using Plan III TOFC service in addition to Plan II TOFC service, transporting the following commodities, Venetian Blinds, Venetian Blind Hardware, Venetian Blind Steel Channels, Venetian Blind Slat Material, Steel Tubing, Curtain Rods, metal, Venetian Blind Tape, Studding or Furring, iron or steel, Ceiling Panels, Folding Doors or Partitions, Aluminum Canopies, Awnings, Strip Steel on skids, Strip Aluminum on skids, Window Shades, Cloth with advertising matter and or displays for above items, via Plan III from Baltimore to Atlanta, Georgia and from Baltimore to Chicago, Illinois, and Plan II from Baltimore to Detroit and Baltimore to Dallas, Texas, for distribution, we have been using these two Plans as they were made available, prior to that time we used Highway or Common Carrier, the volume via Plan III to the above points average about thirty trailer loads per month.

[fol. 810] We do not have our own trailers to move this merchandise over the road, therefore we depend entirely on leasing the trailers from the railroad, if these were not available we would have to resort to other methods of moving our freight or purchasing or leasing the required equipment, for over the road hauls.

While our company does not care to go into transportation, Plans II and III have been the only relief we have had and we further find it the most economical mode of transportation.

More and more manufacturers are forced to transport their own wares because of the ever increasing rates, and all forms of carriers are bitterly complaining of the loss of revenue due to the do it yourself method, this has been a challenge for these same carriers to come up with something to regain the loss, Plan III and II has been our answer, Rule C-3 proposes that more shippers should acquire more equipment, either by purchase or lease, thereby defeating the whole purpose of transportation by carriers.

We most strenuously oppose any rule or regulation that would deter us from keeping our shipping cost at a minimum, via TOFC plans, that we may pass the savings on to our good customers.

"I solemnly declare that I have examined the foregoing statement, and that, to the best of my knowledge and belief, the representations contained therein are true".

Wm. L. Dols.

[fol. 811]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 24

VERIFIED STATEMENT OF JOHN B. SONDEY
(GENERAL ANILINE & FILM CORPORATION)

November 30, 1962

Testimony of John B. Sondey, General Traffic Manager of General Aniline & Film Corp., Dyestuff & Chemical Division, 435 Hudson St., New York 14, N. Y.

Ex Parte 230 Hearing

We are present users of Plan 3 TOFC service, and would like to bespeak in favor of continuing the plan of the railroads leasing trailers to industry.

Previous to institution of piggy-back service, we have used truck lines mostly on our shipments. Since Piggy-Back Plan 3 was inaugurated to Charlotte, N. C., we have been using it, running as high as 3 to 4 shipments per month, or up to 300,000 lbs. per month. Additionally we have quite a few other shipments to Charlotte via truck, which are usually "Rush" and require next day delivery by truck.

Our operation is set up on the basis of serving our customers from our branches. To these branches we ship via the lowest costed means. As we do not have sufficient volume to acquire our own trailers, we welcome the provision that the railroads have set up of leasing trailers. This works to the advantage of the railroads also, because they are able to return the trailers loaded. If we should not be able to lease trailers, we would have to resort more to truck shipments, because the regular box car movement is too slow. Piggy-Back Plan 3 to Charlotte affords us 2nd morning delivery. Via truck delivery is had next day. Via Box car we would have to figure 4 or 5 days. We have been trying to increase our movement via Piggy-Back Plan 3, and have been trying not only to increase the tonnage to Charlotte, but also Chicago and other points where we have made occasional Plan 3 shipments.

[fol. 812]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 25

VERIFIED STATEMENT OF JOHN W. McLACHLAN
(Metal Products Division, Armco Steel Corporation)

Testimony of Witness John W. McLachlan

My name is John W. McLachlan, and I am employed in the traffic department of the Metal Products Division, Armco Steel Corporation, Washington Court House, Ohio plant.

The Washington Court House, Ohio plant manufactures a complete line of steel buildings used in industry, commerce, agriculture, government, etc. We ship these buildings throughout the United States and Canada. The great majority of our shipments require delivery direct to a construction site, therefore truck delivery is necessary. Approximately seventy percent of our shipments move by truck.

[fol. 813] We have shipped via piggyback to a limited extent and have found this type of transportation to be very desirable. We intend to expand our use of piggyback service in the future wherever possible.

We are opposed to the proposed Rule C-3 which states:

> "Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders."

The only piggyback service available to us is under Plan III. As we do not own or operate any trucks or trailers, it is necessary that we lease trailers from a railroad on a trip lease basis.

Due to the nature of our business, it is not economically feasible for us to own or operate our own equipment. If this lease arrangement were not possible, we would not have any available piggyback service.

[fol. 814] We would be very much in favor of a rule which would permit the continuation of shippers leasing equipment from rail carriers under uniform rules and regulations published in tariffs on file with the Commission.

I solemnly declare that I have examined the foregoing statement, and that, to the best of my knowledge and belief, the representations contained therein are true.

John W. McLachlan.

[fol. 815]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 26

VERIFIED STATEMENT OF JAMES B. HAMMOCK
(DELTA TANK MANUFACTURING CO. INC.)

Ex Parte 230—T.O.F.C. Investigation

My name is James B. Hammock. I am General Manager of Delta Tank Manufacturing Company, Inc., 740 Seventh Street, Macon, Georgia, and it is my wish to submit the following statement, bearing on a proposed rule which would prohibit the leasing of equipment by railroads to shippers using TOFC service. We are definitely opposed to such a rule, since it would work a hardship on our use of Plan III TOFC service, and increase cost of marketing our goods.

Our firm, Delta Tank Manufacturing Company, located at Macon, Georgia, manufactures and ships steel tanks, ranging in size from 1,000 gallon capacity downward—mostly of the 500 gallon size. These tanks are used for LPG storage and are marketed in the South and Midwest. We are a volume producer of these tanks and to give you some idea of this volume, we use 10,000,000 pounds of [fol. 816] steel last year in our manufacturing process.

Delta Tank Manufacturing Company uses private carriage in the marketing of our product for the shorter distances and to points to which common carrier truck service is not readily available. We also use common carrier motor transportation. For transportation to the longer distance points (St. Louis, Mo. and Cincinnati, Ohio, for example), Plan III TOFC rail service works well to our economic advantage, as well as to service advantage.

Our Tanks are loaded on flat-bed trailers mostly of size 40 feet in length. We are, and for some time, have used Plan III TOFC rail service, leasing flat-bed trailers from rail carrier. This form of transportation and availability of leasing arrangements, is an attractive form of transpor-

tation and we respectfully urge that no rule be established to prevent leasing of equipment in TOFC service.

I solemnly declare that I have examined the foregoing statement and that to the best of my knowledge and belief, the representations contained therein are true.

Delta Tank Manufacturing Co., Inc., James B. Hammock, General Manager.

[fol. 817]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 27

EXCERPTS FROM VERIFIED STATEMENT OF FRED L. GROGAN (AMARLITE CORPORATION)

November 30, 1962

SUBJECT: Ex Parte No. 230—Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

TESTIMONY OF: Fred L. Grogan, Traffic Manager
Amarlite Corporation
Atlanta, Georgia

My name is Fred L. Grogan. I am employed by Amarlite Corporation of Atlanta, Georgia.

My firm presently is using Plan III Piggyback. In the past we have shipped by Plan II and Plan V also. The commodities shipped fall under the category of aluminum building metal works. Although our points of shipment under Plan III have been restricted to Dallas, Texas and Paramus, New Jersey, from Atlanta, Georgia, we intend to utilize Plan III service to Chicago, Illinois; Cleveland, Ohio; and to Los Angeles, California when such service is available to the west coast. These are the cities in which our district warehouses are located.

Amarlite Corporation first shipped under Plan III in May, 1962. For approximately one and one-half years prior

to that time we used common motor carrier, and previous to that we shipped by our company truck.

* * * * * * *

[fol. 818] Without trip leasing the trailers from the railroads, it would be impossible for us to economically use Plan III. If unable to lease trailers from the railroads it would be necessary for us to move our freight by the more expensive common motor carrier, or by private carriage. However, even private carriage would be more costly than using Plan III with the trip leasing arrangement.

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[fol. 819]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 28

EXCERPTS FROM VERIFIED STATEMENT OF JOHN T. VAN HART
(THE F. H. LAWSON COMPANY)

We wish to voice our opposition to proposed Rule C-3 or any similar rule that would eliminate our being able to lease suitable equipment from a railroad for Plan III service.

For about six months we have used Plan III service for volume shipments of Sheet Steel Ware, Cans, Pails and Tubs between Cincinnati, Atlanta, Georgia; Jacksonville, Florida; New Orleans, Louisiana and New York, New York. This service enables us to distribute our publications from our home plant to branches and depositories at a satisfactory rate and at a profit for the railroads. We now lease trailers from the railroads. To be deprived of this service would place us at a distinct disadvantage with shippers who, because of larger volume or greater financial strength, could provide their own trailer equipment.

Before we used Plan III service we used common carrier trucks or freight forwarders. To find it necessary to go back to these would be a move in the wrong direction be-

[fol. 820] cause of our increasing volume and satisfactory service under Plan III. Our present volume will average better than 80,000 pounds per month and there is every prospect it will increase.

* * * * * * *

[fol. 821]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 30

EXCERPTS FROM VERIFIED STATEMENT OF JACK B. SALT
(MID-STATES STEEL & WIRE CO.)

RE: Ex Parte 230—Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

Testimony of Witness Jack B. Salt

My name is Jack B. Salt, located at Jacksonville, Florida, associated with Mid-States Steel & Wire Co., where I hold the position of Sales Manager.

We are planning to use Plan III TOFC service on shipments of wire from Jacksonville to several Southern destinations when rates which have been established at our request become effective on December 15, 1962. We will use Plan II only on limited occasions when volume is light. We have asked that Plan II rates be established.

We anticipate that volume under Plan III will be several 70,000 pound shipments per month. Present method of shipment is via irregular route common carrier trucklines and company owned vehicles.

[fol. 822] Savings in transportation costs under Plan III arrangements will enable our company to reduce our costs in reaching distant competitive markets. We will be able to take advantage of Plan III TOFC service only if railroads are permitted to continue to lease trailers. Our company will be unable to participate in TOFC service if the railroads are prohibited from leasing trailers to us for use in said service.

TOFC service will enable our company to enlarge our marketing area. It is not feasible for our company to enlarge our private carrier fleet to provide trailers for use with Plan III TOFC service.

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[fol. 823]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 32

EXCERPTS FROM VERIFIED STATEMENT OF GEORGE V. EVANS (INTERNATIONAL PLAYTEX CORPORATION)

DOCKET 230

Statement of International Latex Corporation

Testimony of Witness George V. Evans

My name is George V. Evans, Director, Corporate Traffic & Transportation, International Latex Corporation, Dover, Delaware.

We ship and receive approximately twenty (20) piggyback trailers a month of latex and latex compounds, materials and supplies moving between our plants at Dover, Delaware, and Austell and Newnan, Ga., and Concord, N. C.

Prior to our use of Plan III TOFC service, this traffic generally moved via private and contract trucks.

Our ability to lease trailers from the railroads permits us to utilize Plan III service, which we find more nearly meets our transportation needs than either private carrier or contract carrier. If the Commission prohibits the leasing of trailers under Plan III by the railroads to shippers, we will have no alternative but to continue expanding our private and contract carrier operation.

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[fol. 824]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 33

EXCERPTS FROM VERIFIED STATEMENT OF CHARLES A. MOULTIS
(UNITED STATES PIPE AND FOUNDRY COMPANY)

My name is Charles A. Moultis. I am Traffic Manager of U. S. Pipe and Foundry Company, 3300 First Avenue, North, Birmingham, Alabama.

Manufacturing plants for the production of pig iron, coke and coal by-products and for the production of cast iron pressure pipe are established in the Birmingham, Alabama district, and there is a cast iron soil pipe plant located at Anniston, Alabama. Additionally, plants for the production of cast iron pressure pipe fittings, as well as a cast iron soil pipe plant is operated at Chattanooga, Tennessee. Plants for the production of cast iron pressure pipe are operated at Burlington, New Jersey, and Decoto, California. In addition, storage yards are located strategically throughout the United States where stocks of cast iron pressure pipe and fittings are maintained.

[fol. 825] We are presently and regularly using both Plan II and Plan III TOFC Service (Piggyback).

Our use of Plan II is predominantly for shipment direct to customers. In the use of Plan III, we are currently moving shipments from one of our several plants either in connection with "all-freight" rates or specific per-car commodity rates maintained thereon.

Up until recently Plan III service has been used on interplant movements, and we have just begun using this Plan on direct shipments to customers (jobsite).

Under Plan II we are limited on delivery to consignees to commercial zones, whereas under Plan III we are able to make delivery beyond such zones where our business predominates. We anticipate greater use of Plan III as service becomes available, and the ability to readily and speedily lease the needed trailers from the rail carriers is consid-

ered necessary due to the nature of our business which requires fulfillment of orders with little advance notice.

Up until now all trailers used under Plan III have been leased by us from the railroads at a rate of $10.00 per 24-hour period, subject to certain maximum trip rates. All leases began when trailers were picked up at origin ramp for loading, and ended when returned empty to the railroad at destination.

Since we do not now own, and could not profitably own or lease trailers which would require their return empty, it would be impossible for us to continue the use of Plan III TOFC Service if the proposed Rule C-3 is adopted. Consequently, we would revert to the use of irregular common carrier truck service which generally offers faster service at rates which are the same as Plan II TOFC rates.

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[fol. 826]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 34

VERIFIED STATEMENT OF LAWTON E. GRANT
(MERCHANDISING EQUIPMENT COMPANY)

Ex Parte 230

T. O. F. C. Investigation

Testimony of Merchandising Equipment Company

I am Lawton E. Grant, vice president and owner of Merchandising Equipment Company, manufacturers and producers of merchandising and store fixture equipment. We operate basically in Southeastern part of the United States.

We have started using plan III for the first time this year, prior to that we were shipping by our own truck. Plan III is the only method of shipping long distance that is suitable for our operation other than by our own trucks for the following reasons.

1. Ours is a small company and we maintain our own truck which is approximately less than one half the size of one of the vans provided in plan III. We can neither afford nor think it economically sound for us to operate large vans.

2. Our merchandise is very vulnerable to damage by carriers. Plan III allows us to load and pack our leased equipment at our plant and unload it at job site with our own crews. Per shipment capacity over using our own truck is quadrupled.

[fol. 827] 3. By use of this system we have opened a complete new field where we are now able to compete. Larger companies with vans for shipments no longer have a particular advantage. We are now actively seeking new work in geographical areas where we have been at a distinct disadvantage in the past.

Should this plan be eliminated we would ship again by our own truck. Possibly we would be forced into large capital outlay for equipment which we feel will never bring a fair return.

I solemnly swear that I have examined the foregoing statements and to the best of my knowledge the comments contained herein are true.

LAWTON E. GRANT

LEG:jb

[fol. 828]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 35

VERIFIED STATEMENT OF MILES E. NAPIER
(VERSON MANUFACTURING CO.)

Testimony of Witness Miles E. Napier.

I am Miles E. Napier, Traffic Manager for Southern Porcelain Co., Division of Verson Manufacturing Co. of Dallas,

Texas and Vitro-tech Corporation of Hearne, Texas a subsidiary of Verson Mfg. Co. We are presently using Plan III T.O.F.C. from our plant in Dallas, Texas and Hearne, Texas to Jacksonville, Florida, Tampa, Florida, St. Petersburg, Florida, Orlando, Florida, Cincinnati, Ohio and Detroit, Michigan. Prior to the Plan III T.O.F.C. service being available we were shipping our bathtubs and sinks via rail car and our water closet bowls and water closet tanks via our own trucks. We own and operate six Diesel units. After the T.O.F.C. service was made available we removed our trucks from this run. We lease our trailers from the railroad and from a leasing company. It is to our advantage to trip lease as we do not have to worry our back hauls or invest in more equipment. This we will do if the proposed Rule C-3 is adopted. We will purchase more equipment and in some areas we will remove from our sales territory..

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[fol. 829]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 36

EXCERPTS FROM VERIFIED STATEMENT OF DARDEN NEWMAN
(BURKART-SCHIER CHEMICAL COMPANY)

My name is Darden Newman. I hold the position of Manager, Burkart-Schier Chemical Company, 1705 Boone Street, N. E., Knoxville, Tennessee. This firm is engaged in the wholesale distribution of phosphates, cleaning compounds, acids, alkali, detergents, solvents, and other related chemicals, in the East Tennessee area.

We began using Plan III piggy-back service in May, of this year, between Syracuse, New York and Knoxville. Prior to this time, we received occasional shipments by rail box car; also picked up occasional loads in our own over-the-road equipment, but volume was small and steadily decreasing, particularly on calcium chloride, for the reason that we were being forced out of the market in this area

because of "gray area" truck practices in which certain of our competitors were engaging. The economy of Plan III rates enables us to compete pricewise with this competition, and sales have now increased to the point where we are averaging approximately two trailer loads, 77,000 pounds, per month. We anticipate that sales will continue to increase.

In meeting the transportation needs of our firm, we own and operate three power units and four over-the-road trailers. This equipment is utilized in effecting deliveries to our customers in outlying cities, handling products between our warehouses in Chattanooga and Nashville, and, when available, picking up from suppliers in other territories when it is economical to do so. The equipment is generally kept busy and, aside from the economics involved, would not be available on a dependable basis for picking up inventory needs from our supplies in Syracuse and other northern cities.

* * * * * * *

[fol. 830] Our cost for the operation of our highway equipment exceeds the cost of Plan III piggy-back service, and we are making plans at present to increase our utilization of the service by receiving from suppliers located at origins other than Syracuse. One study indicates that the economy of Plan III rates, versus cost for handling in our own equipment, will enable us to carry a larger stock than we have been able to carry in the past. This, in turn, will enable us to market our products more effectively against our competitors.

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[fol. 831]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Statement No. 37

VERIFIED STATEMENT OF C. GILBERT KAPPEL
(NATIONAL PLASTIC PRODUCTS COMPANY, INC.)

Ex Parte 230 December 4, 1962
Substituted Service
Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

Testimony of witness in support of statements to be included in Southern Railway statement.

I, C. Gilbert Kappel, Traffic Manager of National Plastic Products Company, Inc., Odenton, Maryland desire to submit the following statements in support of Southern Railway's statement. I have held this position since 1950.

We are presently using Plan III TOFC service to Texas points and plan to expand our use of this service to Florida and other points. This is the plan that works best for our company and in this respect we wish to state that we are opposed to the ICC proposed Rule C-3.

We have for many years owned and operated our own private fleet of tractor/trailers operating interstate. It is our intention to continue to operate this fleet, as in the past, but do not presently contemplate expanding the size of our fleet.

However, if we do not have the distinct advantage of trip leasing trailers from the rail carriers, we would be compelled to augment our fleet. The flexibility we now enjoy from leasing rail carriers trailers and the cost thereof to us is very attractive.

One of our principal products—laminated plastic sheets—is shipped on large pallets to many points in the country and

because of their size, weight and volume shipped, we require as much freedom from restrictions as is possible, in connection with trailer leasing arrangements.

* * * * * * *

[fol. 832]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Verified Statements of Class I Railroads of the Western District

EXCERPTS FROM VERIFIED STATEMENT OF T. H. MAGUIRE, CHAIRMAN AND COUNSEL OF THE EXECUTIVE COMMITTEE OF THE WESTERN RAILROAD TRAFFIC ASSOCIATION

My name is T. H. Maguire. My business address is 514 Union Station Building, Chicago 6, Illinois. For the past six years I have been Chairman and Counsel of the Executive Committee of the Western Railroad Traffic Association. Before that I held the position of General Solicitor of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and I had been connected with the Law Department of that railroad for 20 years. I am an attorney at law and admitted to practice before the Commission.

The Western Railroad Traffic Association is an organization operating under the provisions of section 5a of the Interstate Commerce Act. Its articles of association were approved by the Commission in 1949. 276 I.C.C. 183.

Its membership comprises all of the Class I Railroads of the Western District as described in the Commission's report. The Western District includes Wisconsin, the Upper Peninsula of Michigan, most of Illinois, and all of the contiguous states west of the Mississippi River. My statement is presented on behalf of these railroad carriers.

During all of the time I was associated with the Milwaukee Railroad I was engaged in handling transportation matters before the Interstate Commerce Commission. The Executive Committee of the Western Railroad Traffic Association and various rate conferences comprised within the Association have jurisdiction over the consideration of rates, fares, and charges of the member railroads.

* * * * * * *

[fol. 833] For many years the railroads of the United States have been engaged in intense competition for freight traffic with motor carriers for hire, both regulated and unregulated. This period has also seen intercity private motor carriage rise from small beginnings to its present huge volume. The result of these developments is well known. The ratio of railroad freight traffic to the total intercity traffic volume has progressively declined, except during the World War II period, while the ratio of intercity motor traffic to the country's total traffic volume has progressively increased. That decline in the railroad share of freight traffic has continued in spite of every effort put forth to date. Traffic of all types of intercity motor operations, regulated, exempt for hire, and private, have shared in this growing motor traffic ratio. For the details of these developments I refer to the Exhibit accompanying the verified statement of Herman Kroll.

[fol. 834] Certain facts revealed by this Exhibit call for brief comment at this point. In 1959 the total freight revenues of motor carriers reporting to the Interstate Commerce Commission was 80.27 per cent of the total freight, mail, and express revenues of all of the railroads of the United States, whereas the total ton-miles of such motor carriers was only 17.40 per cent of the total railroad ton-miles. See page 5 of the Exhibit. This same general relationship has always existed between motor and rail traffic and revenues; that is, the regulated motor carrier freight revenues have always borne a much higher ratio to railroad freight revenues than the ratio of motor carrier ton-miles to railroad ton-miles, as the Exhibit shows. These figures show clearly that motor carriers have been able to attract generally the higher rated commodities, while the railroads have hauled a much greater ton-mile volume than the motor carriers but at much lower rates per ton-mile.

No one knows the exact volume of traffic handled annually by exempt for-hire motor carriers or by private carriers, but it is well known that the intercity tonnage moved by each of these forms of carriage is huge and growing and

that the total annual ton-miles of both together is almost twice the total annual ton miles of the motor carriers reporting to the Interstate Commerce Commission. See pages 2 and 3 of the Exhibit.

My reason for referring to these specific items relating to the competitive struggle of the railroads to hold traffic is that TOFC service during the short period it has been developing shows clear and definite signs of being one means of reversing or at least arresting these trends of loss of rail traffic to motor carriage. It holds some promise of regaining and holding a portion of the higher rated traffic that has [fol. 835] been lost to the regulated motor carriers, of competing with the exempt motor for-hire carriers, and of putting the trailers of the private carriers on flatcars for the line-haul movement.

For many years the Interstate Commerce Commission in its Annual Reports to Congress has been admonishing the railroads that to meet motor carrier competition they must devise new, bold, and progressive forms of service. Trailer-on-Flatcar Service unquestionably qualifies for those descriptive terms; it has been highly successful; and it promises great future development. Shipper acceptance of TOFC service has been such as to tax the ability of the railroads to keep up with it. In 1954 in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, the Commission decided important issues in a way that laid a sound foundation for the development of TOFC service. The railroads therefore had reason to feel that their developing TOFC service merited the confidence of the shippers and the approval of the Commission.

Now comes a set of proposed rules that will inevitably have the effect of curtailing the growth of TOFC service and that will thereby impair the ability of the railroads to compete with other forms of transportation. Having in mind that the share of the nation's transportation enjoyed by the railroads has been declining steadily whereas the share enjoyed by the regulated and unregulated motor car-

riers has been increasing, it is perfectly evident that the railroads are in no position to absorb a blow that will impair their ability to compete by offering the new service and innovations made possible by TOFC operations. It has yet to be demonstrated that there is any widespread shipper demand for a major disruption in TOFC practices nor has there been a shipper demand that TOFC operations be [fol. 836] forced into a mold that precludes future innovations. In fact, the National Industrial Traffic League has filed a statement of position in opposition to many of the proposed rules. Many individual shippers have stated their opposition to the rules. The freight forwarders have also strongly opposed these proposed rules. Present TOFC operations are meeting a public need, as these statements of position demonstrate. If the rules relating to TOFC operations are changed as proposed, one of the relatively few remaining tools available to the railroads to compete for higher rated traffic will have been substantially impaired.

* * * * * * *

[fol. 837] TOFC service has developed in part because of mechanical improvements in transportation facilities. The mechanical improvements do indeed make rail transportation more efficient and economical, just as have the automatic coupler, the airbrake, dieselization, electronic classification yards and car tracing devices, and the like. Pick up and delivery of freight is expedited. Handling of freight is reduced. Loading and unloading of rail cars is made more speedy and efficient. Empty mileage and car turn-around time are reduced. With these improvements added to the inherent advantage of the railroads to perform low cost line-haul service, the result has been the steadily expanding growth of TOFC service shown on page 6 of the Kroll Exhibit.

It seems entirely reasonable to assume that the mechanical improvements and possible innovations in TOFC service have not been exhausted. As a matter of fact the service is in its infancy. Yet these proposed rules purport to

say that TOFC shall from here on be developed only by the publication of rates in precisely defined ways. The burden upon those who would freeze the pattern this early is a very heavy one for these rules are bound to inhibit the growth and development of a new innovation in service.

More extensive coordination between rail and motor common carriers in an effect to combat the increasing diversion of traffic to private and unregulated carriers has long been urged as necessary to the maintenance and preservation of [fol. 838] adequate and efficient common carrier transportation. Plan I and Plan V TOFC service constitute effective means to this end, and cooperation between rail and motor common carriers in the establishment of such service has been increasing. The Commission does not propose to abolish Plan I and Plan V TOFC service. Yet it proposes rules which most certainly would operate to curtail the establishment of such service.

* * * * * * *

[fol. 839] Rules C-1 and C-2(f), as proposed by the Commission, would appear effectually to foreclose the rendition of Plan III and Plan IV service by the railroads since Rule C-1, by its express terms, would appear to restrict permissible all-rail TOFC service to the type of service commonly known as Plan II and Plan 11½, and Rule C-2(f) would require shippers furnishing any equipment, instrumentality or service in connection with all-rail TOFC service to be compensated through the medium of an allowance contained in published tariffs rather than through the publication of a lower rate for the more limited equipment and service required to be provided by the rail carriers under Plan III and Plan IV service.

Proposed Rules C-1 and C-2(f) merely cast in a new mold the view rejected by the Commission in *Eastern Central Motor Carriers Association, Inc., et al.* v. *Baltimore and Ohio Railroad Company, et al.*, 314 I.C.C. 5, to the effect that Plan III and Plan IV service is different from Plan II service only to the extent of the equipment and service

supplied by the shipper. That view is thoroughly unsound. As demonstrated by verified statements submitted herewith, Plan III and Plan IV service constitute separate and distinct transportation services specifically tailored to meet the shippers' needs, and different from Plan II service by [fol. 840] more than the supplying of certain equipment and service by the shipper. The rail carriers benefit from the utilization of more heavily loaded equipment, release of badly needed box cars for other purposes, more economical and efficient handling of TOFC traffic, and are relieved to a large extent of the necessity for making capital investment to their car supply. The shippers benefit because they perform their own pickup and delivery service and thus secure the benefit of their own particular location in the terminal area, and because they incur only such empty or light loaded return movement as is represented by their own experience. Moreover, unlike the rail carriers, shippers can reach out beyond rail pickup and delivery limits in the assembly and distribution of freight.

Without going on to comment on each rule it may be stated that, in some instances the proposal rules exceed the statutory power of the Commission, in others they disregard principles just recently litigated and resolved on the basis of extended needs, and in others they will impose burdensome and impractical restrictions and conditions. The rules in the area of TOFC operations should be kept to the minimum required for protection of the public and should leave the maximum freedom for carrier imagination, innovation and development.

[fol. 841]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF HERMAN C. KROLL, MANAGER, STATISTICAL BUREAU OF THE EXECUTIVE COMMITTEE-WESTERN RAILROAD TRAFFIC ASSOCIATION

My name is Herman C. Kroll. My office address is 416 Union Station Building, Chicago 6, Illinois. I am Manager of the Statistical Bureau of the Executive Committee-Western Railroad Traffic Association. I have been employed by the Statistical Bureau for the past twenty-two years. The Association is authorized by the Commission under Section 5a of the Act and is maintained by all of the Class I Railroads of the Western District. The Western District comprises that part of the United States west of the Mississippi River, plus Wisconsin, the Upper Peninsula of Michigan, and part of Illinois. A Class I railroad is one having gross operating revenues of $3,000,000 or more per year.

I wish to present Kroll's Exhibit 1, consisting of 9 pages, which is attached to this statement and which was prepared under my direction. The Exhibit is based principally on publications of the Commission or other Government sources and is largely self-explanatory. All figures are for the United States except as otherwise stated.

Page 1 shows the estimated volume and percentage distribution of intercity freight traffic, public and private, in ton-miles, by kinds of transport agency, for the years 1939 through 1960. This demonstrates that the railroads' share of the total freight traffic has steadily declined while the amount of traffic moving over the highways has steadily increased with the exception of the World War II period. [fol. 842] Page 2, columns 2, 3 and 4, shows the intercity ton-miles of Class I, II, and III intercity motor carriers reporting to the Interstate Commerce Commission for the years 1939 through 1959. Column 5 shows the total intercity highway ton-miles, from page 1, column 4. Column 6 of page 2 shows the percentage ratio of the ton-miles of

regulated carriers to the ton-miles of all intercity highway carriers. These figures indicate that in addition to the substantial growth of regulated motor carriers there is a strong trend toward unregulated and private highway transportation.

The figures on page 3 of the Exhibit are obtained by subtracting the figures in column 4 of page 2 from the figures in column 5 of page 2. Column 4 of page 2 shows the total intercity ton-miles of regulated motor carriers reporting to the Commission, and column 5 of page 2 shows the total intercity highway ton-miles, both of regulated and unregulated motor carriers. Thus page 3 shows the intercity ton-miles of all highway carriers not reporting to the Commission, including private and exempt for-hire motor carriers.

It will be noted from page 3 that for 1959 the total unregulated highway ton-miles was almost twice as large as the ton-miles of regulated motor carriers shown on page 2 column 4, and was almost one-third of the railroad ton-miles shown on page 1 column 2. The trend toward private carriage mentioned above is again indicated by these figures.

Pages 4 and 5 of the Exhibit compare the ton-miles and revenues of railroads and of regulated motor carriers reporting to the Commission, years 1939 through 1959. As an example of the trend shown in these pages, for the year 1959 the motor carriers were able to secure revenues which were 80.27 per cent of the railroad revenues for which these motor carriers only handled 17.40 per cent of the railroad ton-miles.

[fol. 843] Page 6 shows the number of railroad cars in revenue service loaded with highway trailers for the years 1955 through November 10, 1962. Column 3 of this page shows the index of these loadings advancing from 100 in 1955 to 365 for the first 45 weeks of 1962.

Page 7 shows the average net investment, net railway operating income, and rate of return, for the Class I Railroads in the Western District for the years 1939 through

1961. It should be noted that the railroads have found it necessary to maintain an increasingly high net investment notwithstanding the steady decrease in traffic shown on pages 1 and 5 column 2.

Page 8 of the Exhibit shows total corporate sales and transportation sales in the United States, years 1939 through 1961. Column 7 and 8 show the declining position of the railroads in this period and the advancing role of highway transportation.

Page 9 shows total national income originating in transportation in the United States, years 1939 through 1961. Here again columns 7 and 8 show the declining railroad position and the advancing highway transportation role.

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Before The

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 230

SUBSTITUTED SERVICE - CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (PIGGYBACK SERVICE)

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Dated at:
Chicago, Illinois
December 3, 1962

Statistical Bureau
Executive Committee-
Western Railroad Traffic Association
Chicago, Illinois No. 4331

[fol. 844]

EXHIBIT No. 1 TO VERIFIED STATEMENT OF HERMAN C. KROLL

[fol. 845]

PAGE 1 OF HERMAN C. KROLL'S EXHIBIT 1

ESTIMATED VOLUME AND PERCENTAGE DISTRIBUTION OF INTERCITY FREIGHT TRAFFIC, PUBLIC AND PRIVATE, IN TON-MILES, BY KINDS OF TRANSPORT AGENCY - YEARS 1939 THROUGH 1960

Year (1)	Railway revenue ton-miles including electric railways, express, and mail		Motor vehicles		Inland waterways, including Great Lakes		Pipe lines (oil)		Airways (domestic revenue service), including express, mail and excess baggage		Total	
	Billions (2)	Percent of total (3)	Billions (4)	Percent of total (5)	Billions (6)	Percent of total (7)	Billions (8)	Percent of total (9)	Billions (10)	Percent of total (11)	Billions (12)	Percent of total (13)
1939	338.650	62.34	52.821	9.72	96.249	17.71	55.602	10.23	0.012	.002	543.534	100.00
1940	379.201	61.30	62.043	10.03	118.057	19.08	59.277	9.58	0.014	.002	618.592	100.00
1941	481.756	62.40	81.363	10.54	140.454	18.19	68.428	8.86	0.019	.002	772.020	100.00
1942	645.422	69.47	59.896	6.45	148.565	15.99	75.087	8.08	0.034	.004	929.004	100.00
1943	734.829	71.26	56.784	5.51	141.652	13.74	97.867	9.49	0.053	.005	1,031.185	100.00
1944	746.912	68.63	58.264	5.35	150.155	13.80	132.864	12.21	0.071	.007	1,088.266	100.00
1945	690.609	67.26	66.948	6.52	142.737	13.90	126.530	12.32	0.091	.009	1,027.115	100.00
1946	602.069	66.61	81.992	9.07	123.973	13.72	95.727	10.59	0.093	.010	903.854	100.00
1947	664.523	65.24	102.095	10.02	146.714	14.40	105.161	10.32	0.158	.016	1,018.651	100.00
1948	647.267	61.94	116.045	11.10	161.846	15.49	119.597	11.44	0.223	.021	1,044.978	100.00
1949	534.694	58.38	126.636	13.83	139.396	15.22	114.916	12.55	0.235	.026	915.877	100.00
1950	596.940	56.17	172.860	16.27	163.344	15.37	129.175	12.16	0.318	.030	1,062.637	100.00
1951	655.353	55.63	188.012	15.96	182.216	15.47	152.115	12.91	0.379	.032	1,178.075	100.00
1952	623.373	54.48	194.607	17.01	168.367	14.71	157.502	13.76	0.415	.036	1,144.264	100.00
1953	614.199	51.01	217.163	18.04	202.439	16.81	169.884	14.11	0.413	.034	1,204.098	100.00
1954	556.557	49.56	213.225	10.99	173.679	15.46	179.203	15.96	0.397	.035	1,123.061	100.00
1955	631.305	49.53	223.254	17.51	216.508	16.98	203.244	15.94	0.481	.038	1,274.872	100.00
1956	655.891	48.40	248.846	18.36	219.978	16.23	229.959	16.97	0.563	.042	1,355.237	100.00
1957	626.222	46.89	254.174	19.03	231.792	17.36	222.728	16.68	0.572	.043	1,335.486	100.00
1958	558.736	45.98	255.544	21.03	189.016	15.55	211.289	17.39	0.579	.048	1,215.166	100.00
1959	562.497	44.97	288.519	22.27	196.559	15.18	226.991	17.52	0.739	.057	1,295.305	100.00
1960	579.130	43.51	299.393	22.50	223.000	16.75	228.626	17.18	0.778	.058	1,330.927	100.00

SOURCE:- Intercity Ton-Miles Statement No. 6103 published by I.C.C. Bureau of Transport Economics and Statistics, dated April 1961 for years 1939 through 1958. Figures for years 1959 and 1960 from 75th Annual Report of the Interstate Commerce Commission.

PAGE 2 OF HERMAN C. KROLL'S EXHIBIT 1

INTERCITY TON-MILES OF CLASS I, II, AND III INTERCITY MOTOR CARRIERS AND TOTAL HIGHWAY INTERCITY TON-MILES - YEARS 1939 THROUGH 1959

Year (1)	Intercity ton-miles of regulated carriers			Total Highway (5)	Percent Regulated of Total Highway (6)
	Common (2)	Contract (3)	Total (4)		
	(Billions)	(Billions)	(Billions)	(Billions)	
1939	14.911	4.736	19.646	52.821	37.19
1940	17.348	3.335	20.683	62.043	33.34
1941	23.212	3.624	26.835	81.363	32.98
1942	25.381	2.702	28.083	59.896	46.89
1943	26.284	2.483	28.768	56.784	50.66
1944	24.577	2.676	27.253	58.264	46.78
1945	24.794	2.495	27.289	66.948	40.76
1946	28.208	2.240	30.448	81.992	37.14
1947	34.744	2.950	37.693	102.095	36.92
1948	42.630	4.076	46.706	116.045	40.25
1949	43.952	3.939	47.891	126.636	37.82
1950	61.276	4.371	65.648	172.860	37.98
1951	66.865	5.426	72.292	188.012	38.45
1952	64.163	6.680	70.843	194.607	36.40
1953	69.184	7.326	76.510	217.163	35.23
1954	65.098	7.203	72.301	213.225	33.91
1955	73.455	9.451	82.906	223.254	37.13
1956	74.552	8.463	83.015	248.846	33.36
1957	75.834	8.575	84.408	254.174	33.21
1958	75.934	8.405	84.339	255.544	33.00
1959(P)	90.537	10.840	101.377	288.519	35.14

(P) Preliminary

SOURCE: Intercity Ton-Miles Statement No. 6103 published by I.C.C. Bureau of Transport Economics and Statistics dated April, 1961.

[fol. 846]

PAGE 3 OF HERMAN C. KROLL'S EXHIBIT 1

PRIVATE AND EXEMPT INTERCITY TON-MILES NOT REPORTED
TO THE INTERSTATE COMMERCE COMMISSION
YEARS 1939 THROUGH 1959

Year (1)	Intercity Ton-Miles (Billions) (2)
1939	33.175
1940	41.360
1941	54.528
1942	31.813
1943	28.016
1944	31.011
1945	39.659
1946	51.544
1947	64.402
1948	69.339
1949	78.745
1950	107.212
1951	115.720
1952	123.764
1953	140.653
1954	140.924
1955	140.348
1956	165.831
1957	169.766
1958	171.205
1959 (P)	187.142

(P) = Preliminary

SOURCE:- From page 2 this Exhibit:
Total Highway Ton-Miles Column (5) Minus
Total Intercity Ton-Miles Column (4).

PAGE 4 OF HERMAN C. KROLL'S EXHIBIT 1

ESTIMATED REVENUES OF CLASS I, II AND III MOTOR CARRIERS OF PROPERTY AND FREIGHT, EXPRESS AND MAIL REVENUES OF CLASS I, II AND III RAILROADS (INCLUDING ELECTRIC RAILWAYS) YEARS 1939 THROUGH 1960

Year (1)	(Millions of dollars) Revenues from property service: Intercity revenues of intercity carriers: Common (2)	Contract (3)	Total Revenues, Intercity and Local (4)	Railway Revenues Including Electric Railways, Freight, Mail and Express (Class I, II and III Rys.) (5)
1939	$ 579.1	$112.0	$ 792.2	$3,473.1
1940	691.5	76.5	867.0	3,765.3
1941	873.9	96.6	1,095.7	4,703.4
1942	967.0	83.2	1,212.7	6,268.7
1943	1,004.1	78.3	1,304.7	7,156.3
1944	998.9	80.3	1,351.9	7,400.2
1945	1,025.0	80.0	1,406.3	6,927.0
1946	1,209.0	87.2	1,654.5	6,120.2
1947	1,684.0	114.7	2,213.6	7,464.3
1948	2,195.0	155.0	2,698.1	8,445.2
1949	2,302.7	169.4	2,911.2	7,487.4
1950	3,063.3	199.3	3,737.1	8,427.6
1951	3,459.6	226.3	4,169.2	9,211.8
1952	3,602.7	297.9	4,417.5	9,409.4
1953	3,965.6	358.6	4,926.4	9,563.5
1954	3,792.3	345.3	4,737.1	8,373.3
1955	4,258.9	468.3	5,535.2	9,110.5
1956	4,449.2	428.3	5,828.9	9,527.8
1957	4,704.5	446.6	6,165.9	9,483.9
1958	4,713.5	411.7	6,131.2	8,630.1
1959	5,516.4	517.0	7,144.9	8,900.9
1960(P)	5,765.3	485.3	7,213.9	8,594.1

(P) = Preliminary

SOURCE: I.C.C. Bureau of Transport Economics and Statistics Statement No. 524 dated February, 1952 for years 1939 through 1943 and Transport Economics for subsequent years - Columns (2), (3), and (4). Column (5) from annual volumes of "Statistics of Railways in the United States" published by the I.C.C.

[fol. 848]

PAGE 5 OF HERMAN C. KROLL'S EXHIBIT 1

TON MILES AND FREIGHT, EXPRESS AND MAIL REVENUE OF RAILROADS AND CLASS I, II AND III MOTOR CARRIERS - YEARS 1939 THROUGH 1959

Year (1)	Ton Miles			Freight, Express and Mail Revenue		
	Railroads (Billions) (2)	Class I, II & III Motor Carriers (Billions) (3)	Percentage Motor Carriers of Railroads (4)	Railroads (Millions) (5)	Class I, II & III Motor Carriers (Millions) (6)	Percentage Motor Carriers of Railroads (7)
1939	338.850	19.646	5.80	$3,473.1	$ 792.2	22.81
1940	379.201	20.683	5.45	3,765.3	867.0	23.03
1941	481.756	26.835	5.57	4,703.4	1,095.7	23.30
1942	645.422	28.083	4.35	6,268.7	1,212.7	19.35
1943	734.829	28.768	3.91	7,156.3	1,304.7	18.23
1944	746.912	27.253	3.65	7,400.2	1,351.9	18.27
1945	690.809	27.289	3.95	6,927.0	1,406.3	20.30
1946	602.069	30.448	5.06	6,120.2	1,654.5	27.03
1947	664.523	37.693	5.67	7,464.3	2,213.6	29.66
1948	647.267	46.706	7.22	8,445.2	2,698.1	31.95
1949	534.694	47.891	8.96	7,487.4	2,911.2	38.88
1950	596.940	65.648	11.00	8,427.6	3,737.1	44.34
1951	655.353	72.292	11.03	9,211.8	4,169.2	45.26
1952	623.373	70.843	11.36	9,409.4	4,417.5	46.95
1953	614.199	76.510	12.46	9,563.5	4,926.4	51.51
1954	556.557	72.301	12.99	8,373.3	4,737.1	56.57
1955	631.385	82.906	13.13	9,110.5	5,535.2	60.76
1956	655.891	83.015	12.66	9,527.8	5,828.9	61.18
1957	626.222	84.408	13.48	9,483.9	6,165.9	65.01
1958	558.738	84.339	15.09	8,630.1	6,131.2	71.04
1959	582.497	101.377	17.40	8,900.9	7,144.9	80.27

SOURCE: Column (2) from Page 1, Column (2)
Column (3) from Page 2, Column (4)
Column (4), computed
Column (5) from Page 4, Column (5)
Column (6) from Page 4, Column (4)
Column (7), computed

PAGE 6 OF HERMAN C. KROLL'S EXHIBIT 1

NUMBER OF CARS LOADED WITH HIGHWAY TRAILERS (PIGGYBACK)
YEARS 1955 THROUGH NOVEMBER 10, 1962

Year (1)	Number of Cars Loaded (2)	Index 1955 = 100 (3)
1955	168 150	100
1956	207 783	124
1957	249 065	148
1958	278 071	165
1959	416 508	248
1960	554 115	330
1961	591 246	352
1962: 45 Week Period Ended Nov. 10	614 398	365

NOTE: Includes cars reported loaded with one or more revenue highway trailers or highway containers.

SOURCE: I.C.C. 73rd Annual Report to Congress for year 1955. A.A.R. Car Service Division reports for years 1956 through 1961, and its statement CS-54A for 45 week period ended November 10, 1962.

[fol. 850]

PAGE 7 OF HERMAN C. KROLL'S EXHIBIT 1

AVERAGE NET INVESTMENT, NET RAILWAY OPERATING INCOME AND RATE OF RETURN FOR CLASS I RAILROADS IN THE WESTERN DISTRICT - YEARS 1939 THROUGH 1961

Year (1)	Average Net Investment (a) (2)	Net Railway Operating Income (3)	Rate of Return on Average Net Investment (4)
1939	$ 9 578 824 522	$177 194 908	1.85
1940	9 610 513 245	224 153 917	2.33
1941	9 711 444 155	368 945 372	3.80
1942	9 881 289 858	651 566 499	6.59
1943	10 013 136 661	598 874 774	5.98
1944	10 021 056 502	483 298 021	4.82
1945	9 826 435 384	389 813 593	3.97
1946	9 683 632 020	317 474 603	3.28
1947	9 705 291 567	372 497 143	3.84
1948	9 850 835 010	433 479 307	4.40
1949	10 110 695 827	315 126 238	3.12
1950	10 375 295 845	480 208 559	4.63
1951	10 721 310 294	403 124 870	3.76
1952	11 058 728 365	456 833 466	4.13
1953	11 326 860 150	450 444 313	3.98
1954	11 510 984 880	378 384 081	3.29
1955	11 654 929 599	449 439 957	3.86
1956	11 807 515 064	417 492 910	3.54
1957	11 993 700 338	381 800 024	3.18
1958	12 111 213 094	387 975 748	3.20
1959	12 130 826 787	347 977 729	2.87
1960	12 223 174 067	293 920 933	2.40
1961	12 246 672 208	315 546 006	2.58

NOTE (a): Represents average investment at beginning and end of year in road and equipment (less accrued depreciation and amortization), material and supplies (Account 712), and Cash (Account 701).

SOURCE: Association of American Railroads' publication "Property Investment and Condensed Operating Income Account."

[fol. 852]

PAGE 8 OF HERMAN C. KROLL'S EXHIBIT 1

TOTAL CORPORATE SALES AND TRANSPORTATION SALES IN THE UNITED STATES

Year	All Industries Total (000,000) (1)	Transportation, All Forms (000,000) (2)	Railroad Transportation (000,000) (3)	Highway Freight Transportation (000,000) (4)	All Other Transportation (000,000) (5)	Per Cent of Total Corporate Sales				Per Cent of Transportation-All Forms		
						Transportation, All Forms (6)	Railroad Transportation (7)	Highway Freight Transportation (8)	All Other Transportation (9)	Railroad Transportation (10)	Highway Freight Transportation (11)	All Other Transportation (12)
1939	$120 789	$ 7 364	$ 4 632	$ 728	$2 004	6.10	3.83	0.60	1.66	62.90	9.89	27.21
1940	135 248	7 769	4 722	793	2 254	5.74	3.49	0.59	1.67	60.78	10.21	29.01
1941	176 181	9 526	5 840	1 006	2 680	5.41	3.31	0.57	1.52	61.31	10.56	28.13
1942	202 777	11 527	7 887	1 061	2 579	5.68	3.89	0.52	1.27	68.42	9.21	22.37
1943	233 435	13 661	9 610	1 160	2 891	5.85	4.12	0.50	1.24	70.35	8.49	21.16
1944	246 737	14 307	10 045	1 188	3 074	5.80	4.07	0.48	1.25	70.21	8.30	21.49
1945	239 512	14 052	9 699	1 232	3 121	5.87	4.05	0.51	1.30	69.02	8.77	22.21
1946	270 898	13 786	8 612	1 542	3 632	5.09	3.18	0.57	1.34	62.47	11.18	26.35
1947	347 801	16 717	9 567	1 999	5 151	4.81	2.75	0.57	1.48	57.23	11.96	30.81
1948	388 744	18 372	10 626	2 451	5 295	4.73	2.73	0.63	1.36	57.84	13.34	28.82
1949	370 079	17 164	9 342	2 677	5 145	4.64	2.52	0.72	1.39	54.43	15.60	29.97
1950	431 857	18 805	10 200	3 407	5 198	4.35	2.36	0.79	1.20	54.24	18.12	27.64
1951	488 446	21 326	11 234	3 856	6 236	4.37	2.30	0.79	1.28	52.68	18.08	29.24
1952	499 454	22 241	11 536	4 193	6 512	4.45	2.31	0.84	1.30	51.87	18.85	29.26
1953	523 307	22 947	11 608	4 664	6 675	4.38	2.22	0.89	1.28	50.59	20.32	29.09
1954	516 502	21 273	10 178	4 697	6 398	4.12	1.97	0.91	1.24	47.84	22.08	30.08
1955	599 390	24 299	11 125	5 902	7 272	4.05	1.86	0.98	1.21	45.78	24.29	29.93
1956	632 417	25 798	11 636	6 067	8 095	4.08	1.84	0.96	1.28	45.10	23.52	31.38
1957	671 801	27 365	11 706	6 701	8 958	4.07	1.74	1.00	1.33	42.78	24.49	32.73
1958	658 153	25 914	10 751	6 520	8 643	3.94	1.63	0.99	1.31	41.49	25.16	33.35
1959	739 427	28 796	11 072	8 198	9 526	3.89	1.50	1.11	1.29	38.45	28.47	33.08
1960	761 212	29 179	N.A.	N.A.	-	3.83	-	-	-	-	-	-
1961	783 123	28 939	N.A.	N.A.	-	3.70	-	-	-	-	-	-
Per Cent Increase 1961 Over 1939	548.3	293.0	(a)139.0	(a)1 026.1	(a)375.3	-	-	-	-	-	-	-

NOTE (a): Per cent increase 1959 over 1939

SOURCE: National Income Supplement and U.S. Income and Output Supplement to "Survey of Current Business"; July, 1962 issue of "Survey of Current Business."

[fol. 853]

PAGE 9 OF HERMAN C. KROLL'S EXHIBIT 1

TOTAL NATIONAL INCOME AND INCOME ORIGINATING IN TRANSPORTATION IN THE UNITED STATES

Year	All Industries Total (000,000) (1)	Transportation, All Forms (000,000) (2)	Railroad Transportation (000,000) (3)	Highway Freight Transportation (000,000) (4)	All Other Transportation (000,000) (5)	Per Cent of Total National Income				Per Cent of Transportation-All Forms		
						Transportation, All Forms (6)	Railroad Transportation (7)	Highway Freight Transportation (8)	All Other Transportation (9)	Railroad Transportation (10)	Highway Freight Transportation (11)	All Other Transportation (12)
1939	$ 72 753	$ 4 642	$2 737	$ 739	$1 166	6.38	3.76	1.02	1.60	58.96	15.92	25.12
1940	81 634	5 040	2 944	815	1 281	6.17	3.61	1.00	1.57	58.41	16.17	25.42
1941	104 710	6 300	3 778	1 021	1 501	6.02	3.61	0.98	1.43	59.97	16.21	23.82
1942	137 694	8 598	5 568	1 183	1 847	6.24	4.04	0.86	1.34	64.76	13.76	21.48
1943	170 310	10 764	6 971	1 308	2 505	6.32	4.09	0.77	1.47	64.64	12.13	23.23
1944	182 639	11 245	6 899	1 354	2 992	6.16	3.78	0.74	1.64	61.35	12.04	26.61
1945	181 248	10 536	6 009	1 390	3 137	5.81	3.32	0.77	1.73	57.03	13.19	29.78
1946	180 879	10 245	5 466	1 699	3 080	5.66	3.02	0.94	1.70	53.35	16.58	30.07
1947	198 177	11 498	6 294	1 993	3 211	5.80	3.18	1.01	1.62	54.74	17.33	27.93
1948	223 487	12 680	7 123	2 287	3 270	5.67	3.19	1.02	1.46	56.17	18.04	25.79
1949	217 690	11 926	6 341	2 376	3 209	5.48	2.91	1.09	1.47	53.17	19.92	26.91
1950	241 876	13 276	7 076	2 819	3 383	5.49	2.93	1.17	1.40	53.29	21.23	25.48
1951	279 313	14 867	7 776	3 117	3 974	5.32	2.78	1.12	1.42	52.30	20.97	26.73
1952	292 155	15 382	7 913	3 380	4 089	5.27	2.71	1.16	1.40	51.44	21.97	26.59
1953	305 573	15 754	7 715	3 814	4 225	5.16	2.52	1.25	1.38	48.97	24.21	26.82
1954	301 794	14 444	6 546	3 836	4 062	4.79	2.17	1.27	1.35	45.32	26.56	28.12
1955	330 206	15 781	7 116	4 301	4 364	4.78	2.16	1.30	1.32	45.09	27.26	27.65
1956	350 836	16 841	7 619	4 647	4 575	4.80	2.17	1.33	1.30	45.24	27.59	27.17
1957	366 943	17 208	7 503	4 885	4 820	4.69	2.04	1.33	1.31	43.60	28.39	28.01
1958	367 384	16 429	6 824	4 911	4 694	4.47	1.86	1.34	1.28	41.54	29.89	28.57
1959	400 481	17 674	6 948	5 632	5 094	4.41	1.73	1.41	1.27	39.31	31.87	28.82
1960	415 480	17 939	6 784	5 711	5 444	4.32	1.63	1.37	1.31	37.82	31.83	30.35
1961	427 829	17 896	6 513	5 954	5 429	4.18	1.52	1.39	1.27	36.39	33.27	30.34
Per Cent Increase 1961 over 1939	488.1	285.5	138.0	705.7	365.6	-	-	-	-	-	-	-

SOURCE: U.S. Income and Output Supplement to "Survey of Current Business"; July, 1962 issue of "Survey of Current Business."

[fol. 854]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF CHARLES D. McGEHEE, ASSISTANT DIRECTOR—MOTOR SERVICES, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO 6, ILLINOIS

My name is Charles D. McGehee. I have been employed by the Chicago and North Western Railway Company, hereinafter called "North Western", for over 10 years, having served in various positions in the Traffic Department. I am presently Assistant Director—Motor Services, with headquarters at 400 West Madison Street, Chicago 6, Illinois. * * *

* * * * * * * *

[fol. 855] Coordinated rail-truck service on the North Western had its beginning in 1957 when Plan I arrangements were entered into between a number of large certificated motor carriers who were members of Middlewest Motor Freight Bureau. At first, trailers were only handled between Chicago, Illinois and St. Paul, Minnesota. This service was expanded to include handling of such trailers between Chicago, Illinois and Council Bluffs, Iowa. Presently the service is available between numerous points as shown on Exhibit 2 attached.

* * * * * * * *

LIST OF POINTS BETWEEN WHICH THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY HANDLES PLAN I TOFC MOVEMENTS.

Butler, Wis.	-	Sioux Falls, S.D.
Butler, Wis.	-	St. Paul, Minn.
Chicago, Ill.	-	Altoona, Wis.
Chicago, Ill.	-	Green Bay, Wis.
Chicago, Ill.	-	Madison, Wis.
Chicago, Ill.	-	Mankato, Minn.
Chicago, Ill.	-	Rochester, Minn.
Chicago, Ill.	-	St. Paul, Minn.
Chicago, Ill.	-	Superior, Wisc.
Chicago, Ill.	-	Wausau, Wisc.
St.Paul, Minn.	-	Green Bay, Wisc.
St. Paul, Minn.	-	Huron, S.D.
St. Paul, Minn.	-	Rockford, Ill.
St. Paul, Minn.	-	Sioux Falls, S.D.
St. Paul, Minn.	-	Wausau, Wisc.
Chicago, Ill.	-	Clinton, Iowa
Minneapolis, Minn.	-	St.Louis Mo.
Minneapolis, Minn.	-	Kansas City, Mo.
Chicago, Ill.	-	Cedar Rapids, Ia.
Chicago, Ill.	-	Ft. Frances, Ont.
Chicago, Ill.	-	Marshalltown, Ia.
Chicago, Ill.	-	Des Moines, Ia.
Chicago, Ill.	-	Denison, Ia.
Chicago, Ill.	-	Council Bluffs, Ia.
Chicago, Ill.	-	East St. Louis, Ill.
Chicago, Ill.	-	Ft. Dodge, Ia.
Chicago, Ill.	-	Mason City, Ia.
Chicago, Ill.	-	Sioux City, Ia.
Chicago, Ill.	-	Sioux Falls, S.D.
Council Bluffs, Ia.	-	Des Moines, Ia.
East St.Louis, Ill.	-	Cedar Rapids, Ia.
East St.Louis, Ill.	-	Council Bluffs, Ia.
East St.Louis, Ill.	-	Des Moines, Ia.
East St.Louis, Ill.	-	Sioux City, Ia.
Sterling, Ill.	-	Council Bluffs, Ia.
Sterling, Ill.	-	Sioux City, Ia.
Sterling, Ill.	-	Sioux Falls, S.D.
St. Paul, Minn.	-	Council Bluffs, Ia.
St. Paul, Minn.	-	East St.Louis, Ill.
Casper, Wyo.	-	Chicago, Ill.
Casper, Wyo.	-	Council Bluffs, Ia.
Casper, Wyo.	-	Des Moines, Ia.
Casper, Wyo.	-	East St.Louis, Ill.
Casper, Wyo.	-	St. Paul, Minn.
Rapid City, S.D.	-	Chicago, Ill.
Rapid City, S.D.	-	Council Bluffs, Ia.
Rapid City, S.D.	-	Des Moines, Ia.
Rapid City, S.D.	-	East St.Louis, Ill.

[fol. 856]

EXHIBIT No. 2 TO VERIFIED STATEMENT OF CHARLES D. McGEHEE

[fol. 857]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF J. H. LYONS
(SOUTHERN PACIFIC COMPANY)

My name is J. H. Lyons. I am employed by Southern Pacific Company as Assistant Freight Traffic Manager, Rates and Divisions, a position which I have held since January, 1961. My office address is 65 Market Street, San Francisco 5, California. My duties include, among other matters, preparation and presentation of evidence respecting rates and divisions before the Interstate Commerce Commission and various State regulatory bodies.

I have had more than 24 years of experience in handling freight rate adjustments and related matters. I am a registered Interstate Commerce Commission practitioner and am a certificated member of the American Society of Traffic and Transportation, Inc.

I am testifying in this proceeding on behalf of the respondent railroads in the Western District, and this statement runs particularly to proposed Rule B-4.

Proposed Rule B-4 reads:

> "The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points."

The proposed rule would limit the railroad in the division of earnings accruing from joint TOFC-motor or water rates to revenues no greater than received under the local all-rail TOFC rate between the points of rail movement.

* * * * * * *

[fol. 858]

1. The rule will discourage reductions in all-rail TOFC rates to meet local competitive conditions.
2. The rule will actually discourage establishment and expansion of joint TOFC motor or water services.
3. The rule is impracticable and would unnecessarily complicate accounting procedures.
4. The rule is unjust, unreasonable, and inequitable to the railroads performing TOFC service.

I shall discuss each of the preceding points in turn.

1. *The rule will discourage reductions in all-rail TOFC rates to meet local competitive conditions.*

There are two basic reasons why Rule B-4 will tend to inhibit the railroads in making reductions in all-rail TOFC rates to meet local competitive conditions, thereby resulting in a higher, more rigid all-rail TOFC rate level.

The first reason is that in the future any shipper proposals for reduced all-rail TOFC rates between two points would have to be critically reviewed by the railroads to ascertain the effect such adjustment might have upon rail-motor divisions.

Whenever a shipper requests a railroad rate reduction it is our general practice to ascertain what effect the sought reduction would have upon our net revenue. The shipper may urge that the reduced rate would generate an additional volume of traffic more than sufficient to offset the per-unit reduction in the rate, or that unless the reduction is made, he cannot continue to ship into the considered market or cannot continue to ship via rail. If we find that these contentions appear valid, so that our net revenue [fol. 859] from the involved traffic will be greater, or would otherwise diminish, the reduction is made. Rule B-4 would add a further test: Not only must the consequence of the sought reduction be an improvement in net revenues from

traffic moving under all-rail TOFC rates, but it must also appear that there will not be a dissipating reduction in divisions on joint TOFC-truck traffic.

Assume, for example, that there is a movement of glass bottles from Los Angeles, California, to Portland, Oregon, by Southern Pacific's all-rail TOFC service and also by the motor-common carriers who frequently use Southern Pacific's TOFC service between Los Angeles and Portland in substitution for their entire over-the-road highway services (Plan I). Assume that a bottle manufacturer at Stockton, California, can secure a customer at Eugene, Oregon, and because of raw material available in the Eugene area, and the fact that he possesses some vehicular equipment of his own, could institute a balanced proprietary operation. This shipper first asks the railroad to establish a relatively low all-rail Plan III TOFC rate, distance considered, from Stockton to Eugene, Oregon, in preference to buying more tractors and hiring drivers. We would also, if the proposed Rule B-4 were in effect, have to give thorough consideration to the possibility that the motor-common carriers might shift some of their Los Angeles-Portland substitute TOFC traffic so as to operate over the road between Los Angeles and Stockton, California, and between Eugene and Portland, Oregon, employing train service only between Stockton and Eugene. If this were done, it would not only reduce drastically the use made of the TOFC service, but would also cause the TOFC carrier to accept [fol. 860] as maximum in divisions for its reduced participation, the relatively low local rate. We might have to reject the request for that reason alone.

I have selected the Pacific Coast TOFC services of Southern Pacific for my example, because I believe that in this area we have developed one of the most extensive offerings of what has heretofore been classed as Plan I piggyback service in conjunction with motor common carriers. Southern Pacific Company operates regularly scheduled piggyback trains between Los Angeles, California, and Portland,

Oregon; between Los Angeles, California, and San Francisco and Oakland, California; and between Oakland, California, and Portland, Oregon, and these piggyback trains transport not only our own all-rail TOFC traffic but are available for use by the motor common carriers with whom we have joint rail-motor divisional arrangements. Generally the motor carriers who employ our service as a substitute for their service between points along the Pacific Coast may tender or receive their trailers at any of the ramps which we use in our own all-rail TOFC services. It has been our standard practice in concluding divisions agreements with the motor common carriers not to limit them to any specific pair of ramp points if they should also wish to use others. For example, a motor common carrier with authority to operate between Los Angeles, California, and Portland, Oregon, and who chooses to enter into a substitute service arrangement with us, would not be tied to only the ramp points at Los Angeles and Portland; if his motor operating authority permits, he would be free to tender or receive his trailers at the numerous [fol. 861] intermediate ramp points as well; Bakersfield, Fresno, Stockton, Oakland, Roseville, Chico and Redding, California; or Klamath Falls, Salem or Eugene, Oregon. As our division varies with distance in which the motor carrier's trailer is transported in rail service, we would receive a much lesser compensation for a movement between Stockton, California, and Eugene, Oregon, than we would between Los Angeles, California, and Portland, Oregon, and there would be less utilization of available TOFC facilities.

We believe that the flexibility inherent in offering the motor carriers use of the numerous ramps at intermediate points as well as the ramps at termini has served to make our piggyback substitute service more attractive, and has so far worked to our advantage as well as to that of the motor common carriers. Where a joint rail-motor TOFC service has been established with such extensive coverage

as that between Los Angeles, California, and Portland, Oregon, Rule B-4, I believe, would work to the disadvantage of the rail carriers. The possibility would always be present that a reduced all-rail TOFC rate between intermediate points, if resulting, as Rule B-4 would permit, in a reduction in the railroad division of joint rail-motor TOFC rates, would, in the manner previously shown, pull traffic from the longer terminal-to-terminal rail TOFC service and thereby reduce use of rail facilities and rail revenues from joint rail-motor TOFC traffic.

Another situation, although not resulting in less use of the TOFC service, could have a similar adverse result on TOFC revenue. Assume that the bottle manufacturer at Stockton, California, had a customer in Portland, Oregon, [fol. 862] and used common motor carriers for these shipments because the possibilities for a balanced proprietary movement did not prevail as they did at Eugene.

This motor carrier used TOFC under Plan I for the portion of the haul from Stockton to Eugene because it found such operation more economical than entire over-the-highway movement, and tied in well with his existing Portland-Eugene highway runs.

If the aforementioned relatively low rate were established from Stockton to Eugene it would not cause use of TOFC for a smaller portion of the total haul, but would apply as a maximum on the division of revenue for the TOFC carrier. Here, too, the requested reduction might have to be rejected because of adverse effect upon revenue from traffic now handled.

The second reason why proposed Rule B-4 will make all-rail TOFC rate structures more rigid is the fact that the motor carriers will be able to discourage the railroads from reducing all-rail TOFC rates where the reduction might have an adverse competitive effect upon them. In the *bottles* example which I gave earlier, assume instead that the proposal were initiated for the purpose of attracting to all-rail TOFC traffic now moving over the road but divided between motor common carrier service and

proprietary carriage. The motor carrier would naturally not want to see diverted from it the present all-motor traffic, and Rule B-4 would give it the means of discouraging the railroad from establishing a reduced TOFC rate.

To visualize how this would be done it is necessary to briefly describe the normal railroad rate-making proce- [fol. 863] dures. The various rate proposals of the shippers and of the rail carriers are regularly placed on a public docket by the appropriate rail tariff bureaus, such as the Pacific Southcoast Freight Bureau and the North Pacific Coast Freight Bureau of San Francisco, California, and Seattle, Washington, respectively. Before action is taken on a specific rate proposal advanced by a shipper, the proposal will have received publicity and be known to not only other interested shippers but also to the motor-carrier competitors of the rail lines.

When a shipper proposes a reduced rate because of his particular needs, the rail lines study and investigate to determine whether this adjustment will have some competitive relation and effect upon other rate adjustments and thereby cause the railroads to make further rate reductions. After such a shipper proposal for a reduced rate has been publicized by the rate bureau, I can think of no communication more likely to throw cold water on the shipper's hopes than a letter to the railroads from a motor carrier stating, in this instance, desire to use TOFC Plan I from Stockton to Eugene and suggesting in effect that if the requested reduced all-rail TOFC rate is adopted, the motor carrier will use it (or technically the new maximum division between the same points) in connection with its own over-the-road service to actively participate in other traffic now moving all-rail for a longer haul.

2. *The rule will actually discourage establishment and expansion of joint TOFC motor or water rates.*

I have previously referred to the piggyback services of my own company, Southern Pacific, as being in an advanced

[fol. 864] stage of development along the Pacific Coast insofar as joint rail-motor coordination is concerned. We have fast piggyback trains with regular scheduled departures in each direction between San Francisco-Oakland and Los Angeles, California; Oakland, California, and Portland, Oregon; and Los Angeles, California, and Portland, Oregon. Piggyback train service is available to the numerous motor-common carriers with which we have rail-for-motor substitute service arrangements (Plan I) not only between these termini but also between one of the termini and numerous intermediate points or between the intermediate points themselves. In virtually every instance in which we offer what has heretofore been termed a Plan I TOFC substitute service, we also offer an all-rail piggyback service under Southern Pacific rates and responsibility with terminal services performed by our own motor subsidiary. We believe that this all-rail piggyback service is a good service, we solicit vigorously for it, and it moves a substantial volume of traffic. The Plan I TOFC service for the motor common carriers is also valuable to us, and we strive to improve it, make it more attractive to the motor carriers who are in position to make use of it, urge them to make a regular use of it, and anticipate its expansion.

* * * * * * *

[fol. 865]

4. *The rule is unjust, unreasonable, and inequitable to the railroads performing TOFC service.*

In the operation of our transportation business we are concerned with maximizing the net revenues produced by our transportation plant. This principle guides us constantly in establishing rates for all-rail TOFC services, and it has also guided our thinking in offering rail substitute services to the motor-common carriers. Our substitute service is offered to motor common carriers to attract to our line traffic which would otherwise move principally by highway common carrier and which could not be secured in significant amounts in boxcar or all-rail TOFC. In short,

the motor carrier controls the traffic, regardless of the competitive rail services, and will either move it over the highway or he may, if it is to his advantage, employ the Plan I [fol. 866] rail service. If he does the latter, the railroad receives revenue which it would not otherwise obtain, the motor carrier reduces his costs, and both parties benefit.

The establishment of the rail carriers' division for substitute rail for motor services is guided by different consideration from those that enter into the establishment of divisions for all-rail services. In the first place, the railroad must have an attractive piggyback train schedule which the motor carriers can conveniently use or the railroad cannot hope to secure much business at any level of divisions. Assuming that the attractive piggyback train service is present and that the motor common carriers are interested in making use of it, the controlling consideration becomes the motor carriers' relievable costs. The motor carriers will seldom be interested in using substitute rail piggyback unless they can do so at a lesser cost than moving over the road. We have found, in our negotiations with motor carriers over divisions, that this is the controlling factor: that motor carriers regard their over-the-road operating costs as an absolute ceiling for any payment to the railroads for substitute service. Our divisions for substitute service, therefore, tend to follow average truck operating costs for the distances involved. In establishing divisions of all-rail TOFC rates or in establishing the level of a local TOFC all-rail rate, the yardstick is seldom that of truck operating costs unless the rate adjustment is designed solely to pull traffic away from proprietary carriage. I do not think it is logical, therefore, to arbitrarily couple local all-rail TOFC rates to divisions for a substitute rail service.

We believe that we as a rail carrier have an inherent [fol. 867] advantage over paralleling motor carriers in the form of lower line-haul costs for the longer hauls. This being so, it follows that for the longer hauls the railroads are able to operate profitably at lower rates than the motor

carriers would have to charge for compensatory all-motor movements. Assuming that considerations other than simply meeting motor common carrier rate competition enter into the construction of all-rail TOFC rates on such traffic, the railroads will publish rates lower than those of the motor carriers, and should the motor carriers meet the reduction there will be an inclination on their part to solicit only when they are unable to get a load of better-paying freight. Inasmuch as the railroad's division for joint rail-motor TOFC services will be related to the motor cost of operation, and is a flat charge regardless of trailer contents, it is entirely possible that the railroad division may be higher than the local TOFC rate for a specific commodity.

With this background there is, from the railroad's standpoint, no economic reason to accord the motor carrier a division on the specific commodity as low as the all-rail TOFC rate. The motor carriers in this circumstance are not effective highway competitors for the considered traffic, and encouraging them to handle it on TOFC would simply mean diverting traffic from the railroad in the first place and taking it back in substitute service. This would be an example of what we would consider to be an uneconomic use of Plan I TOFC service, enabling motor common carriers to gain control of traffic movements at the ultimate expense of the railroads, notwithstanding that the motor carriers have an inherent disadvantage from a cost standpoint and have never been effective competitors for this [fol. 868] traffic in over-the-road movements.

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[fol. 869]

BEFORE THE INTERSTATE COMMERCE COMMISSION

STATEMENT OF J. H. LYONS

My name is J. H. Lyons and I am employed by Southern Pacific Company as Assistant Freight Traffic Manager, Rates and Divisions, with offices at 65 Market Street, San

Francisco 5, California. My experience and qualifications are set forth in my statement under Rule B-4, *supra*.

This testimony is presented on behalf of the railroad respondents in the Western District in opposition to proposed Rule B-5. Proposed Rule B-5 states:

> "Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto."

Our opposition runs principally to the provision in Rule B-5 that any railroad providing a joint TOFC service "shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions", and in order to explain the basis of our opposition, I shall first refer briefly to the basic philosophy behind our offering of TOFC service to motor-common carriers.

Our objective in pricing all of our railroad services is to maximize our net revenues from our transportation properties. We provide a Plan I TOFC substitute service between numerous points along the Pacific Coast, as I have described in my statement under Rule B-4, and we provide this service even though we have our own all-rail TOFC [fol. 870] service between the same points. Our thinking here has been that even though we have a good all-rail TOFC service conducted under rail rates and responsibility, there is, nevertheless, a great additional volume of traffic of all kinds between those points which the motor carriers will always control. If this assumption is correct,

it follows that it is to our advantage to carry the motor-common carriers' trailers along with our own, and accept from the motor carriers a division which is less in many instances than our own all-rail TOFC rate. This is revenue which we would not otherwise receive, for otherwise the traffic would move entirely over the road.

The basic assumption which explains the offering of both all-rail and Plan I TOFC between the same points is that the motor carrier tendering us the traffic under Plan I is presently an effective competitor on the highway, and would move this traffic over the road if he did not put it on the trains. Of course, this assumption cannot hold true for every pound of freight in every trailer of every motor common carrier using Plan I substitute service, but as a general proposition it must be true if the provision of a Plan I service is to be justified from the railroad's viewpoint. Where particular situations are encountered, however, in which the railroad would not be adding new revenue by extending Plan I TOFC service to a paralleling trucker, but would instead be moving at a division of the truck rate traffic which might otherwise move under some all-rail service at a higher rate, then extension of the service cannot, from an economic standpoint, be justified.

In all cases in which we have completed contracts with [fol. 871] motor-common carriers for the provision of Plan I TOFC service, the motor-common carrier is already an effective competitor over the highway between the areas involved. If any of these carriers, however, had not been effective competitors over the road, but had made only occasional use of their certificates between the considered points, we would view with caution the extension of Plan I TOFC service for concern that we would simply be creating additional competition for ourselves. If a motor-common carrier should wish to start a new service between two points on our line, and if the apparent object of his traffic solicitation activities would be traffic presently moving all-rail, the probability is that extension of Plan I TOFC to this carrier would result in economic loss rather

than advantage to the railroad. This would be especially true if the motor carrier in question maintained tariff rates which, although largely unused, were on a basis lower than the prevailing all-rail TOFC rates. In that case the probability would be very high that the new carrier would be operating on the railroad's present traffic.

Plan I piggybacking is a form of partnership in which the railroad and the motor carrier must have a certain degree of confidence in one another. Haphazard partnerships are not always good business arrangements, and when we enter into a Plan I TOFC contract we expect to first know something about our partner's business reputation, condition of his equipment, etc. We would not want to become embroiled in continual haggling with him over claims, nor would we want a partner who would be inclined to blame Southern Pacific Company unjustly whenever, because of inadequate or inferior equipment or for other reasons, his own service performance fell down, for [fol. 872] this would be detrimental to us and our own business relationships with the same shippers.

The ability to select responsible motor carriers as partners can also protect the railroad from direct, serious loss of money. My company, through requiring financial stability and responsibility on the part of the motor carriers with whom we consummate contracts, has suffered no losses because of failure or refusal of our motor carrier partner to make proper and full interline settlement of money due us.

However, at least one western railroad has not been so fortunate, as Mr. T. P. Wadsworth's testimony relates.

Ability to choose responsible motor carriers prevents or holds such losses to a minimum, but inability to exclude irresponsible motor carriers would enhance the possibility of such losses many fold.

When we enter into a Plan I TOFC arrangement we do not insist that the motor carrier promise us a certain number of trailers for a certain regular movement. It is

understood, however, that we anticipate use of our piggyback trains on more than simply an overflow basis. It does not seem fair and equitable to us or to our regular piggyback users to expect us to extend Plan I TOFC service on a standby basis to those who would not use it, except during periods of extraordinarily heavy traffic movement when they do not have enough tractors and drivers to take the shipments over the road, and who would then descend upon the piggyback ramps insisting vociferiously that they receive their "fair share" of the available piggyback cars.

It should be understood that Southern Pacific, in exer- [fol. 873] cising business judgment in extending or withholding TOFC service to or from paralleling motor-common carriers, has not prevented growth of Plan I piggyback. At the present time we have Plan I TOFC contracts with more than 25 motor-common carriers covering north-south movements along the Pacific Coast alone, and these are with motor-common carriers of both general and specific commodities. I believe this includes the majority of the motor carriers which have daily traffic movements between North Pacific Coast and Pacific Southcoast Freight Bureau territory.

J. H. Lyons.

[fol. 874]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF T. P. WADSWORTH

Testimony of T. P. Wadsworth

In Ex Parte 230

My name is T. P. Wadsworth, Assistant Director of Pricing for The Western Pacific Railroad Company. My qualifications and background have heretofore been set forth at some length in connection with the testimony I have entered in this proceeding regarding proposed Rule B-2.

In testifying on the provisions of Rule B-5, I am entering this statement on behalf of all of the western railroads who are parties to this submission.

Disregarding the question of jurisdiction which is to be handled elsewhere in this pleading, I wish to submit testimony dealing with the practicalities of the problems to be encountered by the railroads should they be required to join with all motor carriers desirous of participating in joint intermodal service.

There are two major areas of concern in the matter of practical obstacles to the promulgation of Rule B-5 as it applies to connecting motor carriers.

First, based upon recent experience, we have found that some motor carriers do not have sufficient economic stability to adequately protect our interest in the settlement of interline accounts. In one recent instance, for example, Western Pacific was forced to discontinue operations with a connecting motor carrier upon very short notice, because of its failure and refusal to make a proper and full accounting of monies due unto us in interline settlements. [fol. 875] Even on short notice, by the time the service was discontinued, this carrier was indebted to us in an amount in excess of $25,000 which we are now in the process of attempting to recover through legal channels. If, however, in the face of this rule, the carriers are to be forced to defend unilateral action in terminating unsatisfactory arrangements on this or other grounds, or to be subjected to the possibility of restraining orders pending proof that the actions of such connecting carriers justify a difference of treatment under the rule's broad qualifying language, the situation could become critical. We could be put in the position of risking even greater loss without regard to the question of whether we could be sued for damages should some court, or the Commission for that matter, determine that our action amounted to discriminatory practices. We believe that a major reason for our limited number of similar situations has been our right to choose our partners in this business. We must have the right to deal with those

in whom we at least have initial confidence. It does not solve our problem to contend that "similar circumstances and conditions" protect us because this would require an intensive investigation of every applicant and even then our findings or conclusions might be erroneous or challenged.

Secondly, and perhaps even more importantly, intermodal TOFC service must be considered as directly competitive with motor and joint motor-water service. Accordingly, the railroads must be allowed to select not only the areas within which it will perform joint intermodal TOFC but also those with whom they will join.

[fol. 876] It is easy to conceive of many reasons a given motor carrier is anxious to direct its principal efforts toward building up its participation in joint intermodal TOFC. Other motor carriers might, however, feel that they would prefer to compete principally with TOFC or boxcar service. The quality of the latter's service in joint intermodal participation, might well be something less than desirable from the railroads' competitive standpoint. The railroad should remain free to deal with the former and exclude the latter. It is no defense to contend that the qualifying language "similar circumstances and conditions" would provide any protection to the railroads in this area. Litigation could take years and, worse, a damaging approach might not be uncovered until damage is done.

The loading of TOFC traffic requires a close working alliance between the motor and rail carriers if schedules are to be met and/or improved. The ability of the railroads to determine who shall work with them is not only an essential ingredient of efficient operation but a tremendous incentive to the participating carrier or carriers to continue a fully cooperative service.

In drafting this Rule, the Commission appears to have completely overlooked the intense competitive situation between the railroads and motor carriers. TOFC is a railroad service designed to meet the overwhelming challenge of the motor industry. To force the railroads to put the

ability to control the quality of such service in the hands of its direct competitors, is to give these competitors the opportunity to, if not destroy, at least severely hamper this service.

[fol. 877]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

VERIFIED STATEMENT OF MR. T. M. CAIAZZA, ASSISTANT VICE PRESIDENT OF TRAFFIC, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

My name is T. M. Caiazza. I have been assistant Vice President of The Atchison, Topeka and Santa Fe Railway Company, with headquarters at Chicago, Illinois, since 1957. This statement is directed to proposed Rules C-1 and C-2 (f) and is submitted on behalf of the western railroads, respondents in Ex Parte No. 230.

The western railroads, as indicated in special pleading filed by them pursuant to the Commission's order of October 11, 1962, are opposed to Rules C-1 and C-2(f) because they restrict the types of all-rail TOFC service which may be performed by the railroads, specifically excluding service under what has been termed Plans III and IV. My statement will pertain to Plan IV service between Chicago, Illinois, St. Louis, Missouri and Memphis, Tennessee, on the one hand, and Pacific Coast points on the other, principally Los Angeles and points in the San Francisco Bay area, as generally representative of Plan IV service.

The rates providing this service have been effective since June 15, 1958. Exhibit No. 1, attached, a reproduction of [fol. 878] Item 4500-B, Supplement 41 to T.C.F.B. Tariff No. 1-K, I.C.C. No. 1668, covers rates for the westbound movement currently in effect. The tariff item is self-explanatory. It provides Plan IV TOFC service under which freight, all kinds, is transported in trailers or containers provided by shippers on flat cars owned or leased by them

under circumstances where the railroad performs only the line-haul transportation and the shippers or their agents load and unload the trailers or containers and perform the pick-up and delivery service.

I participated in the discussions and conferences leading to the establishment of the Plan IV service. It was established by the railroads to meet proprietary and for-hire motor carrier competition and to enable them to participate more fully in the large and increasing volume of less-than-carload traffic principally between Chicago and the Pacific Coast. Proprietary and for-hire motor carriers had made vast inroads on rail less-than-carload traffic and the Plan IV service was designed to arrest the diversion of this type of traffic and to regain some of the traffic which had been lost.

The rapid expansion of trailer-on-flat-car operations had demonstrated the undoubted merit possessed by such operations in meeting motor carrier competition. Both the rail carriers and the shippers benefit from such operations since they combine the flexibility and door-to-door service provided by motor carriers with the speed and economy of rail [fol. 879] operations. It was concluded, therefore, to make this type of service effective between the points involved as affording the best means presently available for meeting proprietary and for-hire motor competition.

The principal innovation in the Plan IV service in contrast with Plan II service consists of the furnishing of both the flat cars and the trailers or containers by the shippers and the performance of pick-up and delivery service by the shippers. The rail carriers benefit from the utilization of more heavily loaded equipment, release of badly needed box cars for other purposes, more economical and efficient handling of TOFC traffic, and are relieved to a large extent of the necessity for making capital investment to their car supply. The shippers benefit because they perform their own pick-up and delivery service and thus secure the benefit of their own particular location in the terminal area, and because they incur only such empty or light-loaded re-

turn movement as is represented by their own experience. Moreover, unlike the rail carriers, shippers can reach out beyond rail pick-up and delivery limits in the assembly and distribution of freight. In essence, therefore, the Plan IV service constitutes a separate and distinct transportation service specifically tailored to meet the shippers' needs, and differs from Plan II service by more than the supplying of certain equipment and service by the shippers.

[fol. 880] Under Plan II, the rate charged the shippers necessarily reflects the average expense of pick-up and delivery of freight for all shippers at all points in the rail terminal area whereas under Plan IV shippers who perform these services for their own account derive the benefit of their own more advantageously situated location in the terminal area. Under Plan IV, also, the shippers generally incur only the expense attendant upon the empty return or light loaded movement represented by their own personal experience whereas under Plan II the rate necessarily reflects the average expense of this character incurred by the railroads for all shippers. And, as stated, shippers utilizing Plan IV service are enabled to pick up and deliver freight outside the limited rail pick-up and delivery areas permitted the rail carriers under Plan II. Manifestly, the benefits thus extended shippers under Plan IV cannot be afforded them through the medium of allowances contemplated in proposed Rule C-2(f).

In the establishment of Plan IV service, the rail carriers had in mind the fact that there exists an area of less-than-carload business in which they do not adequately compete with the motor carriers. This is the so-called "volume rate area." Many motor carriers publish rates on varying minimum weights at 10,000 pounds, 15,000 pounds, 20,000 pounds, or 25,000 pounds, and on truckloads, the rates for each weight bracket decreasing as the weights increase. The rail carriers do not have a substantial amount of rates published to cover this intermediate territory between small less-than-carload lots and carload lots. In order to be competitive with the motor carriers in this area, it is essential

[fol. 881] that the rail carriers handle the traffic in carload lots. They concluded that if they published rates which would induce shippers to assemble these larger less-than-carload shipments into a single shipment and move them at a carload rate, they would regain some of the traffic. Consolidation of "volume" less-than-carload shipments into carload shipments by freight forwarders, shippers' associations, and individual shippers is, therefore, an integral part of the Plan IV service.

The Plan IV service has been very successful ever since its inauguration in June 1958. Exhibit No. 2, attached, shows the volume of traffic moved thereunder by the Santa Fe from the inception of the service through September 1962. It will be noted that 30,308 carloads were handled in Plan IV service through September 1962. The volume handled has been substantial and demonstrates the public need for the service.

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STATEMENT OF PLAN IV TOFC TRAFFIC

The A. T. & S. F. Railway Company

Period	Westbound (Cars)	Eastbound (Cars)	Total (Cars)
1958 (1)	640	593	1233
1959	3412	3341	6753
1960	4301	4274	8575
1961	4047	3734	7781
1962 (9 months)	3346	2620	5966
Total	15746	14562	30308

(1) Movement commenced in August.

[fol. 883]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF R. S. SANDGREN
(NORTHERN PACIFIC RWY. CO.)

My name is R. S. Sandgren. I am General Freight Agent of the Northern Pacific Railway Company, St. Paul, Minnesota.

* * * * * * *

Northern Pacific operates approximately 6777 miles of road in freight service extending westward from its eastern termini at St. Paul-Minneapolis and Duluth-Superior, in Minnesota and Wisconsin, through the northern tier of states to western termini in Washington and Oregon. The Company's traffic consists of raw materials and products moving from the soil, mines, forests, fisheries and grazing lands of the West to the populous consuming centers of the eastern one-third of the United States, and of a return movement [fol. 884] in lesser volume of manufactured goods and supplies for the industries and population served. Eastbound traffic yields approximately two-thirds of the Northern Pacific's total transcontinental freight revenues.

The most important revenue-producing commodity group is manufactures and miscellaneous. Exhibit 1 shows that in 1961 Northern Pacific obtained $57,420,700 in freight revenues in handling this traffic, which moves predominantly westbound. This traffic not only yields substantial revenues but also produces westbound tonnage which the Company sorely needs in its efforts to balance westbound versus eastbound carloads of all traffic.

During the years following World War II intercity traffic in these commodities increased substantially but more and more of it moved in private transportation or by common or contract motor carrier in less-than-carload lots. Exhibit 2 attached shows that from 1952 to 1961 Northern Pacific experienced no increase in carload manufactures and miscellaneous revenues, even though intercity traffic in this

group is rising. Although data relating to private carriage are not available, reports to the Interstate Commerce Commission reflect that Class I common and contract motor carriers have experienced substantial increases in the volume of this tonnage handled. Exhibit 3 shows that in 1960 gross freight revenues for these carriers in the United States on manufactures and miscellaneous traffic amounted [fol. 885] to $1,686,731,812, or 31% more than they earned on this traffic in 1956.

Attempts in the 1950's to meet by ordinary boxcar service this growing regulated and unregulated truck competition largely failed. Although less-than-carload shipments of manufactures and miscellaneous can be consolidated into carloads, shippers required more flexibility and speed than Northern Pacific could provide in regular boxcar service. Rail service is essentially tied to the rail route, because railroads cannot range beyond their terminal areas for the pickup and delivery of their traffic. The stopping of cars to complete loading and partially unload acted as a deterrent to providing expeditious movement on these commodities, which generally demand fast service.

In an effort to halt this trend and, if possible, recapture some of this traffic moving between transcontinental points, Northern Pacific joined in the establishment of Plan IV TOFC rates and services. * * *

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[fol. 886] Northern Pacific Plan IV rates and services have yielded substantial westbound revenues. Since May 15, 1959 the Company has transported more than 2,000 freight cars and more than 4,000 trailers for which service freight revenues of over $2,000,000 have accrued to the participating rail carriers. Northern Pacific's manufactures and miscellaneous carload revenues continued to decline in 1960 and 1961, due in part to a slow-down in the nation's economy, but this decrease was partially offset by revenues from freight forwarder traffic moving under Plan IV rates. Exhibit 4 demonstrates that, contrary to the decline in man-

ufactures and miscellaneous revenues, earnings from freight forwarder traffic have held steady or increased since 1958. A good portion of this freight forwarder traffic consists of consolidated shipments of small lots of manufactures and miscellaneous commodities which had been lost to rail movement before the institution of Plan IV operations. The present substantial volume of Plan IV traffic demonstrates that Northern Pacific and its connecting railroads are meeting the needs of freight forwarders [fol.887] and shippers for this kind of competitively priced service.

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[fol. 888]

EXHIBIT No. 3 TO VERIFIED STATEMENT OF R. S. SANDGREN

NORTHERN PACIFIC RAILWAY COMPANY

Motor Carrier Freight Commodity Statistics, Class I Common and Contract Carriers of Property, for Years 1956 Through 1960 Inclusive

Year		UNITED STATES				(1) PACIFIC REGION			
		Total Revenue Freight Carried No. of Tons (2000 Lbs.)	Index No. 1956=100	Gross Freight Revenue (Dollars)	Index No. 1956=100	Total Revenue Freight Carried No. of Tons (2000 Lbs.)	Index No. 1956=100	Gross Freight Revenue (Dollars)	Index No. 1956=100
1956	Total Manufactures and Miscellaneous	135,670,171	100.0	1,286,347,658	100.0	15,048,282	100.0	114,069,417	100.0
	Total Truckload	153,790,969	100.0	1,454,097,634	100.0	20,834,810	100.0	142,111,062	100.0
1957	Total Manufactures and Miscellaneous	136,312,394	100.5	1,390,143,083	108.1	15,149,463	100.7	125,702,159	110.2
	Total Truckload	157,243,586	102.2	1,575,252,201	108.3	22,457,972	107.8	153,642,356	108.1
1958	Total Manufactures and Miscellaneous	133,463,942	98.4	1,340,015,425	104.2	14,717,576	97.8	118,849,184	104.2
	Total Truckload	152,801,192	99.4	1,526,535,930	105.0	19,912,623	95.7	143,631,476	101.1
1959	Total Manufactures and Miscellaneous	154,821,624	114.1	1,627,559,714	126.5	16,984,667	112.9	146,041,394	128.0
	Total Truckload	177,091,150	115.1	1,846,055,404	127.0	22,505,823	108.0	175,110,891	123.2
1960	Total Manufactures and Miscellaneous	158,413,953	116.8	1,686,731,812	131.1	17,381,594	115.5	163,382,675	143.2
	Total Truckload	182,228,986	118.5	1,925,316,703	132.4	23,326,173	112.0	199,527,882	140.4

(1) Includes Arizona, California, Nevada, Oregon and Washington.

Source: Interstate Commerce Commission Statements Nos. 5718, 5815, 596, 608 and 6114.

[fol. 889]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF
EDWARD F. GRASSER
(ST. LOUIS-SAN FRANCISCO RWY. CO.)

My name is Edward F. Grasser. I am an Assistant General Freight Agent of the St. Louis-San Francisco Railway Company, with offices at 906 Olive Street, St. Louis 1, Missouri. I am in charge of the Commerce Department which is a section of the Freight Traffic Department. • • •

• • • • • • • •

[fol. 890]

III

Desirability of Plan III in Present Form From Standpoint of Railroads and Shippers

Shortly after the development and relatively extensive use of trailer-on-flat-car service by the railroads and shippers, it became obvious to the railroads that a need existed for the publication of rates for transporting shipper's high-
[fol. 891] way trailers between railroad ramps in the performance of service which did not include pick-up or delivery. Namely, the ramp-to-ramp service, presently known as Plan III. While there were a number of reasons for the development and desirability of that type service, the one outstanding reason was the desire of the railroads to attract and/or retain tonnage which had been moving or was susceptible to moving under private carriage. This fact can easily be determined by reviewing testimony of both shippers and railroads in numerous proceedings involving Plan III rates before the Interstate Commerce Commission. Among those were ICC Docket 32533—Eastern Central Motor Carriers Association, Inc. v. the Baltimore & Ohio Railroad Company et al., ICC Docket 33133—All Freight in Trailer-on-Flat Cars Between the East and Chicago and East St. Louis, ICC Docket 33411, Freight, All Kinds, St. Louis and East St. Louis, to Oklahoma and Texas, and numerous others.

• • • • • • • •

[fol. 892] Generally speaking, the desirability of Plan III as presently performed insofar as the railroads are concerned could be summed up by the following:

1. Attract profitable traffic, primarily the type of traffic moving in private carriage.

2. Eliminate rail terminal services as compared to operations under Plan II.

3. Plan III permits a rail service in conjunction with shipper handling at origin and destination and at the same time results in a cost saving to the railroad when compared to Plan II.

Insofar as the shippers are concerned, the basic advantage of the present method of publishing Plan III rates is that such rates now provide a service by the railroads to the shippers who desire to furnish a part of the instrumentalities and services which under Plan II the carriers are obligated to furnish. There are, of course, other advantages to the shipper, some of which are directly related to those previously enumerated as advantages to the railroads. Among these are the flexibility of the service, i.e. the shipper is not dependent upon pick-up or delivery services by the railroad and may use his own forces and schedules for such handling; the cost savings to the shippers [fol. 893] furnishing equipment which in many cases they already own; the furnishing of the transportation from or to the railroad ramp with forces they already employ. The service also eliminates the over-the-road expense of private carriage, while, generally, equalling private carriage and the speed and convenience of such carriage.

* * * * * * *

[fol. 894]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF D. A. KELLER, MANAGER, RAIL-HIGHWAY SALES OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

My name is D. A. Keller. I am the Manager, Rail-Highway Sales of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. I have been the Manager of this department since 1961 and prior to that time was the Assistant Manager of the department.

* * * * * * * *

* * * In 1959, a group of shippers in Seattle, Washington [fol. 895] formed an association for the purpose of using the newly published and effective Plan IV rates. To use Plan IV rates, the shipper must provide the trailer and rail equipment. At the time the Association was formed, they owned no equipment and could not be expected to invest substantial sums of money without knowing whether this method of transportation would prove satisfactory for the group or that the rates would remain in effect.

Our company leased to this group on a long term lease for six months one Flexi-Van rail car and arranged for them to lease two Flexi-Van trailers. This association then began on a trial basis the use of this equipment, shipping between Chicago and Seattle on the Plan IV rates. The group's experience during the six months proved that the service met their needs and could be utilized with resultant savings to them in transportation costs. This association then commenced acquiring its own equipment and today the group owns directly, or leases from manufacturers, five Flexi-Van rail cars and ten Flexi-Van trailers. After the six month period elapsed, the lease we had was cancelled and we no longer leased equipment to these people. From 1959, when we first leased the initial car to this group until September 1962, our railroad has realized over $400,000 in gross freight revenue from Plan IV shipments

from this association. We feel the development of this amount would not have been possible without the use of [fol. 896] the initial six month term lease that we made to the association.

We also lease to freight forwarders rail cars suitable for the handling of their Plan IV piggyback trailers. These leases are made so the forwarders may supplement their own equipment during peak periods of traffic to meet unusual demands. This equipment is not leased on a one way trip basis but for round trips only. Through this type of supplemental leasing, our company has not only realized revenue from the lease of equipment but it has enabled us to receive additional freight revenues from Plan IV traffic which might have moved in another manner had we not been able to supply the additional equipment. The rail equipment which we leased in this service was equipment formerly used for the T.O.F.C. handling of automobile traffic, but with the change of the automobile movement to multi-level type rail cars, these T.O.F.C. cars were no longer needed and would have remained idle had they not been leased to the freight forwarders. For the lease of this equipment over the past two years, we have received from the leases alone approximately $30,000.

Another manner in which our company leases trailer equipment is to shippers using so-called Plan III rates. Our company entered the Plan III service with the publishing of rates between Chicago, Illinois on one hand and [fol. 897] the Twin Cities (St. Paul-Minneapolis, Minn.) on the other in February 1960. Up to that time we had participated in only Plan II and IV rates with the bulk of our business, approximately 70%, in Plan II. This Plan II business moved in quantity from Chicago to the Twin Cities, at that time our biggest T.O.F.C. terminal. Much of the Plan II business moving from Chicago was received from Eastern connections, with the result that we encountered a rather heavy empty return movement to the Chicago terminal. The local Plan II Chicago-Twin Cities traffic also followed this pattern. A concentrated effort to secure

business moving in an Eastern direction did little towards filling this empty equipment.

In an endeavor to generate a movement from the Twin Cities and utilize the equipment made empty here, we published Plan III rates between Chicago and the Twin Cities, and during the first year of operation were successful in moving a minor amount of Plan III business. Eighty-two percent of the Plan III business during this first year moved *from* the Twin Cities eastbound, enabling us to fill some of our own empty trailer equipment, as well as foreign equipment that we had on per diem, instead of sending it home empty. Equipment leasing was largely responsible for the realization of additional revenue on Plan III. During 1960, this service filled over 500 trailers that [fol. 898] otherwise would have moved empty from the Twin Cities. During 1962, it has filled in excess of 1100 trailers that would have moved from the Twin Cities empty to the East. For the first 10 months of 1962, we have realized in excess of $46,000 from the leasing of trailer equipment which has off-set a considerable amount of equipment expense. For the first 7 months of 1962, our estimated gross freight revenue from Plan III business will exceed $150,000.

Our Traffic Research Department has made extensive studies on both the Plan III and IV operations and has determined that these Plans have created the highest percentage of earnings of all of our T.O.F.C. operations.

Without the leasing of equipment of all kinds for T.O.F.C. service, our company would not have realized the substantial revenues outlined but, on the contrary, would have incurred greater expenses in our Plan II handling because of a greater empty trailer movement. Through the use of Plan III and the lease of equipment, we have made use of what would otherwise be empty equipment to augment our revenues. Our company has never purchased equipment to lease for the movement of Plan III or IV traffic but instead has found ways and means of efficiently utilizing [fol. 899] available equipment that otherwise would remain idle or move empty.

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VOL. 2

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VOLUME 2

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.;

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, APPELLANT,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.; AND

No. 60

UNITED STATES, ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

NO. 57 FILED JANUARY 14, 1966
NO. 59 FILED JANUARY 17, 1966
NO. 60 FILED JANUARY 17, 1966
PROBABLE JURISDICTION NOTED APRIL 18, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.;

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, APPELLANT,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.; AND

No. 60

UNITED STATES, ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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[fol. 900]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF T. P. WADSWORTH
(WESTERN PACIFIC RR Co.)

My name is T. P. Wadsworth, Assistant Director of Pricing for The Western Pacific Railroad Company.

* * * * * * *

A number of railroads, particularly the smaller ones, frequently find themselves in the position of being unable to meet immediate demands for equipment. Unless equipment is available when needed by the shipper, the traffic will either find its way to another carrier or perhaps even to another mode of transportation. It is also possible that when the demand cannot be promptly met, the traffic simply does not move causing damage to both the carrier and the shipper.

[fol. 901] The problem of keeping an adequate supply of equipment always on hand, is compounded by the fact that the demand does not always follow a set pattern. Unfortunately, the problem is further compounded by the fact the heavy demand is not even seasonal in many instances but varies from day to day. It is respectfully submitted that even the more well endowed carriers cannot always have on hand sufficient equipment to meet such demands.

* * * * * * *

[fol. 902]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads is a voluntary unincorporated association whose membership comprises railroads owning and operating 98.7 per cent of the railroad mileage owned and operated by Class I railroads in the United States.

• • • • • • •

[fol. 903]

I.

Factual

Although early counterparts of trailer-on-flat car, or piggyback, service were known and used in the United States in the 19th century—and later in the 1920's, 1930's and 1940's—its substantial adoption and growth date only from the early 1950's. As a broadly used method of transportation, in fact, it is scarcely ten years old. Probably no other development in the field of surface transportation, during this period, has been so widely noted or so favorably regarded by the public at large.

As is well known, its growth in the past decade has been spectacular and continuous. Today 61 Class I railroads report piggyback loadings to the Car Service Division of the Association of American Railroads. A list of these railroads is attached hereto (stencil No. 136907). The service has taken five principal forms, popularly referred to as Plan I through Plan V, which are, of course, well

known to the parties in this proceeding. The statistical measure of growth appears in the attached statements (stencils No. 136908 and No. 136909), showing the number of flat cars loaded in revenue piggyback service for the years 1955 through 1962, by weeks. In 1955, the total number of flat cars loaded was 168,150, for a weekly average of 3,234. The total number loaded in 1961 was 591,246, for a weekly average of 11,370. As of November 24, 1962, a total of 641,351 had been loaded in such service, for a weekly average to that date of 13,646.

A cumulative statement beginning with the year 1960 and continuing to and including the week ended November 24, 1962, is attached (stencil No. 136906). For the 47-week period in 1962, there was a 20.8 per cent increase over 1961 [fol. 904] and a 34.6 per cent increase over 1960.

A representation in graph form, for the years 1955, 1956, 1957, 1958, 1959, 1960, 1961 and the 47 weeks of 1962 ending November 24, of the number of flat cars loaded with revenue highway trailers or highway containers in piggyback service, is attached (stencil No. 136904).

Another graph (stencil No. 136905) shows for the years 1959, 1960, 1961 and the 47 weeks of 1962 ending November 24, the number of highway trailers or containers loaded on flat cars (including revenue and non-revenue movements), showing approximately 1½ million handled in 1962, as compared with 729,893 in 1959.

The statistical indices tell only part of the story. A large investment has been made by the railroads in trailers, containers, flat cars, loading and unloading platforms, and numerous appurtenant devices. Suppliers have developed—and are still developing—technological improvements and methods. Railroads, shippers, and participating motor carriers have collaborated in fashioning a flexible tool from joint use of the two modes of transportation, rail and highway. Refinements and new uses are still being perfected. This growth has been carried out under regulatory guidelines laid down by the decision of the entire Commission,

dated July 30, 1954, in *Movement of Highway Trailers by Rail,* 293 I.C.C. 93. This decision established general principles, but wisely left room for the exercise of skill and ingenuity by railroads, shippers, and participating motor carriers in developing and adapting the service to the diverse needs of the American economy. The five principal Plans have been the outcome of a process of organic growth and accommodation. The net result, to date, has been a highly efficient, progressive form of transportation, offering many benefits to shippers, the railroads, participating motor carriers and the general public.

• • • • • • •

[fol. 905]

III.

Factual

As previously pointed out, TOFC service requires the cooperation of rail carriers and highway carriers. TOFC service, under Plans I and V, requires the cooperation of rail carriers and authorized highway carriers, usually a common carrier by motor vehicle. Operations under Plan II require the rail carrier to provide, by its own facilities or by an authorized motor carrier, the hauls within terminal areas. Plans III and IV call for a combining of the facilities of the rail carrier with the motor carrier facilities of a shipper or a forwarder. It obviously is desirable that the motor carrier part of the TOFC service be performed willingly and efficiently. There is cause for serious concern as to the willingness of many common carriers by motor vehicle to engage in this service, in view of what appears to have been a concerted effort in the trucking industry to defeat TOFC service. Only a few years ago, the American Trucking Associations, along with forty-four motor carriers, filed a petition to reopen *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, alleging the illegality of Plans II, III and IV. On July 18, 1959, the ninety-man executive committee of the American Trucking

Associations adopted a policy statement opposing rail piggyback operations except under Plan I. In February 1959, Mr. D. P. Kipp, representing the Regular Common Carrier Conference on the American Trucking Assns. Piggyback [fol. 906] Committee, said of piggybacking, "The thing keeps on going and multiplying like a virus." In his annual report in 1960, ATA President Welby M. Frantz told the annual meeting that:

> ". . . piggyback lying dormant for 30 years, suddenly emerges from the cold storage compartment and we find it a threatening fact of competition . . . There is a better than even chance that piggyback, as presently conducted in some of its forms, will prove to be one of the most destructive factors which have ever disturbed orderly transportation."

There are many other expressions by trucking representatives of their distaste for the development of TOFC service. Plan V was likewise attacked. Mr. James E. Haydon, Manager, Commerce Department, The Eastern Central Motor Carriers Association, Inc., in a panel discussion at the annual meeting of the Association of Interstate Commerce Commission Practitioners, May 13, 1960, said of Plan V:

> "The rail service under this plan is trailer-on-flatcar so that as a practical matter the joint service is about the same as a joint-line motor carrier service all the way, yet the rates charged are in many instances lower than the motor carrier rates. That is true also with respect to the automobile arrangement between the railroads and certain motor carriers, so that from all we have seen so far of Plan V coordination can only lead to the conclusion that it is presently being used simply as a competitive device to divert traffic from the longhaul motor common carriers through the medium of reduced rates, but in the name of 'coordination' about which we hear so much."

To date in this proceeding the trucking industry generally has not persisted in its claim that every Plan for TOFC service other than Plan I is illegal, but their prior expressions and conduct must raise apprehension as to the willingness of the motor carrier industry as a whole to cooperate in the development of the various methods of utilizing TOFC service.

• • • • • • •

[fol. 907] IV.

Factual

Another aspect of opposition to TOFC service from within the ranks of the motor carrier industry is the outspoken hostility of its organized employees. Piggybacking, according to expressions of their leaders, is evil. The International Brotherhood of Teamsters prepared and circulated a pamphlet entitled "Dangerous Combination," devoted to an attack on piggybacking, with foreword by Mr. James R. Hoffa, President of the Teamsters, in which he alleged, "railroads and the Commission threaten to destroy a vital segment of the trucking industry, and with it the jobs of 15,000 Teamsters." Another pamphlet circulated by the same organization was entitled "How Piggyback Destroys the Work Opportunities of Teamsters," in which each Teamster was requested to write his Congressman or Senator to point out the dangers of piggybacking in all parts of the country.

As a further implementation of their attack, the Teamsters have insisted upon the insertion in many of the labor contracts between their members and motor carrier employers of a provision, which is presently effective, that "for each trailer or container placed on, or delivered to, rail flat car, birdy-back, fishy-back or barge operations, the sum of five ($5.00) Dollars shall be paid" into a fund as the Union may direct. Referring to this provision in an article published in October 1961, in "The Shipper-Motor Executive," Mr. Hoffa said: "This was not forced on the trucker employers. It was agreed to by both man-

agement and labor through the process of free collective bargaining. It is good for both parties because we realized that neither party knows what the future holds." As a midwestern official of the Teamsters explained in 1961,[1] [fol. 908] "This clause was meant to curb trucking freight companies who have attempted to ship their truck freight in vans by rail, particularly in the Eastern and Western states." Other provisions in Teamster contracts are reported to prohibit the use by motor carriers of any new piggyback service, to give the Union (in substance) a veto over motor carrier decisions to enter piggybacking, and to limit the amount of piggybacking that may be done to predetermined levels. The full detail of these arrangements is unknown.

[fol. 909] Philip F. Welsh.

[1] In a letter dated May 26, 1961, from Frank Demeria, President, General Drivers, Warehousemen, Helpers & Inside Employees, Local Union No. 346 (Affiliated with the International Brotherhood of the Teamsters, Chauffeurs, Warehousemen and Helpers of America) of Duluth, Minnesota, to the Northern Pacific Transport Company.

The following list includes all 61 U. S. Class I railroad systems reporting piggyback loadings to the Car Service Division:

EASTERN
- Ann Arbor
- Bangor & Aroostook
- Boston & Maine
- Delaware & Hudson
- Detroit, Toledo & Ironton
- Erie-Lackawanna
- Grand Trunk Western
- Lehigh Valley
- Maine Central
- Monon
- New York Central
- Nickel Plate
- New Haven
- Pittsburgh & Lake Erie
- Wabash

ALLEGHENY
- Baltimore & Ohio
- Bessemer & Lake Erie
- Central R.R. of New Jersey
- Pennsylvania
- Reading
- Western Maryland

POCAHONTAS
- Chesapeake & Ohio
- Norfolk & Western

SOUTHERN
- Atlanta & West Point - Western Ry. of Alabama
- Atlantic Coast Line
- Central of Georgia
- Clinchfield
- Florida East Coast
- Georgia
- Gulf, Mobile & Ohio
- Illinois Central
- Louisville & Nashville
- Richmond, Fredericksburg & Potomac
- Seaboard Air Line
- Southern System
- Tennessee Central

NORTHWESTERN
- Chicago & North Western System
- Chicago Great Western
- Chicago, Milwaukee, St. Paul & Pacific
- Great Northern
- Northern Pacific
- Soo Line
- Spokane, Portland & Seattle

CENTRALWESTERN
- Atchison, Topeka & Santa Fe
- Chicago & Eastern Illinois
- Chicago, Burlington & Quincy
- Chicago, Rock Island & Pacific
- Colorado & Southern Lines
- Denver & Rio Grande Western
- Illinois Terminal
- Southern Pacific
- Toledo, Peoria & Western
- Union Pacific
- Western Pacific

SOUTHWESTERN
- Kansas City Southern - Louisiana & Arkansas
- Midland Valley - Kansas, Oklahoma & Gulf - OCAA
- Missouri - Kansas - Texas
- Missouri Pacific
- St. Louis-San Francisco
- St. Louis Southwestern
- Texas & Pacific

Car Service Division
September 1, 1962

[fol. 911]

CARS LOADED WITH HIGHWAY TRAILERS IN REVENUE SERVICE (PIGGYBACK)

136906

YEAR	NUMBER OF ROADS REPORTING a	NUMBER OF CARS LOADED b	
		WEEK ENDED November 24	47 WEEKS ENDED November 24
1962	61	12,392	641,351
1961	58	10,260	533,917
1960	54	9,208	504,971
INCREASE 1962 vs. 1961: CARS		2,132	107,434
PER CENT		20.8	20.1
INCREASE 1962 vs. 1960: CARS		3,184	136,380
PER CENT		34.6	27.0

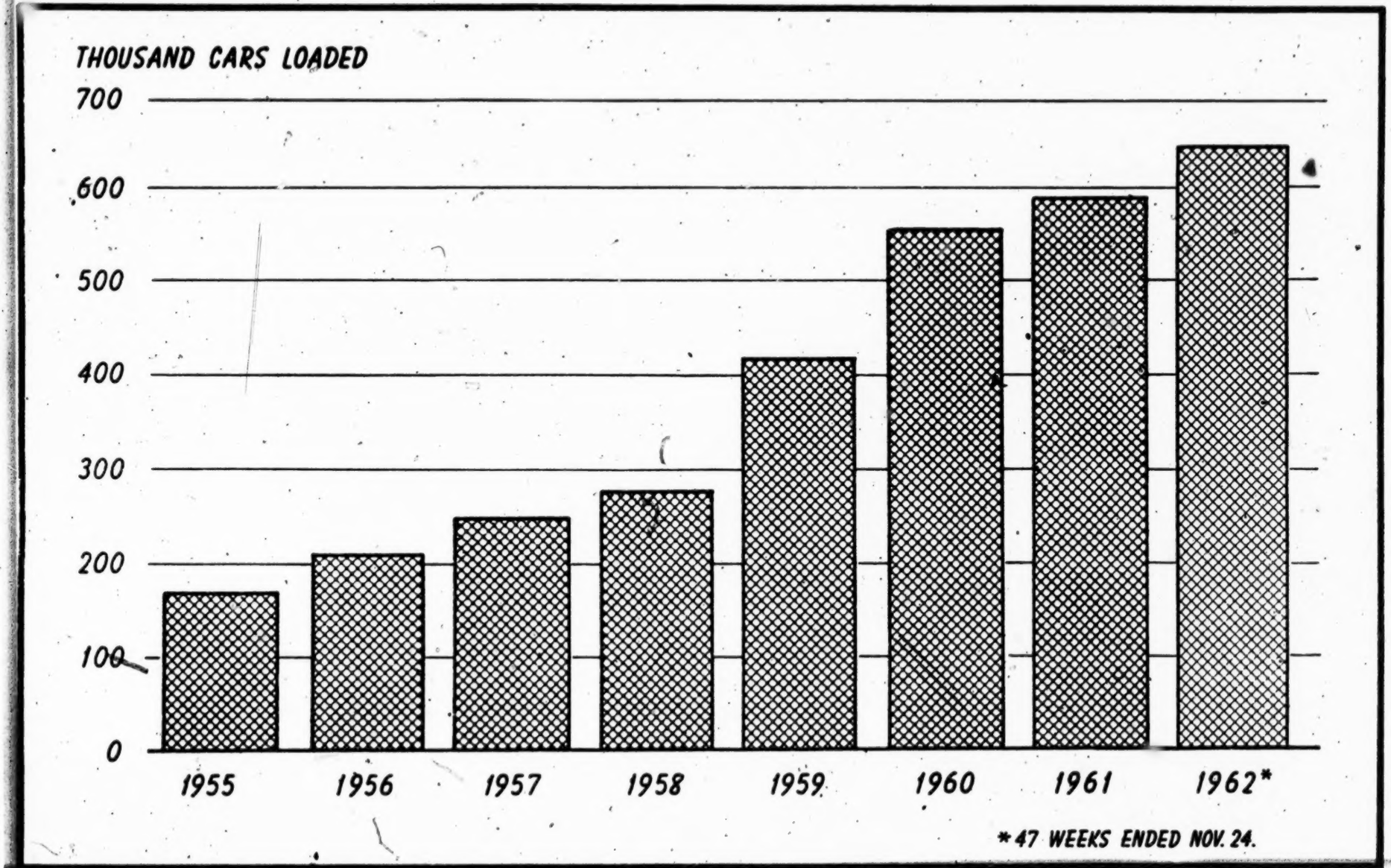
a Number of Class I U. S. railroad systems originating this type traffic.
b Includes cars reported loaded with one or more highway trailers or highway containers. All cars were included in the over-all total for the period indicated.

[fol. 912]

136904

FREIGHT CARS LOADED WITH ONE OR MORE REVENUE HIGHWAY TRAILERS OR HIGHWAY CONTAINERS (PIGGYBACK) BY YEARS 1955–1962

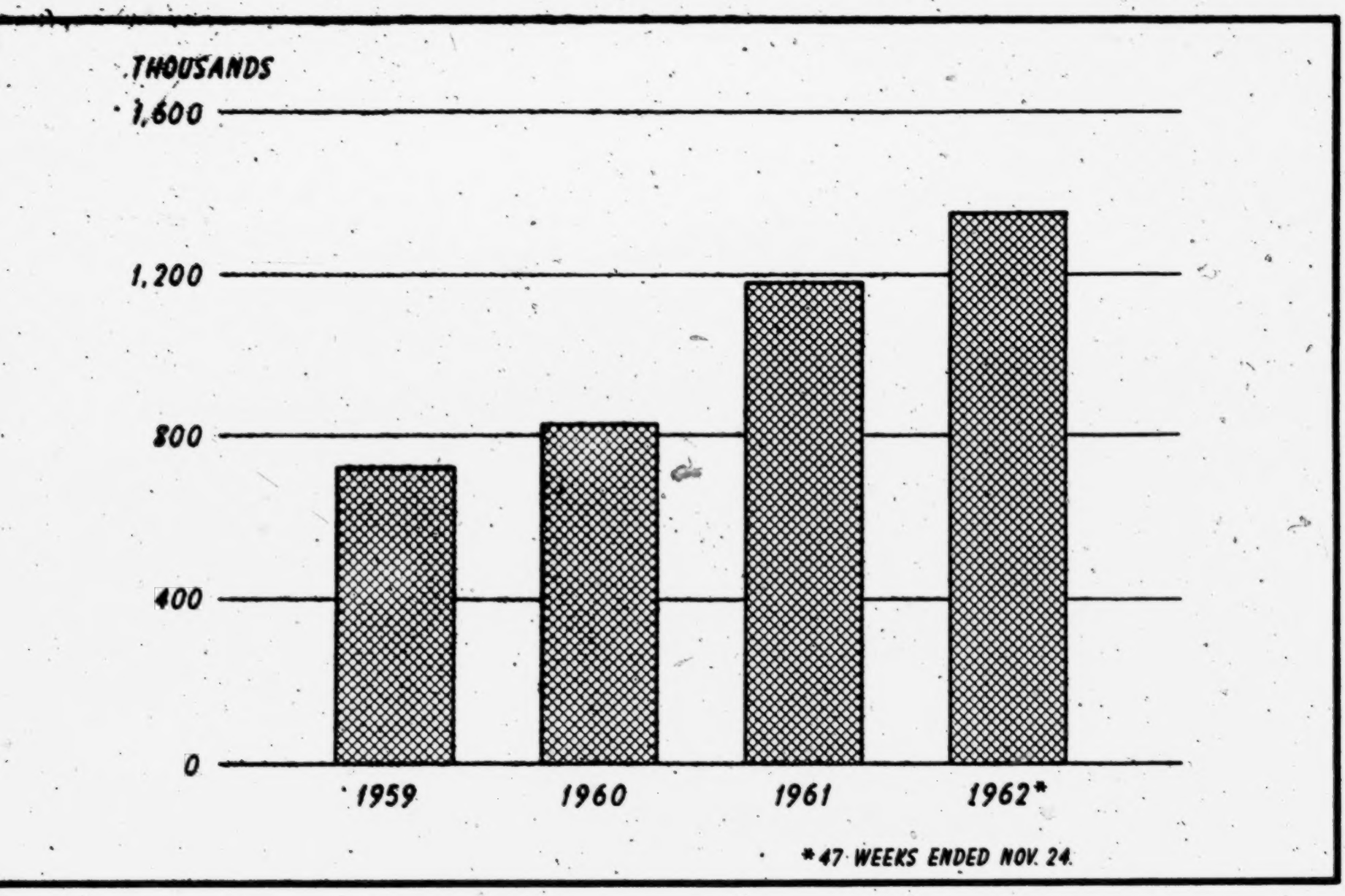
Class I Railroads in the United States



HIGHWAY TRAILERS OR HIGHWAY CONTAINERS LOADED ON RAILROAD FREIGHT CARS (PIGGYBACK) INCLUDES BOTH REVENUE AND NON-REVENUE MOVEMENTS BY YEARS 1959-1962*

136905

Class I Railroads in the United States



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[fol. 914]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT AND STATEMENT OF POSITION OF FREIGHT FORWARDERS INSTITUTE AND CERTAIN FREIGHT FORWARDERS FILED IN RESPONSE TO COMMISSION'S ORDER OF OCTOBER 11, 1962

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[fol. 915]

VERIFIED STATEMENT OF FACTS BY MORRIS FORGASH

My name is Morris Forgash. My business address is 711 Third Avenue, New York, New York. I am President and Chairman of the Board of the United States Freight Company. The United States Freight Company is a holding company listed on the New York Stock Exchange, and is owned by more than 15,000 shareholders. It has investments in various business enterprises, most, but not all of which are engaged in some form of transportation. Among these are the following freight forwarding companies subject to regulation under Part IV of the Interstate Commerce Act: Empire Freight Company, International Forwarding Company, Lone Star Package Car Company, Merchant Shippers Association, Texas Freight Company, Universal Carloading & Distributing Co., Inc., Western Carloading Company, Inc., and the Westland Forwarding Company. I am either president or chief executive officer of each of these companies.

I have been associated with the transportation industry for more than forty years, during which period I have successively held various executive positions with the Universal Carloading & Distributing Company and with the United States Freight Company. I became president of

the United States Freight Company in 1941, and have held that position since that date. I have closely followed the development of TOFC service and, since Plans III and IV were established in 1958, the forwarding companies owned by United States Freight have made extensive use of the services offered under those plans. Of my personal knowledge, many other freight forwarding [fol. 916] companies also are making extensive use of TOFC Plans III and IV.

In keeping with the Commission's order of October 12, 1962, which requested that persons with common interests endeavor to consolidate their presentation of verified statements, I have been authorized to present this statement on behalf of all of the freight forwarding companies which are members of the Freight Forwarders Institute. The names of these companies are listed in Exhibit No. 2 attached hereto and made a part hereof. The Freight Forwarders Institute is a trade association representing the freight forwarding industry, and I am Chairman of its Board of Governors.

Representatives of the freight forwarding industry, including myself, have carefully studied the proposed rules which were promulgated with the Commission's order of October 12, 1962, and it is the considered judgment of our industry, in which I fully share, that, if adopted, these rules would nullify completely the growth and development in TOFC service which has taken place in recent years. The basis for this conclusion is so self-evident that it scarcely requires explanation. Prior to 1958, TOFC Plans I and II were the only plans in effect. The volume of traffic handled under those two plans was too insignificant to create even a ripple upon the stream of interstate commerce. It was only after the establishment of TOFC Plans III and IV in 1958 that the volume of traffic moving in piggyback service began the spectacular growth which has arrested the attention of everyone concerned with transportation and has brought TOFC service to the im-

[fol. 917] portant position which it now occupies in our transportation system. Therefore, the conclusion is inescapable that it was TOFC Plans III and IV which made piggybacking what it is today, and that any set of rules which would abolish these plans, as the proposed rules promulgated by the Commission in this proceeding seemingly would do, would relegate TOFC service to the inconsequential status which it occupied prior to 1958.

As I understand the proposed rules, instead of being permitted to publish a flat charge per loaded or empty trailer, container, or flat car furnished by the shipper or freight forwarder, the railroads would be required to publish a conventional rate such as they now publish in connection with Plan II TOFC service, and would be permitted to make an allowance to any shipper or freight forwarder which furnished its own equipment. Thus, in lieu of Plan III and Plan IV TOFC services as they exist today, the railroads would be authorized to offer only a Plan II type service and to publish allowances to compensate the shipper or freight forwarder who elected to furnish his own equipment. This identical proposal was urged upon the Commission by the complainant motor carriers in Docket No. 32533, *Eastern Central Motor Carriers Association, Inc.* v. *Baltimore and Ohio Railroad Company, et al.*, and was categorically rejected in the Commission's decision.

Plan II could never, under any circumstances or with any modifications, accomplish the purposes and objectives of Plans III and IV, or fulfill the important overall mission [fol. 918] of piggybacking. In order to understand why that is so, some essential facts must be appreciated. Plan II was designed to enable the railroads to compete on a more equal basis with the motor carriers for truckload traffic. Plan II rates, initially, were the same as the class or commodity rates of the motor carriers on the same commodities between the same points. With slight deviations brought about by fluctuations in the rate structures of the truckers and the railroads, Plan II rates

remain substantially the same as the motor carrier class and commodity rates.

This means that the maximum *potential* area in which Plan II could compete with truck service is 25 to 30 percent of the traffic that is transported by motor carriers. That is so because not more than 25 to 30 percent of the tonnage moved by motor carriers is in the truckload category. To be conservative and absolutely safe I have stated the percentage on the high side.

This, then, is the competitive area we are talking about when we speak of Plan II. But the figure is also overstated because of other factors. In the nature of things the railroads cannot, and never will be able to, compete by use of Plan II with even the 25 percent of truck traffic that moves in truckloads. That is because of the special circumstances surrounding truck transportation and the special rules in motor carrier tariffs, such as stop-offs and split deliveries, and because of other characteristics which the railroads simply cannot match by Plan II.

Plan II was established four or five years before Plans III and IV made their appearance, and if Plan II had [fol. 919] proved adequate to serve the objectives and achieve the potentials of piggybacking, Plans III and IV would never have been employed. Plans III and IV were designed to improve the competitive position of the railroads in the inevitable struggle for traffic in different areas. They represent radically new and improved pricing techniques. In the present-day arena of competitive ratemaking, cost of service has become the controlling factor. A shipper operating his own fleet of trucks in private carriage incurs a certain cost per vehicle-mile to operate those trucks over the highway. Whatever this cost may be, it remains the same whether the truck is loaded with first class freight or fifth class freight, making such allowances as may be necessary for the weight factor. When railroad service is reduced to pure transportation—the pulling of rail cars over steel rails between rail terminals—

the railroads can match or better the costs of any other form of transportation, public or private, especially in the longer hauls. That is the economic principle underlying Plan III and Plan IV rates.

But, again, we must bear in mind the competitive area embraced by the service. Just as in the case of Plan II, the competitive area in which Plans III and IV are effective is limited. I have publicly made, and statistically documented, the statement that rail piggyback service, overall, is competitive with not much more than 10 percent of the truck transportation performed in this country. In a statement which I filed with the Senate Commerce Committee last year in connection with the hearings on bill S. 1197 copies of which are in the files of the Commis- [fol. 920] sion, I showed that based on a study of the statistics of all class I and II motor common carriers of property for the year 1959, 88.9 percent of the tonnage handled by such carriers had an average haul of less than 500 miles. The study showed many other interesting statistics but for purposes of this statement, I will use only the one figure.

To give meaning to the truck tonnage figure as related to rail piggybacking, I showed, in the same document, that the railroads, as a matter of policy, do not publish piggyback rates for distances less than 300-miles, and that the preponderance of rail piggyback traffic has a haul of 500-miles or more. The Commission is in a position to verify both the truck and the rail figures.

This means that only about 11 percent of the tonnage of common carrier trucks—and that, of course, is the tonnage handled by the long-haul truckers—is even in the competitive arena with Plans III and IV piggybacking. It is important to bear this in mind in evaluating the potential competitive impact of rail piggybacking. The killing of Plans III and IV would free only about 10 percent of the trucking industry from the competition afforded by those plans.

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[fol. 921] But even though both Plans II and the concept represented by Plans III and IV are limited, competitively speaking, to the areas I have indicated, each serves a useful purpose and a different purpose, and each should be encouraged. They represent innovations in service and pricing techniques which offer the first ray of hope in recent times for stemming the declining fortunes of the essential railroad industry.

In recent years, the Commission has approved many types of so-called incentive rates which represented departures from traditional concepts of ratemaking, but which were shown to be necessary to enable the railroads either to retain existing traffic, or to attract new traffic. Plans III and IV are examples of such incentive ratemaking, and have been approved by the Commission in Docket No. 32533, *Eastern Central Motor Carriers Association, Inc.* v. *Baltimore & Ohio Railroad Company, et al.* These plans offer the only realistic solution to the problem [fol. 922] of unregulated private carriage by making it economically attractive to shippers who are now engaged in private carriage to get out of the trucking business and ship their freight via regulated common carriers.

Plans III and IV also provide important incentives in the field of freight forwarder traffic. By providing the freight forwarders with a lower cost of line-haul transportation than conventional box car rates, and by enabling the forwarders to provide door-to-door service in highway trailers, with a minimum of intermediate rehandling, Plans III and IV have enabled the freight forwarders to compete more effectively with both regulated and unregulated motor carriers for volume shipments. Utilizing these plans, the freight forwarders have been able to offer a truly coordinated service via highway and rail. Under published through rates and single carrier responsibility, the forwarders are now able to offer a complete service between practically any two points in the United States on all types of movements which are adapted to handling in

freight forwarder service. Thus, through the agency of the forwarder, the railroads are enabled to compete for business which is now moving by truck, both regulated and unregulated.

Forwarder service to the public has been correspondingly improved. Not only have we been able to offer volume rates on many movements where the cost of line-haul transportation had previously prevented us from doing so, but, in addition, our service has been improved in other respects. Very often, freight picked up in a TOFC trailer can be placed aboard a train and forwarded on the same day, whereas, using conventional box car service that same [fol. 923] freight would have had to be handled across a freight-house platform, and thereby delayed a day. The same thing is often true at destination. When a trailer arrives containing a large quantity of freight for one consignee, the freight is delivered directly from the trailer, again avoiding the platform handling. This flexibility has enabled us to offer a more expeditious service to the public. The new flat cars which are being used in conjunction with TOFC service, are the latest type roller-bearing equipment, capable of being operated on high speed trains. As a result, railroad schedules have been speeded up, and time-in-transit has been reduced. As a result of reduction in platform handling of freight, loss and damage has been reduced, and shippers throughout the country are getting their merchandise delivered not only more quickly, but in better condition than ever before.

These advantages are possible only under TOFC Plans III and IV. As I have already stated, the TOFC Plan II rates are patterned after the truck rates, and, barring minor deviations, are substantially the same as the truck rates. Obviously, the freight forwarders could not compete with the motor carriers for volume shipments if they were forced to pay the motor carrier volume rates for line-haul transportation, in addition to pickup and delivery, off-line assembly or distribution, and other operating ex-

penses. The incentive charges which the railroads have provided under Plans III and IV enable the freight forwarders to play their part in providing coordinated TOFC service. It is my considered judgment that no system of allowances which could be devised could take the place of [fol. 924] TOFC Plans III and IV, and that if such plans should be discontinued, neither shippers engaged in private carriage, nor freight forwarders will be able to utilize the limited and inadequate type of Plan II service which is evidently all that would survive under the proposed rules. This type of service was not designed to do the job which is being done by Plans III and IV, and no possible system of allowances can equip it to do that job.

* * * * * * *

[fol. 925] Today, the competitive situation has radically changed and become more intensified. Improved highways and technological advances have resulted in much longer truck hauls. The highway trailer has been increased in capacity almost to the capacity of a box car. Industry has dispersed and left the rail heads. Piggybacking is a modern means of transferring a railroad car from steel rails to truck chassis and permitting it to move to off-track locations where the traffic has gravitated. Competitively speaking, the old technique of railroading has almost run its course, and unless the railroads are permitted to employ innovations such as those represented by Plans III and IV the days of their existence as members of the free enterprise system are numbered.

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[fol. 926] It is the national transportation policy of the Congress that each form of transportation be so regulated as to preserve its inherent advantages. Through Plans III and IV the railroads, for the first time in history, have found a way to exploit to the fullest extent their undisputed advantage in the mass—distance transportation of freight. Why should they be deprived of the right to assert that advantage?

There is another page of history that ought to be kept fresh in our mind in dealing with the piggyback situation. Plans III and IV represent one means of self-help resorted to by the railroads in response to the prodding of the Congress after the hearings which resulted in the Transportation Act of 1958. Hearings on the "deteriorating railroad situation" held by the Surface Transportation Subcommittee of the Senate Commerce Committee early in 1958 developed the fact that the railroad industry was in a deplorable condition. Everyone is familiar with the changes made in the rule of ratemaking and in other provisions of the law as a result of those hearings.

But the Senate Commerce Committee recognized that unless the railroads were sufficiently interested in self-help, no changes in the law would insure their survival. Thus the Committee said, in its report:

> "A fourth reason [for the railroad decline] is the attitude of some railroad managements. There has been a failure to recognize changing conditions, times, and tastes. A failure to compete aggressively for business by use of modernized equipment, by adjustments [fol. 927] in plant and financial structures, as well as a *failure to adjust rates to compete effectively for traffic.*" (Emphasis added) (S. Rept. 1647, 85 Cong.)

Plans III and IV piggyback reflect an awareness of changing conditions, times, and tastes. They represent an adjustment of rates to compete effectively for traffic with regulated as well as unregulated carriers. They are modern and responsive to the current needs and demands of the shippers. The overwhelming success and immediate and universal acceptance of the plans is eloquent testimony to their effectiveness.

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[fol. 928]

EXHIBIT NO. 2 TO VERIFIED STATEMENT AND STATEMENT OF POSITION OF FREIGHT FORWARDERS INSTITUTE AND CERTAIN FREIGHT FORWARDERS

LIST OF MEMBERS—FREIGHT FORWARDERS INSTITUTE

ACME FAST FREIGHT, INC.

AMERICAN FREIGHT FORWARDING CORP.

BARGE SERVICE CORPORATION

CENTURY CARLOADING, INC.

INTERNATIONAL FORWARDING COMPANY

LIFSCHULTZ FAST FREIGHT

LONE STAR PACKAGE CAR COMPANY

MERCHANT SHIPPERS ASSOCIATION

NATIONAL CARLOADING CORPORATION

OHIO FAST FREIGHT CORPORATION

PACIFIC & ATLANTIC SHIPPERS

REPUBLIC CARLOADING & DISTRIBUTING CO.

SHELDON FORWARDING COMPANY

SPRINGMEIER SHIPPING CO., INC.

UNIVERSAL CARLOADING & DISTRIBUTING CO.

WESTERN CARLOADING COMPANY

WESTLAND FORWARDING COMPANY

[fol. 929]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF NORMAN G. KLEISLEY, OWNER, C & M FOWARDING COMPANY

My name is Norman G. Kleisley. I am the sole owner and personally direct all operations of the C & M Forwarding Company with offices located at 283 Oak Street, Rochester 8, New York. The C & M Forwarding Company, hereinafter referred to as C & M, operates *from* Rochester, New York, to Chicago, Illinois, and New York, New York, and certain portions of the metropolitan areas surrounding those two destination cities, under Freight Forwarder Permit FF 22 granted by the Interstate Commerce Commission.

* * * * * * *

[fol. 930] From the date of its formation until 1954, C & M used rail box car service exclusively for the movement of all traffic received from its shippers for transportation outbound from Rochester, New York, to Chicago and New York City. However, at the latter time, due to intense motor carrier competition and delays in delivery of the loaded inbound box cars at Chicago and New York City it became necessary to divert our business to motor carriers. This change increased our costs and in turn made it necessary to increase our rates to the shipping public. It is a matter of public record, that in recent years the motor carriers have experienced constantly increasing operating expenses which have caused a steady rise in motor carrier rates and charges. If it had been necessary for us to continue to have all of our business transported by the motor carriers, we in turn would have been forced to further increase our rates charged to the shipping public. [fol. 931] However, the development of rail "Piggyback Service", especially the Plan III type of operation, en-

abled us to return a considerable volume of our traffic to the railroads. Our use of the Plan III "Piggyback Service" has now grown to the extent that practically all of our Rochester to Chicago traffic moves by that method. We have found the service to be both excellent and consistent with the result that we are generally able to provide second morning delivery of less carload shipments in Chicago. Even more importantly, handling our business under Plan III "Piggyback Service", has enabled us to provide this service at rates which produce considerable savings to the Shipping Public. These savings to our customers are the result of our being able to maintain our basic rates on less carload shipments which became effective in 1959. During that same period there have been substantial increases in the comparable less truckload rates. In this connection, it should be noted that our Class 100 rate from Rochester, New York, to Chicago, Illinois, reflects a saving to our customers of eighty-seven (87) cents per hundred pounds, when compared with the regular common motor carrier rate for shipments of less than one thousand pounds. Likewise, our Minimum Charge to the Shipping Public is $1.03 less than that maintained by the motor carriers. Thus we are, for all practical purposes, giving the Shipping Public the benefits of the lower cost rail transportation, while at the same time providing an overall service which is at least equal to motor carrier LTL services.

As previously explained, C & M's operation is strictly outbound from our Rochester, New York, terminal. Despite our "one way" service, we moved 133 trailers in "Piggyback Service" during the first three months of 1962. All but seven of those trailers were leased from a railroad [fol. 932] subsidiary—for the one way movement—and moved under Plan III Charges. The other seven trailers were furnished by the rail carrier and moved under Plan II rates. The 126 leased trailers carried 3,074,088 pounds of merchandise. If the latter traffic had been handled

under Plan II "Piggyback Service" or by motor carriers, our out of pocket costs would have been increased over 50%. Such an increase, in operating costs would of course have to be reflected in our rates to the Shipping Public.

[fol. 933]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF DONALD P. KIPP, PRESIDENT, KRAMER BROS. FREIGHT LINES, INC.

My name is Donald P. Kipp and I am President of Kramer Bros. Freight Lines, Inc., of Detroit, Michigan, a common carrier of general freight by motor vehicle operating between New York City on the east and Chicago on the west, serving numerous points both large and small. I have spent my entire working life in transportation and in addition to my duties in the operation of Kramer Bros., I actively participate in the activities of various industry groups dealing with the problems of the motor carrier industry and the national transportation system. At the present time I am a member of the Board of Governors of the Regular Common Carrier Conference, Chairman of the Conference Policy Committee, and Conference Vice President on the Executive Committee of the American Trucking Associations. In addition, I am presently serving as the Chairman of the Committee on Transportation Practices, a group formed by the Regular Common Carrier Conference, the National Motor Freight Traffic Association, and the Common Carrier Conference-Irregular Route, to assist the Commission in eliminating gray area transportation.

My testimony in this proceeding is submitted on behalf of my company and the motor carrier interests generally as [fol. 934] represented by the American Trucking Associations, Inc., the National Motor Freight Traffic Association, Inc., the Regular Common Carrier Conference, the Com-

mon Carrier Conference Irregular Route, the twelve motor rate bureaus, and the four individual carriers which have joined together in the filing of this statement of facts and argument.

Attached as a part of this statement of facts and argument are a series of exhibits numbered MCI 1–MCI 22 which are extracts of testimony and reproductions of exhibits introduced in evidence before the Commission in Docket No. 33133, et al., *All Freight In Trailer-On-Flat Car—Between The East And Chicago And East St. Louis.* That evidence is highly informative as to the way in which trailer-on-flatcar transportation is presently being provided by the railroads and is lucidly descriptive of the many practices currently being engaged in by the railroads. My testimony here is based in part upon that evidence and in part upon my own knowledge gained from a lifetime of experience in transportation and from my daily work in the management of Kramer Bros. Freight Lines.

* * * * * * *

[fol. 935] The recent emphasis on TOFC was initiated in 1954 with the publication by some railroads of rates for what we now call Plan II service. That service was a door-to-door railroad service in which the railroads would pick up shipments at the shipper's dock in railroad trailers, place them aboard railroad flatcars for line-haul to destination, and deliver the shipments at the docks of the consignees directly from the railroad trailers. This service, being directly comparable to normal motor carrier service, was priced on the basis of the then existing motor carrier rates, and still today, the Plan II rates of the railroads are generally the same as those of the motor carriers. In my experience so-called Plan II TOFC has been a highly competitive railroad service and is one which permits the railroads to meet the motor carriers on an even basis.

Shortly after the institution of Plan II some of the motor carriers joined with certain railroads in the institution of what is called Plan I service. This, as the Com-

mission knows, is a so-called substituted service in which the railroads move the trailers of motor carriers for some or all of the line-haul which the motor carrier could otherwise perform over the road. The rates and charges for this [fol. 936] service are published by the motor carriers and are concurred in by the railroads which receive a division of the motor carrier rate. This service, which is literally a joint service coordinating the advantages of motor carrier service with those of rail service has proved to be beneficial to both industries. My own company uses this service when it is found desirable to do so.

* * * * * * *

[fol. 937] As I have already indicated, the railroads maintain Plan II TOFC rates between most of the points served by them. Those rates are made on the normal basis in accordance with the various rate making provisions of the Interstate Commerce Act. And they are complete-service rates in which the railroads provide all equipment and all service necessary to the transportation of property from the consignor's dock to the consignee's platform. It cannot be challenged that when a railroad offers a Plan III [fol. 938] service and in conjunction therewith furnishes the two trailers on a trip-lease basis, and furnishes pickup and delivery service, both at unpublished privately negotiated charges, the net result in terms of transportation is that the railroad gives the shipper exactly the same service that it would give in Plan II. But the total amount of money collected by the railroad bears no relationship whatever to the amount it would charge if Plan II rates were applied.

Plan III, while in theory a ramp-to-ramp limited service, and while ostensibly established as a means of meeting private carriage, has turned out to be a door-to-door competitive operation in which the railroads continue to provide a complete or nearly complete service under circumstances and conditions which permit them virtually to bargain with individual shippers for their traffic. The

record in Docket No. 33133 makes it crystal clear that Plan III has recovered precious little traffic from private carriage, but has substantially reallocated traffic between and among the various carriers, my own company included. I have particular reference to Exhibits MCI *5* through MCI *13*.

* * * * * * *

[fol. 939] When Plan III diverts traffic from rail boxcar service or rail Plan II, there is inevitably a downward pressure upon the rate structure of the motor carriers, for Plan III becomes the competitive ceiling which the motor carriers must meet if they are to continue in the transportation business. Thereby it has a deadening effect on the revenues of the motor carriers with the result in many instances of both the motor carriers and the rail carriers transporting the same traffic as before for less revenue.

* * * * * * *

[fol. 940] The TOFC rules which have been proposed by the Commission, to my mind, and here I speak for the motor carrier industry, are good and, moreover are essential if stability and sanity are to be restored to the transportation of freight by the common carriers, both rail and motor. In essence they would prohibit the trip-leasing of trailers to shippers; they would require that rates and charges be predicated on the furnishing of all equipment and all service by the carriers; they would require that [fol. 941] wherever additional services are offered, the charges for those services be included in the tariffs—and that wherever services are provided by shippers, the allowances would be likewise published. The rules would, in no way, curtail the usefulness or the performance of TOFC service and would permit the widest degree of flexibility in meeting the needs of the shipping public. * * *

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[fol. 942]

EXHIBIT MCI-1 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of R. W. Talbot, General Manager—Freight Rates, Pennsylvania Railroad Company, in Docket No. 33133, et al., All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis

* * * * * * *

[fol. 943]. Q. Will you please describe the development of piggyback service on the Pennsylvania Railroad since 1954?

A. As previously stated, the Plan II type of piggyback [fol. 944] service was originally established July 12, 1954, between a number of local points on the Pennsylvania Railroad—this represented the initial postwar piggyback venture on the Pennsylvania Railroad. We have learned that this type of piggyback service is generally not profitable on the shorter hauls and that the terminal trucking expense must be closely controlled in order not to get out of hand. We have likewise learned that loaded movements must be reasonably balanced in order to avoid excessive movement of empty trailers. We have also learned that this type of service is not fully competitive with motor carrier service, as it lacks the same degree of flexibility in a number of respects. Its traffic potential appears to be largely limited to industries located within reasonable local trucking distance of the terminal ramps.

* * * * * * *

[fol. 945] Q. What considerations led to the establishment of the Plan III service in 1958?

A. As previously explained, Plan III is a related type of piggyback service which provides for the line-haul transportation of shippers' trailers between ramps located at designated rail termini. Various considerations led to the establishment of this service and they may be summarized substantially as follows:

1. A desire to experiment with all promising methods of coordinating rail and highway transportation—the railroad industry has been severely criticized for years for their seeming unwillingness to adopt new methods.

2. A desire to round out their experience in the piggyback field which had been gained through the earlier introduction of Plan I and Plan II services.

3. The realization that neither Plan I nor Plan II had been successful in halting the continuing erosion of the more desirable traffic to highway service.

4. The realization that the Plan II service would not be a wholly effective means of meeting motor truck competition, due to its lack of the same degree of flexibility in a number of respects.

5. The insistent demand by the shipping public that the railroads directly provide for the line-haul transportation of shippers' trailers at charges comparable to those assessed [fol. 946] for the similar transportation of motor carrier trailers under Plan I.

6. The definite realization that neither Plan I nor Plan II service provided a medium of stemming the rapidly growing diversion of the more desirable types of traffic to private transportation, that is, highway movement in motor vehicles directly operated by private shippers.

* * * * * * *

[fol. 947] By Mr. Duke:

Q. Bringing this situation up-to-date, does the level of the Plan I charges continue less than the comparable Plan III charges involved in this proceeding?

A. Yes. My Exhibit No. 4 shows a comparison of Plan I charges for representative local movements on the Pennsylvania Railroad and the present Plan III charges for the same movements. This exhibit shows the comparable rail line-haul charges on shipments consisting of two trailers

for total lading weights of 50,000, 60,000 and 70,000 pounds, [fol. 948] and the same charges expressed in cents per 100 lbs. The Plan I charges are in every instance materially lower than the corresponding Plan III charges.

* * * * * * *

[fol. 949] Now, I come to this question, Mr. Talbot. For what specific traffic were the Plan III trailer on flat car charges devised?

A. For what specific traffic?

Q. Yes?

A. The commerce of the nation, the high class high-rated commerce of the nation that the railroads had lost during the post-war period.

Q. In other words, you were not seeking to serve any specific type of shipper?

A. No, sir.

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[fol. 950]

EXHIBIT MCI-5 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract Of Testimony Of Delmar Adams, Production Control and Traffic Manager of R. P. Scherer Corporation, In Docket No. 33133, et al., All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis

[fol. 951] Direct examination.

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A. (Reading) My name is Delmer H. Adams. I am Production Control and Traffic Manager of R. P. Scherer Corporation. R. P. Scherer Corporation is a corporation organized under the laws of Michigan, and engaged in the production and sale of soft gelatin capsules. * * *

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[fol. 952] Prior to the availability of trailer-on-flat-car Plan III, R. P. Scherer Corporation operated private car-

riage between Detroit and Newark. To carry out its private carriage operations, it owned and operated two tractors and two trailer units. The volume of traffic moving in private carriage amounted to between one and two trailer loads per week.

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The Plan III piggyback operation has enabled R. P. Scherer Corporation to discontinue engaging in private carriage and to sell the power equipment which it employed in that operation. The two trailers which it employed in private carriage it continues to use in its Plan III operation.

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[fol. 953]

EXHIBIT MCI-6 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract Of Testimony Of Irby L. O'Brien, General Traffic Manager, Monsanto Chemical Company In Docket No. 33133, et al., All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis

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[fol. 954] A. My name is Irby L. O'Brien. I am General Traffic Manager, Monsanto Chemical Company, with headquarters at St. Louis, Missouri. I have been General Traffic Manager for two years.

* * * * * * *

[fol. 955] I am familiar with the railroads' TOFC Plan III arrangement which involves movement of shippers' trailers on railroad flat cars. Monsanto is presently using this arrangement principally between points in Official Territory.

The Plan III arrangement is a forward and constructive step by the railroads. In my judgment it combines and preserves the inherent advantages of the railroad and motor truck industries and is in the public interest.

1. It provides fast, dependable service.

2. It is economical.

[fol. 956] 3. It is almost damage-free transportation.

4. It offers opportunity for continuing innovations in transportation techniques.

Monsanto, in its transportation operations, uses railroads, motor carriers and water carriers. We need a financially strong motor carrier industry just as much as we need strong solvent railroad and water carriers. It is my considered judgment that the railroads' Plan III will not result in destructive competition.

During the period that we have been using Plan III we continue to use over the road motor carriers between points where we use the railroads' Plan III. Some of the reasons for continuing use of motor carriers are:

1. Motor carrier service is more flexible.

2. Railroad trains depart once daily, motor trucks depart when loaded, resulting in more frequent departures with consequent faster delivery.

3. Faster motor carrier service.

4. Insufficient tonnage available to make railroads' Plan III 70,000 ton minimum economical.

5. Railroad rule requiring maximum sixty percent of one article in one 70,000 pound shipment.

6. Trailer equipment is not always available when required.

7. Shipments in less truckload quantities made by truck.

The background of our decision to use Plan III may be [fol. 957] helpful in the consideration of the issues in these cases. We sell large quantities of the St. Louis area produced products in the New York, New Jersey and Boston areas.

We are competing in this market with many other chemical companies, whose manufacturing plants are located in the immediate vicinity of plants of our customers. To

compete with the more distant suppliers, we must keep inventories at warehouses in the East to meet customers' delivery requirements.

In 1948 commodity rates were established by the carriers to enable the long haul western producers to actively compete in this eastern market. After those rates were established, our volume to the east substantially increased.

The numerous general increases in freight rates since 1958 have been on a percentage basis. This had the effect of increasing our long haul rates from St. Louis a much greater amount in cents per hundred pounds than the increases in rates from the plants of our competitors located in New York-New Jersey area.

This intensified our competitive disadvantage in the eastern market and resulted in limiting our ability to economically participate. One product was withdrawn from sale in the East and production of two other products was transferred to our Everett, Massachusetts, Plant.

[fol. 958] Because of this condition, the Traffic Department in February, 1957, began a preliminary study of the economics of operating our private motor carrier fleet.

* * * * * * *

The geographical flow of our products and raw materials and the location of our plants would have permitted [fol. 959] balanced movements and an excellent opportunity for economical private operation.

The study of our private truck operations was completed in early 1958. It showed substantial savings under common carrier cost and justified our undertaking such an operation. For example, the study showed that the cost was thirty-five cents a truck mile or $1.02 per hundred pounds for a truckload from St. Louis, Missouri, to New York, New York, containing 33,000 pounds.

Before we were able to progress our private operation, a representative of one of the Eastern railroads came to St. Louis and talked to us about the railroads' proposed Plan III. This plan contemplated transporting two shipper-

owned or leased trailers between railroad terminals at a charge of fifty cents per flat car mile or twenty-five cents per trailer mile. Arrangements for and the cost of movement to and from the railroads' terminals were the shippers' responsibility.

The initial plan contemplated establishing the service between major Eastern terminals on the one hand and Midwestern terminals on the other. At first, it appeared doubtful that the arrangement would be economical enough to prevent us from going to private operation. After discussing further with the railroads, we decided to hold in abeyance our private operation and to try Plan III.

We began using Plan III shortly after the effective date [fol. 960] of the first arrangement. We are now using the arrangement between points within Official Territory, for example, from East St. Louis to Boston, Massachusetts; Philadelphia, Pennsylvania; Hoboken, Kearny and North Bergen, New Jersey areas; from Springfield, Massachusetts to Chicago, Illinois; St. Louis, Missouri; Cincinnati, Ohio and Louisville, Kentucky; from Cincinnati, Ohio to the New York area.

Deliveries are made from the destination terminals to warehouse and customers within an area of approximately 50 miles by common or contract motor carriers.

We are now using and will continue to use over the road motor common carriers from and to the same areas that we use railroad Plan III.

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[fol. 961] Q. You estimated that your company moved in Plan III piggyback service from your St. Louis and East St. Louis plants to points in the East, 50 million pounds a year. Am I correct in that?

A. Yes, sir.

Q. Now, prior to the installation of the Plan III piggyback, what portion of that 50 million pounds of traffic moved by motor common carrier?

A. Well, there is a long period before that, in my own experience—I have been with Monsanto a total of 15 years.

When I first came with Monsanto, I don't recall the exact tonnage, but substantially all our package materials moved from the three St. Louis plants to the East by rail. There was a gradual erosion in that movement until at the time we started using Plan III substantially 100 percent of the [fol. 962] movement was by motor common carriers.

Q. So this entire 50 million pounds of traffic a year prior to the institution of the Plan III piggy-back was moving by motor carriers?

A. I could not say that, because our tonnage fluctuates up and down from time to time. Sometimes business is good, sometimes it is bad. But I would say that it has been substantially that for the last several years.

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[fol. 963]

EXHIBIT MCI-7 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract Of Testimony Of R. W. Gruver, General Traffic Manager Of Thomas Industries, Inc., In Docket No. 33133, et al., All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis

[fol. 964] Direct examination.

By Mr. Daly:

Q. Will you proceed?

A. My name is R. W. Gruver. I am the General Traffic Manager of Thomas Industries, Inc., with offices at 207 East Broadway, Louisville 2, Kentucky. I have been engaged in various traffic capacities in both carrier and industrial traffic for some 30 years. I have been with Thomas Industries for the past 15 years.

Thomas Industries manufactures and distributes a wide variety of articles, including lighting fixtures, bath cabinets, lamp posts, advertising display boards and electric

dimmers to all parts of the country east of the Rocky Mountains.

At the present time, we are utilizing railroad Plan III [fol. 965] service from Louisville, Kentucky to Springfield, Massachusetts and Cleveland, Ohio. Prior to our use of Plan III service, these products were being transported in company-owned and operated highway equipment by our own drivers. Today we dray these shipments from our plant at Hopkinsville, Kentucky to the railroad site at Louisville and forward the material in Plan III service.

The freight is loaded and unloaded to and from the trailers by our own employees, and the drayage at Cleveland and Springfield is likewise performed by our own tractors and drivers.

While we still handle a substantial amount of traffic in our own private carriage system, we intend to continue to expand our present use of Plan III. Until the inception of Plan III, private carriage was the only method which provided the necessary speedy, consistent and flexible service required.

* * * * * * *

[fol. 966] Plan III permits us to have the freight loaded by our own employees. The intercity service has been fast and dependable, and convenient and flexible delivery to distributors within the area can be performed by our own employees with our own equipment. Only one handling of freight at origin and destination is necessary, a highly important factor in the transportation of our particular products.

By performing our own drayage from Hopkinsville to the railroad site at Louisville, we avoid a local short haul movement and inconsistent service which we could not accept in delivery to our distributors in the northeast.

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[fol. 967] Frankly, that is the basis for the Plan III as far as we are concerned. We are operating into areas where we have no return haul and as a private carrier we

couldn't pick up anything else, of course. We have never gone into the field of exempt commodities. We have been in the trucking business only as a matter of necessity, not desire.

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[fol. 968]

EXHIBIT MCI-8 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract Of Testimony Of Theodore W. Allen, Consultant—Traffic, General Electric Company, In Docket No. 33133, et al., All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis

[fol. 969] Direct examination.

The Witness: My name is Theodore W. Allen. I am Consultant-Traffic for the General Electric Company with business offices at 570 Lexington Avenue, New York, New York. I have served in various traffic capacities with General Electric for the past eleven years.

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General Electric presently engages in private over-the-road transportation to a substantial degree. Such movements are primarily either interplant or made in the [fol. 970] gathering of component materials from its various suppliers.

Its nationwide operations permit it to set up loads in each direction so as to achieve the economies of balanced movement. Examples of our private carriage at present would be between Schenectady and other points in New England and New York State, between New Jersey and Owensboro, Kentucky, between Tyler, Texas, and Cleveland, Ohio, and between New Jersey and California.

Some of these operations have been carried on for many years and were instituted in order to achieve a level of service and cost not possible in the use of the regulated rail and motor carriers.

Prior to the inception of Plan III trailer-on-flat-car service, we had been reviewing the feasibility of expanding

our private carriage operations to additional plants and movements. The Plan III rates, however, were attractive enough to permit experimental use of that service.

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Our experience thus far with Plan III has been most [fol. 971] gratifying. Today, for example, our service on the New York Central between Selkirk and Chicago is comparable with passenger schedules. So long as the rates remain on their present level and the service continues, General Electric has no incentive to give further consideration to private carriage on these movements.

General Electric's use of Plan III is dictated not only by the rates and the intercity service, but by the flexibility it permits in terminal areas. Thus, with the use of our own tractors and trailers, we are able to effect pick up from any number of suppliers in the area, using a single van.

For example, our Albany shipments are drawn from Schenectady, Hudson Falls, and Waterford, New York, and Pittsfield, Massachusetts. Similarly, we are enabled to make widespread distribution of our products where necessary at destination.

The loading and unloading of the freight to and from the vans is performed by our own employees. Similarly, we perform most of our own drayage with our own equipment at origin and destination. Occasionally, we may utilize a local carrier at St. Louis.

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[fol. 972] Q. Then I take it that your utilization of Plan III is where you have a movement for which you have no balancing return movement, is that correct?

A. A—

Q. Balancing return movement.

A. In general that would be correct.

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[fol. 973]

EXHIBIT MCI-9 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract Of Testimony Of Howard L. Verbridge, Traffic Manager—Rates, Eastman Kodak Company, In Docket No. 33133, All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis

[fol. 974] A. My name is Howard L. Verbridge. I am employed by the Eastman Kodak Company, Rochester, New York, in the capacity of Traffic Manager—Rates.

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[fol. 975] Prior to the establishment of Plan III rates and services to and from Rochester, all freight to Chicago and all packaged freight from Midland moved by motor common carrier. Even the relatively small amount of chemicals routed by box car to Chamblee was vulnerable to diversion to truck, due to cost advantages and the more satisfactory service by motor. Our Chicago facility is an off-track location at 1727 Indiana Avenue. Thus, the use of box cars for this traffic, requiring team-track delivery and local cartage to our branch, would be impractical.

Plan III has provided us with convenient and flexible service at costs which make it unnecessary for us to explore the alternative of private transportation. Its loss, or the addition of unnecessary restrictions with respect to its use, [fol. 976] would seriously dislocate our present system of distribution, and would require us to re-evaluate our policy of using regulated carriage.

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[fol. 977] We compare the total cost to move by motor common carrier compared to our total cost of moving by Plan III.

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[fol. 978]

EXHIBIT MCI-10 TO VERIFIED STATEMENT OF DONALD P. KIRP

Extract of Testimony of Vincent C. Borman, Jr.,
Assistant Traffic Manager, Boston Woven Hose Division,
American Biltrite Rubber Company in
Docket No. 33133, et al.,
All Freight in Trailer on Flat Car—Between
the East and Chicago & East St. Louis

[fol. 979] Direct examination.

By Mr. Daily:

Q. Would you state your name?

A. Vincent C. Borman, Jr.

Q. You are employed by whom?

[fol. 980] A. The Boston Woven Hose and Rubber Division of the American Biltrite Rubber Company.

* * * * * * *

Q. Does your company have traffic move in plan III transportation now?

A. Yes.

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Q. Which railroad are you using from Boston to Chicago?

[fol. 981] A. New York Central.

Q. To both points?

A. Yes, sir, Chicago and St. Louis.

Q. Who performs the drayage at origin between your plants and the railroad ramp?

A. We do, with our own employees, and our own equipment.

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Q. Who performs the drayage for your company at St. Louis and Chicago?

A. At St. Louis it is performed by Ben Gutman Trucking Company and in Chicago by Willet Transfer.

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Q. Prior to using Plan III service how did this traffic move from Boston to Chicago and East St. Louis?

A. In our own trucks in private carriage.

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[fol. 982]

EXHIBIT MCI—11 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of Roy W. Heckel, Jr., Rate Analyst, American Radiator & Standard Sanitary Corporation, in Docket No. 33133, et al., All Freight in Trailer on Flat Car—Between the East and Chicago & East St. Louis

[fol. 983] A. My name is R. W. Heckel, Jr. I am employed by the American Radiator & Standard Sanitary Corporation as a Rate Analyst in the Traffic and Transportation Department. • • •

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[fol. 984] We presently utilize Plan III Service between Baltimore, Maryland and Louisville, Kentucky. We also have shipped Plan III from Louisville, Kentucky to New Orleans, Louisiana and Atlanta, Georgia and New Orleans, Louisiana to Chicago, Illinois.

Our Plan III movement between Louisville, Kentucky and Baltimore, Maryland is substantial. It approximates four and one-half million pounds annually. While the predominant movement is eastbound from Louisville to Baltimore, we also have a balanced movement of approximately eight hundred thousand pounds annually.

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[fol. 985] If it were not for Plan III, a substantial portion of our traffic between Louisville and Baltimore would move

in private carriage. Moreover, our movement from Louisville, Kentucky to New Orleans, Louisiana is also adaptable to private carriage as we could obtain a balanced movement by shipping finished products from New Orleans to customers in states north of Louisiana as well as shipping materials to our Kokomo, Indiana and Tiffin, Ohio plants.

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[fol. 986]

EXHIBIT MCI-12 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of Robert Ricker, Traffic Manager of Rates and Research, Stanley Works, Inc., in Docket No. 33133, et al., All Freight in Trailer on Flat Car—Between the East and Chicago & East St. Louis

[fol. 987] Direct examination.

By Mr. Hunt:

Q. Mr. Ricker, will you please state your full name and address and employment?

A. Robert Ricker. I am employed as Traffic Manager of Rates and Research by the Stanley Works, Inc., with home offices at 195 Lake Street, New Britain, Connecticut.

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[fol. 988] Q. To what extent, if any, does your company use Plan III TOFC?

A. We presently forward two or three flats weekly to Chicago, and probably two flats monthly to Atlanta.

[fol. 989] The Chicago traffic goes partly to our corporate warehouse and partly for direct distribution by truck, rail and other means.

Q. Will you please state the volume of your Plan III traffic in trailer loads?

A. Four to six trailer loads a week to Chicago and about four trailer loads a month to Atlanta.

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Q. Did Stanley Works engage in private transportation with respect to shipments which now move in Plan III?

A. We have hauled our Atlanta merchandise by private carriage, yes.

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[fol. 990] Q. It is a fact, is it not, that the New Haven Railroad with its connecting carriers to the West maintains for your company out of New Britain and out of Wallingford a line of all-commodity rates for box car movement which were published to compete with Plan III? Isn't that true?

A. There is a line of all-commodity rates. We still use them to some extent on direct cars to the warehouse on some of the products, some of the divisional shipping points.

I will say it costs more to use Plan III, but the flexibility of Plan III makes up for this added cost, whereby we can switch a trailer around from plant to plant with a minimum of cost and effort.

We maintain our own switch engine at New Britain to shuttle cars between the plants, but trailer flexibility is much better than a Stanley steam engine.

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[fol. 991]

EXHIBIT MCI-13 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of Myron G. Kuhlman, Barrington Traffic Manager, Jewel Tea Co., Inc., In Docket No. 33133, et al., All Freight in Trailer on Flat Car—Between the East and Chicago & East St. Louis

[fol. 992] Direct examination.

By Mr. Daily:

Q. Will you proceed with your statement, please?

A. My name is Myron G. Kuhlman. I am Barrington Traffic Manager of the Jewel Tea Co., Inc., Barrington, Illinois.

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[fol. 993] Because of the diverse nature of the operations of Jewel Tea Co., Inc., the method of transporting its products and commodities for sale and distribution varies from point to point and includes the use of both rail and motor common carriage, and private carriage. To Arbutus, Maryland, and Binghamton, New York, to which Plan III trailer-on-flat-car rates are available, this Company is employ-
[fol. 994] ing Plan III piggyback to a distinct advantage. The plan provides both fast and economic service, with both of which factors this Company is vitally concerned in its transportation operations. Efficiency is necessary to keep inventories in line; low cost operations are imperative because of the intense nature of competition in the industry. The Plan III rates to Arbutus and Binghamton satisfactorily meet these requirements.

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[fol. 995] Q. You say the shipping operations of your company "have been enhanced by the availability of TOFC Plan III rates." What do you mean "enhanced"? Do you simply mean your costs have been reduced?

A. That is part of it. Also, that costs, or service in line with costs, has been improved. In other words, we can get second morning service at a lesser cost than was previously available to us.

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[fol. 996]

EXHIBIT MCI-15 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of Gurney S. Horsman, Assistant to the Distribution Manager, W. T. Grant Company, In Docket No. 33133, et al., All Freight in Trailer on Flat Car—Between The East and Chicago & East St. Louis

[fol. 997] Direct examination.

By Mr. Duke:

Q. Will you tell us your name and business address?

A. My name is Gurney S. Horsman. I am employed by the W. T. Grant Company, business address 1441 Broadway, New York City. I am in the capacity of Assistant to the Distribution Manager.

Q. Does W. T. Grant Company use Plan III piggy-back service?

A. Yes, we do.

Q. Where does W. T. Grant Company use Plan III piggy-back service?

A. From New York to Buffalo, and from New York to Fort Wayne, Indiana.

Q. The traffic that is now moving in Plan III piggy-back service, how was it moving prior to the institution of Plan III?

A. By private carriage.

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[fol. 998]

EXHIBIT MCI-18 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of John A. Parsons, Director of Piggyback, L&N Railroad, In Docket No. 33133, et al., All Freight in Trailer on Flat Car—Between the East and Chicago & East St. Louis

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[fol. 999] Q. Does the L&N Railroad ever provide any such services?

A. The L&N has no subsidiary trucking companies. All of our pick-up and delivery is done by the contractors. If the shipper requests us to recommend one we will recommend the same unaffiliated local contractor who performs our work because we know the job that he can do. But in many cases the shipper selects on his own volition his contractor to perform that service, or performs it himself.

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[fol. 1000]

EXHIBIT MCI-19 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of J. C. Parrish, Assistant to Manager, TOFC Traffic Seaboard Air Line Railroad Company In Docket No. 33133, et al., All Freight in Trailer on Flat Car—Between the East and Chicago & East St. Louis

[fol. 1001] Direct examination.

By Mr. Reynolds:

Q. Please state your name, address and occupation.

A. My name is J. C. Parrish. I am employed as Assistant to Manager TOFC Traffic, Seaboard Air Line Railroad Company, 3600 W. Broad Street, Richmond, Virginia.

* * * * * * *

[fol. 1002] Q. Does the Seaboard arrange to have Plan III traffic trucked from or to the railroad ramps at origin or destination?

A. The Seaboard does not arrange to have traffic moving under Plan III trucked for the shipper or the consignee at origin or destination. If requested, shippers are placed in contact with a responsible delivery firm and they make their own arrangements. The shipper or consignee either hauls the trailers, himself, or makes arrangements to have the hauling done by a local firm.

[fol. 1003] Q. Does the Seaboard have any interest, direct or indirect, in the local drayage firms which truck the trailers to or from the ramps at origin or destination?

A. No.

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[fol. 1004]

EXHIBIT MCI-20 TO VERIFIED STATEMENT OF DONALD P. KIPP

Extract of Testimony of Joseph A. Kirkman, General Manager of Rail-Highway Service, Southern Railway System, in Docket No. 33133, et al., All Freight in Trailer on Flat Car—Between the East and Chicago & East St. Louis

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[fol. 1005] A. My name is Joseph A. Kirkman. I am General Manager of Southern Railway System's rail-highway service. I have held this position since June, 1961. Prior thereto, I held various supervisory and executive positions with several motor carriers and motor carrier associations. I have had more than 30 years experience in various phases of transportation.

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[fol. 1006] Q. Does the Southern have local cartage carriers who perform pick-up and delivery in connection with Plan II movements?

A. Yes, we have contracts with several such local carriers, none of which are in any way affiliated with the Southern.

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[fol. 1007] By Mr. Fessenden:

Q. You said the Southern has a supply of containers and trailers. How large is that supply?

A. We have 540 dry containers, by that I mean standard containers, 66 open tops, 40 reefers, making a total of 646 containers.

We have 401 chassis, we have 50 flatbed trailers, 10 van type drop-frame trailers. We have four drop-frame open-top trailers.

Q. When you say 540 dry containers, what do you use the term "container" to include?

A. The simplest way to explain that, I believe, is that in reference to a container it is the body of a trailer. The chassis is the running gear and frame. Southern has an excellent system of using cranes to pick up the body of the trailer and set it onto a cradle-frame and does not use the wheels and chassis in every case from origin to destination.

We have moved just the body, and when we get to [fol. 1008] destination we set it off onto the chassis and it is ready for delivery. It is a very simple operation and much faster than the conventional ramp loading.

Q. Your reference to 540 dry containers is to containers of the type you have just described and does not include any conventional highway trailers?

A. No, it does not.

Q. I assume the 66 open tops are conventional highway trailers.

A. They are containers.

Q. Those are also containers?

A. Yes.

Q. And are the 40 reefers also containers?

A. They are containers.

Q. What about the 50 flatbeds?

A. If you tried to make a container out of that, you would have a pallet, so that is a trailer.

Q. Is the same true of the 10 van-type drop-frames and the four open-top drop frames?

A. The ten drop-frame trailers are actually trailers, and the four are actually trailers.

Q. You say in the railroad transportation of the 540— of all the containers, you use a cradle-frame. Is that different from the ordinary flat-car used for the TOFC service?

[fol. 1009] A. Well, it is an improvement over the ordinary TOFC flatcar. It is an improvement in this manner: The car has a cushioned underframe which takes up a certain amount of vibration for sudden stops. You have a few, inasmuch as travel between part of the trailer rests on— and the frame of the car, to take up the shock. We have superimposed on that a cradle or bolster which has another cushioning device in it, and our containers move in this manner, so that a sudden stop or jerk is taken up in the cushioning devices. So that it is more of a floating ride, and we have yet to pay a claim on any piece of freight moving in one of these containers in our cushioned underframe cradle cars.

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[fol. 1010] Q. I noticed both in your testimony and I think in Exhibit 77 itself, it is expressly provided, I believe, that the Southern will lease trailers to shippers "when available."

A. Yes, sir.

Q. How is the availability determined?

A. I borrowed a page in the motor carrier experience when I came with the railroads, and I set up this equipment control center and it is exactly the same thing as the "central dispatch" for the motor carriers.

We operate under exactly the same principles. We try to anticipate the needs of a certain terminal and try to funnel equipment to him as he needs it, and we try to furnish it with the least empty miles we can. It is exactly the principle we operate on.

Q. I take it when your central control knows that at a particular point you have a regular shipper who tomorrow will need four Plan III trailers and there are none there,

you will run in four empty if necessary to have them there for him, is that correct?

A. From the closest point.

• • • • • • • •

[fol. 1011] By Mr. Fessenden:

Q. You have indicated you are quite familiar with Plan III and the Plan III flow of traffic on the Southern. Isn't it true that some of the at least principal users of the service are freight forwarders and shippers associations?

A. Shipper associations, no. Freight forwarders do use it quite extensively.

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[fol. 1012]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF ROBERT E. COOPER, JR. OF COOPER-JARRETT, INC.

My name is Robert E. Cooper, Jr. I am President and Chairman of the Board of Cooper-Jarrett, Inc. My business address is 100 Water Street, Jersey City, New Jersey.

Cooper-Jarrett, Inc., is a common carrier by motor vehicle operating over regular routes which extend from New York City on the east to Kansas City on the west. The Company serves an extensive area around New York City, the entire State of Connecticut, and the principal intermediate points between New York City, and Kansas City including Philadelphia, Baltimore, Pittsburgh, Cleveland, Toledo, Columbus, Cincinnati and Chicago. I personally have been active in the operations of the company during my entire adult life and I am very familiar with both the physical operations and the competitive circumstances with which the company is and has been faced.

Cooper-Jarrett, Inc., was one of the first to joint with the railroads in trailer-on-flatcar transportation and is today a substantial participant therein.

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[fol. 1013] I refer to the Plan III TOFC services. Prior to the establishment of Plan III services the railroads in the east had been supplying a Plan II service which consisted of door-to-door transportation at rates and charges the substantial equivalent of the motor carrier rates and charges. Plan III charges were established supposedly for the purpose of attracting the traffic of private carriers and were fixed without reference to the nature of the freight or the actual weight thereof, subject to rather general limitations. Plan III charges also contemplated the railroad would be excused from providing the trailer itself and the physical transportation services of moving that trailer between the railroad loading or unloading point, on the one hand, and the shipper or receiver facilities, on the other.

My long experience in the field of transportation has shown me that any time a wholesale rate is established, the shippers will find some means of utilizing it. This was the case with Plan III and before long such utilization of the Plan III service became widespread. The railroads, in response to competitive pressures or otherwise, promptly began leasing their own trailers or those of their subsid-
[fol. 1014] iaries for one-way trips in Plan III operations. In other words, a transportation charge established for a shipper who was to supply his own trailers became used by shippers who called upon the railroads to supply them. The same is true of the cartage between the shippers' places of business and the railroad loading points.

The net effect of the establishment of these wholesale rates has been that shippers who formerly paid rates long considered just and reasonable were enabled to secure their transportation at sharply reduced charges. Although Plan III charges were published in terms of aggregate amounts for the transportation of not to exceed 70,000 pounds of freight, the shippers of substantially less than that quantity were able to use them through the intervention of shippers' associations which sprang up in great numbers

shortly after the establishment of the Plan III charges. Thus, in effect, the railroad is providing all of the services contemplated under a Plan II rate at a reduced level of charges.

The field of interstate transportation is now so complex that nothing happens to one carrier or one mode of transport without a collateral and almost immediate effect upon another. The tremendous reductions in charges brought about by the Plan III TOFC service has been communicated directly to Cooper-Jarrett and, I am convinced, to all other motor carriers which operate between railroad key points. The shippers of the high grade traffic, that is, the luxury and high value freight, have been the most prominent users [fol. 1015] of the Plan III wholesale charges. To my positive knowledge, shippers of liquor, plastics, drugs, bicycle saddles, hardware, coffee, bearings and electrical fittings have diverted to Plan III traffic which they formerly shipped by motor carrier or by railroad Plan II. This has been accomplished by such shippers either through a shipper association or some other device by which they take advantage of these services of the railroads. I point out again that this has been done by calling upon the railroads to provide not only the Plan III service but also the trailers and the cartage service which converts it into door-to-door transportation.

Not only have there been substantial diversions of traffic from other types of transportation to the Plan III operation but, in addition, the very existence of the wholesale-rate Plan III concept has resulted in downward pressures on the rate structures of all carriers. I know Cooper-Jarrett looked to some of this traffic for revenues to enable it to transport other of its traffic at favorable charges which are needed if the traffic is to move at all. I also know that much of this higher grade traffic has been kept on the lines of Cooper-Jarrett only by reason of substantial rate reductions. As an example, the rate on liquors out of the New York area to Chicago was reduced from $1.63 per cwt. to $1.20 per cwt. The rate for Thomas and Betts

Corporation which manufactures electrical fittings was reduced from $1.55 per cwt. to $1.27 per cwt. * * *

• • • • • • •

[fol. 1016] At the commencement of this statement, I mentioned that Cooper-Jarrett is a substantial participant in railroad piggyback service as a substitute for the over-the-road operation of Cooper-Jarrett trailers. Through the services of TOFC, Inc., my company participates with the Erie-Lackawanna Railroad and also the company participates with the Pennsylvania Railroad in trailer-on-flatcar services between New York and points in the State of Ohio. In addition, we participate in trailer-on-flatcar service with the Chicago and Great Western Railroad between Chicago and Kansas City. During the month of September, 1962, Cooper-Jarrett moved a grand total of 651 trailers by railroad piggyback. We have encountered no difficulty in the utilization of this service and I am firmly of the opinion that our participation in it will grow if no impediment is put in its way. I am also of the opinion that this coordinated service is good and can be of inestimable benefit to the public as well as to the cooperating carriers.

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[fol. 1017]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

VERIFIED STATEMENT OF KENNETH T. SHEEHY, VICE PRESIDENT OF TRAFFIC, DENVER-CHICAGO TRUCKING COMPANY, INC., 45TH AVENUE AT JACKSON STREET, DENVER 16, COLORADO

[fol. 1018] My name is Kenneth T. Sheehy and I am the Vice President of Traffic, Denver-Chicago Trucking Company, Inc. My business address is 45th Avenue at Jackson Street, Denver 16, Colorado. Denver-Chicago is a common carrier of general commodities by motor vehicle over regu-

lar routes. Its operations in interstate and foreign commerce are conducted pursuant to authority duly granted by the Interstate Commerce Commission. Its routes extend from the Atlantic to the Pacific Coast and it serves New York City in the east and Los Angeles and Seattle in the west. Between the two extremities of its operations it serves many important intermediate points, maintaining terminals at the following: Albany, Syracuse and Buffalo, New York; Cleveland, Ohio; Detroit, Michigan; Louisville, Kentucky; Chicago, Illinois; St. Louis and Kansas City, Missouri; Denver, Colorado Springs and Pueblo, Colorado; and Phoenix, Arizona.

Denver-Chicago is principally a long-haul carrier specializing in the transportation of less-than-truckload shipments. The average length of haul per shipment was, during the year 1961, 1,458 miles. During the first ten months of 1962, 50.7% of the total traffic transported by the carrier was of the less-than-truckload category and the weight per shipment of that traffic was 451 pounds. During that same ten months, the carrier received freight revenues in the total amount of $37,729,424, of which 68.7% was derived from the transportation of the less-than-truckload traffic.

The trail-on-flatcar transportation provided by the railroads has had a tremendous impact upon Denver-Chicago. This has occurred in two ways, with both of which I am very familiar since in my position as Vice President of [fol. 1019] Traffic, I have complete charge of the piggyback operations for our company.

One of the ways that Denver-Chicago has been affected by the TOFC operations of the railroads has been beneficial. Beginning in 1955, Denver-Chicago commenced the substitution of trailer-on-flatcar movements for operation over the highways with respect to all or a portion of certain line-haul movements. The extent to which this substitution has taken place can be gauged from the fact that during the first ten months of 1962 Denver-Chicago oper-

ated a total of 46,735,628 trailer miles over the highways and substituted TOFC transportation for an additional 6,609,276 trailer miles. In other words, almost 13% of the trailer miles operated by Denver-Chicago in line-haul service are accomplished through the medium of the trailer-on-flatcar transportation. In my opinion, that is a substantial growth from the small beginning which took place in 1955.

The areas within which Denver-Chicago utilized trailer-on-flatcar transportation extend throughout virtually its entire system east of Denver, Colorado. Denver-Chicago participates in Plan I TOFC transportation with the Erie-Lackawanna between Chicago and New York and between Chicago and Syracuse. In addition, Denver-Chicago also participates in joint-line TOFC service with the Erie-Lackawanna and the Delaware and Hudson between Chicago and Albany. Our company also utilizes the services of the Wabash between Chicago and Buffalo and between Chicago and Detroit; the services of the Nickel Plate be- [fol. 1020] tween Chicago and Cleveland; and the services of the Rock Island between Chicago, St. Louis, and Kansas City, on the one hand, and, on the other, Denver, Colorado.

Although some of the carriers west of the Rocky Mountains are commencing to establish local TOFC operations available to motor carriers as substitution for over-the-road operations in line-haul service, there still are no such services available for transportation between Denver and the West Coast. If such a service should be established in the near future it would be our purpose to utilize it in substantial degree.

Denver-Chicago has found the use of TOFC transportation as a substitute for its over-the-road operations a useful tool which accomplishes the combination of motor and rail transportation into a more effective and economical method of providing the public with prompt, speedy, and efficient transportation service. I certainly hope that whatever rules and regulations are adopted and promulgated by the Interstate Commerce Commission in this proceeding,

nothing be done which would in any way inhibit or handicap the cooperative efforts of the railroads and the motor carriers as they have existed in the past and as exemplified by the experience of Denver-Chicago Trucking Company, Inc.

The other manner in which Denver-Chicago has felt the impact of trailer-on-flatcar operations of the railroads has been by no means helpful. The Transcontinental Railroads maintain between the principal West Coast points on the one hand, and, on the other, Chicago, Illinois a type of rate publication covering trailer-on-flatcar service which has been the cause of some very destructive competitive practices. That type of publication is called Plan IV, and contemplates the provision of motive power by the railroad for movement over the railroad's right-of-way of a ship- [fol. 1021] per's flatcar laden with the shipper's trailers, the latter containing freight. The tariffs naming the charges for the movement of the flatcars and the trailers would apply those charges to such movement whether the trailers be laden or empty and, of course, the contemplation is that it will be the shipper's responsibility to pay for the complete round trip movement of the facilities. The regulated freight forwarders and the unregulated shipper associations have been the principal users of the Plan IV service to equip themselves with flatcars and trailers, insofar as I have been able to ascertain. I am not familiar with the sources from which they have secured such transportation instrumentalities but I do know that when they have utilized them in the Plan IV operation to transport traffic to the West Coast they are under tremendous economic pressure to secure lading for the return movement thereof. This pressure has resulted in an open and notorious market for Plan IV space eastbound to Chicago. A flatcar and two trailers can be readily leased on almost a moment's notice for a nominal sum on the West Coast if such instrumentalities are to be used to ship traffic to Chicago or beyond Chicago. The charges levied for the eastbound move-

ment by the railroads are ridiculously low and serve, in combination with the readily available facilities for lease, to defeat both the railroad and the motor carrier charges which would otherwise be applicable to the movement of that freight. The effect of this entire situation has been to cause the formation of eight or ten shipper associations along the West Coast, each of which is dedicated to the task of defeating the otherwise applicable and assumedly reasonable transportation charges which would normally apply.

The effect of the foregoing upon Denver-Chicago has been direct and it has been serious. A survey made by my com- [fol. 1022] pany within the last six weeks disclosed that, counting known accounts only, Denver-Chicago has lost more than 1,000,000 pounds of eastbound traffic per month. The situation has gotten so bad that today it is actually possible to lease one trailer and one-half a flatcar for use eastbound from the West Coast to Chicago in Plan IV TOFC service.

In my judgment, practices of the foregoing sort cannot fail to impair the ability of all modes of transport properly to maintain themselves in a position of ready capability to serve the public. I understand that the Interstate Commerce Commission has proposed for adoption and promulgation some rules and regulations which would put an end to this very practice. I earnestly and sincerely hope that this be done.

Kenneth T. Sheehy

[fol. 1023]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPT FROM ARGUMENT ON BEHALF OF MOTOR CARRIER INTERESTS

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[fol. 1024] Sight should not be lost of the fact that TOFC service is only another method of transporting property and not even a new one at that. • • •

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[fol. 1025]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggy-Back Service)

EXCERPTS FROM STATEMENT OF LOCAL AND SHORT HAUL CARRIERS' NATIONAL CONFERENCE

Comes now your Respondent, the Local and Short Haul Carriers National Conference, by their Manager and attorney, respectively, and hereby respectfully submit, these, its views, as respects the use of coordinated and substituted service, and states as follows:

Preliminary Statement

The Local and Short Haul Carriers National Conference is one of the twelve conferences of the American Trucking Associations, Inc. Its membership is made up of both local and short haul motor carriers operating in these United States. Many of our members are local motor carriers whose operations and rates have been exempt from regulation pursuant to Section 203(b) (8) of the Interstate [fol. 1026] Commerce Act. Equally as many members are short haul motor carriers operating pursuant to authority

granted by this Commission. Their operations and practices are subject to Part II of the Act. Many of our members perform both local and short haul motor carrier operations referred to above. And, among both types of motor carriers represented by this conference, there are many who are now presently participating in the various piggy-back (TOFC) services recognized by this Commission.

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A.

Definitions

2. This rule, in its present form, as it pertains to Plan I, TOFC service, is objectionable for the reason that it would enable certificated motor carriers to substitute their entire line-haul movement from origin to destination without the necessity of performing any transportation service under an outstanding certificate. By substituting TOFC service for the entire line-haul movement from origin to destination the certificated motor carrier provides *no* transporta- [fol. 1027] tion service as contemplated under Part II of the Act, but performs a pickup and delivery service at points in the commercial zone in direct competition with local cartage companies operating in the exempt zone pursuant to Section 203(b) (8) of the Act. This rule should be modified so as to require the motor carrier substituting the entire line-haul movement to perform something more than a pickup or delivery service in the commercial zone of the origin or destination city or point of interchange. Stated differently, the rule should provide that in order for a line-haul motor carrier to participate in Plan I TOFC service, it must perform some portion of the line-haul movement authorized in its certificate from or to a point beyond the commercial zone of the point of interchange.

• • • • • • •

[fol. 1028] 5. This Rule is objectionable because it disregards various practical considerations. Joint arrangements between modes of transport have existed for many years. These arrangements take into consideration (1) payment of bills and financial security, (2) volume and frequency of movement of traffic, (3) availability and proper care for equipment, (4) balanced movements, (5) consideration of schedules, (6) possibility of freight diversion to a competitor, and (7) personal considerations. It is common knowledge that line-haul motor carriers do not and will not enter into interchange arrangement with other motor carriers until the aforementioned considerations have been fully reviewed. The instant proposal, we believe, is not workable, and would not be in the public interest. It would place upon railroads a higher degree of responsibility by requiring them to enter into like arrangements with other motor carriers under similar circumstances and conditions in total disregard of these practical considerations heretofore mentioned. Also, this rule disregards the factors of trust and confidence and the practices of the transportation industry as respects interchanging and interlining of freight between carriers.

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[fol. 1029]

I Economic Regulation of Motor Services in Connection With All TOFC Services

Movement of large and cumbersome TOFC trailers and removable truck bodies used in the various TOFC services within the commercial zone at either time of pickup or delivery of shipment is now being performed to a large extent by motor carriers operating pursuant to the partial exemption provided by Section 203(b) (8) of the Act. • • •

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[fol. 1030]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, NEW YORK CONSOLIDATED FREIGHTWAYS CORPORATION, MISSOURI CONSOLIDATED FREIGHTWAYS CORPORATION

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[fol. 1031] In its initial statement, Consolidated went to considerable length in deseribing its participation in and use of coordinated or substituted service. Since that statement is now a part of the record in this proceeding, the facts presented therein will not be repeated here. However, the following information will update some of the pertinent facts contained in Consolidated's initial statement.

1. Consolidated has Plan I arrangements with twenty-three (23) railroads and has substituted service tariff provisions, published and effective between approximately 340 pairs of points. All points involved are ones for which Consolidated holds underlying authority from the Commission to serve as a regular route motor common carrier.

[fol. 1032] 2. Through the first ten (10) months of 1962 Consolidated moved 7,878 loaded trailers in Plan I service. This is a substantial increase over the 5,394 loaded trailers moved in Plan I service during the entire year of 1961. The trailers moved in 1962 contained some 255,000,000 pounds of freight which represented slightly more than eight (8) percent of all tonnage moved by Consolidated in the same period.

3. For the movement of its trailers, loaded and/or empty, in Plan I service, Consolidated, through the first ten (10) months of 1962, paid to various railroads the

total sum of $1,841,085.85. This figure is almost double the $1,034,987.48 paid to various railroads for the full year, 1961.

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[fol. 1033]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF LOREN HENDRIX, VICE PRESIDENT AND GENERAL MANAGER OF MIDWEST HAULERS, INC., TOLEDO, OHIO

My name is Loren Hendix, Vice President and General Manager, Midwest Haulers, Inc., 228 Superior Street, Toledo, Ohio.

• • • • • • •

[fol. 1034] Historically, Midwest Haulers' method and type of service performed for its freight forwarder shippers is no different today than it was twenty-five years ago. Its operations are entirely one of transporting trailerloads of freight from the dock of a freight forwarder in one city to the dock of a freight forwarder in another city, the freight having been loaded by the forwarder and moving under the seal of the forwarder and on the shipping documents of the freight forwarder. The only significant change in the service afforded by Midwest Haulers, Inc., is that since 1958, when it first began to offer Plan I, Trailer-on-[fol. 1035] flatcar service to its shippers, that service has expanded during the past five years to a point where, in the first six months of 1962, it tendered to all rail carriers in Official Territory with whom it has concurrences and who offer a Plan I TOFC service to motor common carriers approximately 18,000 trailerloads of freight between points of service authorized to it under its certificate.

Accordingly, our company does have a vital interest in this proceeding and in the preservation for the future of its ability to utilize Plan I TOFC service which has met

such a welcome response from the limited class of shippers whom it is authorized to serve.

* * * * * * *

* * * Furthermore, the railroads with whom it concurs in the provision of this Plan I service have so improved their railroad service and schedules that it has enabled our company to remove equipment from the highways and place it in this Plan I service and make as good or better delivery schedules than it was able to do before. * * *

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[fol. 1036]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF R. B. GOTFREDSON, PRESIDENT, FOR AND ON BEHALF OF RESPONDENT, TRANSAMERICAN FREIGHT LINES, INC.

* * * * * * *

[fol. 1037] The position of respondent is that it desires to continue the use of TOFC service in the same manner in which it is now conducted, without the imposition of restrictive rules and regulations which would hamper future development of this coordinated service, which, in the opinion of the respondent, is definitely in the public interest.

* * * * * * *

[fol. 1038] The purpose of the proposed addition to this rule is to place a limitation upon the right of short-haul [fol. 1039] motor carriers to use this type of service and to prevent such short-haul motor carriers from becoming competitors of long-haul motor carriers in the solicitation and handling of traffic in which, up to this time, such short-haul motor carriers have never participated in to any great extent. Respondent does not believe that "piggyback" operations should be used as a stepping stone toward the

establishing of short-haul motor carriers as active competitors of long-haul motor carriers.

* * * * * * *

[fol. 1040] In suggesting this addition to the rule, respondent has directly in mind its present use of "substituted intermodal TOFC service" as defined by it in connection with the Pennsylvania Railroad. As heretofore indicated, this is a large usage, and a whole train is made available to and used exclusively by respondent. It is respondent's belief that this arrangement, and others made between railroads and motor carriers, should not be disturbed.

Respondent is advised that the Pennsylvania Railroad will make available a train or trains to other motor carriers on the same terms as to respondent, if such other motor carriers desire to make a comparable use of the TOFC service.

* * * * * * *

[fol. 1041] C.

Rules Governing All Rail TOFC Service

1. Respondent generally agrees with this rule, but has suggested an addition thereto reading as follows:

> provided however, that the rates to shippers for such service are the same as those charged shippers by motor carriers between the same points.

Respondent respectfully submits that the addition to the rule provides protection against unreasonable railroad competition to motor carriers. The addition to the rule which respondent has suggested would make the use of TOFC service as a device for rate cutting by either rail or motor carriers impossible, and would have, respondent believes, a beneficial and stabilizing effect upon the entire rate situation as involving the two forms of transportation.

* * * * * * *

[fol. 1042]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT FILED ON BEHALF OF BEKINS VAN LINES CO.

By: Robert C. Johnson, Vice-President of Bekins Van Lines Co.

[fol. 1043]

State of California,
County of Los Angeles, ss.:

Robert C. Johnson, being first duly sworn deposes and says: My name is Robert C. Johnson. I am the Vice-President, Bekins Van Lines Co. My office is located at 1335 South Figueroa Street, Los Angeles 15, California.

• • • • • • •

[fol. 1044] The special pleading of Bekins Van Lines Co. also requested Rule B. 5. be changed by adding a phrase to the first sentence thereof which would impose the obligation upon the railroad to determine whether such joint intermodal TOFC service could be participated in under the proposed rules by the motor carrier between the proposed origin and destination points. The need for this change comes from the fact that without the railroad being obligated to examine into the operating authority and authorized routes of the motor carrier and to satisfy itself that the motor carrier does have suitable authority there will be many violations of the proposed rules. It has been my experience that before any motor carrier undertakes Piggyback substituted service with the railroad that there is a period of negotiations between the sales and management officials of the railroad and of the motor carrier. It will be a relatively easy thing for the railroads to require proof from the motor carrier at this initial point in time that the proposed service is legal and conforms to the rules

as between points that the motor carrier has authority to serve. * * *

* * * * * * *

[fol. 1045] In the special pleading filed on behalf of Bekins Van Lines Co. a new Rule B. 12. was proposed as follows:

> "12. Any railroad which provides all-rail TOFC service for a shipper's association or freight forwarder in connection with such association's or freight forwarder's household goods traffic shall not refuse to enter into a like arrangement with Motor Common Carriers of Household Goods as defined by the Commission provided such motor carrier has authority to serve the points involved and such service would not violate Rule B. 3."

[fol. 1046] Bekins Van Lines Co. and many other household goods carriers now utilize Piggyback and other forms of substituted service in connection with handling their traffic of household goods. Substituted service gives a flexibility to our operations which the company would not otherwise enjoy in that trailers can be sent from one area where they have been loaded through to another area for delivery. This is possible only where there is sufficient through tonnage to fill out a trailer or a railcar with containerized shipments. Because of the influx of population into certain areas of the country, without a comparable outbound movement there many times develops an inbalance of tonnage moving between the different areas and where substituted service is available by utilizing containers it is unnecessary to delay shipments until road equipment can be moved into the area.

* * * * * * *

[fol. 1047]

BEFORE THE INTERSTATE COMMERCE COMMISSION

VERIFIED STATEMENT OF YALE TRANSPORT CORP. BY JOSEPH W. WATSON

Yale Transport Corp.
460—12th Avenue
New York 18, New York

December 5, 1962

Interstate Commerce Commission
Office of the Secretary
Washington 25, D. C.

Ex Parte 230

Substituted Service; Charges and Practices of For-Hire Carriers and Freight Forwarders; Piggyback Service.

Verified statement due December 10, 1962.

Comes now Yale Transport Corp. and by its Director of Traffic, Joseph W. Watson, files this its verified statement of facts and argument in support of its position in the captioned proceeding. Yale Transport Corp., hereinafter called Yale, operates as a motor common carrier subject to Part II of the Interstate Commerce Act under certificate No. MC-17778 and various subs thereto.

Facts

As stated in its initial pleading Yale participates in "joint intermodal TOFC service" arrangements with various rail carriers. In the year 1963 it is estimated that Yale will participate in intermodal service in the movement of a minimum of 4,000 trailers.

Much of the freight so transported under what is now referred to as Plan I is freight which formerly moved via private carriage and/or shipping associations. The advantages offered by Plan I have allowed Yale to compete for this type of traffic.

Through the use of Plan I, Yale has been able to reduce certain costs, hold down others, and in general operate more efficiently on a segment of its business.

[fol. 1048]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF HELM'S EXPRESS, INC. BY ALEXANDER MARKOWITZ, VICE PRESIDENT—TRAFFIC

[fol. 1049]

I

Opening Statement

My name is Alexander Markowitz. I am Vice President—Traffic, Helm's Express, Inc. I have held this position with respondent approximately twelve years. In the course of my duties, I have particularly kept myself informed with respect to the charges, services, and practices involved in all rail and joint intermodal TOFC service.

This verified statement is filed on behalf of Helm's Express, Inc. MC-629, Helm's Express, Inc., Operator of Keystone Transfer Co., Inc. MC-64939, Zeno Freightways, Inc., and The Royal Transportation Company, all under management control of Helm's Express, Inc. Where the term "carrier" or "respondent" or Helm's Express, Inc. is used, it shall be understood to cover the above interests. When the term "another carrier" is used, it shall be understood not to include the above locally or jointly with each other.

Helm's Express, Inc. is a motor common carrier of commodities generally, with the usual exceptions, certificated by the Interstate Commerce Commission under MC-629, over a network of regular and irregular routes extending from Boston, Mass., and vicinity to Cincinnati, Ohio, and Lawrenceburg, Indiana, and serving more than 3000 points in Massachusetts, Connecticut, Rhode Island, New York,

New Jersey, Pennsylvania, Delaware, Maryland, District of Columbia, Virginia, West Virginia, Ohio, and Indiana.

[fol. 1050] Respondent conducts motor carrier operations in an area in which the development of TOFC service has had an important competitive effect. It has also been a user of Plan I piggyback substituted freight service of the Pennsylvania Railroad Company under PRR divisional basis 9599, and it appears as a participant in Substituted Freight Service Directories published for our account of Eastern Central Motor Carriers Association, Inc. and Middle Atlantic Conference, Agents.

This service is regularly employed by respondent in the movement of empty and loaded highway trailers operated by respondent and moved over the lines of the railroad between New York and Cincinnati.

* * * * * * *

[fol. 1051] II

General Statement

* * * This proceeding does not appear to reach all the rate devices or the "gray area" problems connected with the offering of TOFC service. Co-ordinated transport facilities, or intermodal TOFC service does appear to be one of its objectives. * * *

[fol. 1052] * * * In the final analysis, the shipper is less interested in the *mode* of transportation, and his principal interest is in *rates and services,* as it always was, and always will be.

* * * * * * *

TOFC, as a technological development and as a service improvement factor, was and is, an important contribution to transportation in the interests of the public and of the railroads and motor common carriers. It is also a railroad development in which that form of transportation has invested heavily and it is entitled to exploit its success to the fullest. It behooves the motor common carrier to also de-

velop new technologies and approaches to the end of developing a more economical form of transportation and a better service to the shipper.

The Commission must, itself, responsive to the purposes of this investigation seek from the Congress new legislation, if necessary, by which TOFC service and all other technological changes may be properly provided for and a public policy clearly stated in the law to guide all concerned.

[fol. 1053] The Commission should, at the conclusion of these proceedings, and in its findings, incorporate recommended legislation to the Congress for modification of existing laws and for new laws as needed to realize the primary purpose of this proceeding, which, to respondent, appears to be a declared intent of public policy to encourage voluntary co-ordinated intermodal transportation services, making proper use of TOFC and other technological developments in the direction of developing all purpose interchangeable vehicles, trailers, or containers utilized in joint intermodal service.

III

Position of Respondent

In this proceeding, it is the position of Helm's Express, Inc. that the following orders or actions by the Commission shall be taken to the end that the stated purposes of the proceeding shall be attained and the public interest served.

1. TOFC service, all rail or intermodal, should be developed for the purpose of promoting better rail and co-ordinated service with other modes of transportation.

2. Rules should be promulgated which will prevent unlawful discrimination, preference, prejudice, concessions, and rebates forbidden by the present provisions of the Interstate Commerce Act and the Elkins Act.

3. The Commission's findings in *Substituted Freight Service* 232 ICC 683, and *Interchange of Traffic at point of Origin* 46 MCC 623, should be reconsidered and modified as hereinafter proposed, and to implement proposed Rule 7 of Appendix B to govern joint intermodal TOFC service.

[fol. 1054] 4. So-called "substituted service" or Plan I piggyback service should be disapproved and in lieu thereof Plan III service and co-ordinated truck-rail service should be permitted to shippers and motor common carriers alike under regulation, laid down by your Commission in this proceeding.

5. Railroads should be required to operate in accordance with their certificates granted them by your Commission under Section 1(18) of the Act.

6. Proceedings in which railroads have been permitted to conduct substituted service in motor carrier operation should, to the extent necessary, be re-opened for further consideration to determine modifications made necessary if recommendation No. 5 above is adopted.

7. Motor common carriers should be required to operate in accordance with their certificates granted them by your Commission under Section 206, 207, and 216 (c) of Part II of the Act.

8. Proceedings in which motor carriers have been permitted to conduct substituted service in rail operations should, to the extent necessary, be re-opened for further consideration to determine modifications made necessary if recommendation No. 7 is adopted.

* * * * * * *

[fol. 1055] 10. So-called Plan V service or Co-ordinated Truck Rail Service shall be the only *joint* intermodal TOFC service authorized, requiring the publication of joint through rates in tariffs filed with your Commis-

sion between railroads and other modes of transportation utilizing TOFC service on a voluntary basis by the participants.

11. If recommendation No. 10 is not carried into effect within a reasonable time after its adoption by you, the Congress should be requested to enact legislation compelling the establishment of joint intermodal TOFC service in proper tariff filings, where the public interest is shown to require the establishment and maintenance of such a service.

12. Re-open, for further consideration, your findings to the extent they may be inconsistent with the recommendations here made arrived at by your Commission in *National Auto Transporters Assn. Petition for a Declaratory Order* MCC-3024 and embracing MCC 3077.

13. Re-open, for further consideration, the proceeding designated as *Gordons Transports* v. *Strickland Freight Lines* No. 33606. Respondent urges upon you that if recommendation No. 10 above is adopted, the issues in No. 33606 will have become moot.

14. Institute proceedings necessary to determine upon a proper record, issues submitted in this proceeding by American Trucking Associations, Inc. as follows:

[fol. 1056] What standards are necessary for determining the cost of providing or performing trailer-on flat-car service?

What should be the relationship between rates for and services offered under Plan II (all rail TOFC) and the rates and services in connection with Plan III and IV piggyback and what standards are necessary to assure that discrimination cannot arise when Plan II rates and Plan III and IV rates are offered for the same freight?

What standards are necessary to assure maintenance of proper relationships among rates for various piggyback services between piggyback service and non-piggyback service and between piggyback service and the services of competitive modes of carriage?

15. Appendix C, 1 a and b of proposed rules governing all rail TOFC service should be clarified to indicate whether the language reading—"In either of the following ways" means either way, both ways, or only one way to the exclusion of the other.

Rule 2 (f) of Appendix C should be clarified that if no allowance is paid, the railroad is then required to render service shown and indicate charge therefor.

Rule 3 of Appendix C should prohibit *rental and bailment* in addition to lease for use in TOFC service, facilities indicated between parties named.

[fol. 1057]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF FACTS OF EAZOR EXPRESS, INC.

Comes now Eazor Express, Inc., whose general offices are located at 15—26th Street, Pittsburgh 22, Pennsylvania, and states the following:

Statement of Facts

* * * * * * *

Eazor Express, Inc. utilizes substituted service under Plan I Trailer-on-Flatcar Service with a number of railroads. Rates assessed by Eazor are the regular motor carrier rates published by the various motor carrier tariff [fol. 1058] bureaus, while the charges against Eazor Ex-

press by the railroads are published in their Division Basis publications and are available to all common carriers. Although the word "Division" is used, no joint rates are involved. Appropriate references to the substituted service are published in the affected motor carrier tariffs. Such arrangements are in effect with the Boston & Maine; Delaware & Hudson; Erie-Lackawanna; New York, New Haven & Hartford; Lehigh & Hudson; Chesapeake & Ohio; Pennsylvania; Nickel Plate; and Wabash Railroads. Plan I service is being utilized between Pittsburgh, Pa. and Chicago, Illinois; Pittsburgh and Kearney, N. J.; Pittsburgh and Boston, Mass.; Boston and Chicago; Kearney, N. J. and Chicago; Charleston, W. Va. and Chicago; Charleston and Kearney; Sharon, Pa. and Jersey City, N. J.; Sharon and Chicago; and Buffalo, N. Y. and Chicago.

[fol. 1059]

BEFORE THE INTERSTATE COMMERCE COMMISSION
Washington, D. C.

Ex Parte No. 230

VERIFIED STATEMENT OF RAINSFORD A. BROWN, SR.,
DYER O'HARE HAULING CO.

My name is Rainsford A. Brown, Sr. I am President and General Manager of Dyer O'Hare Hauling Co., with offices located at 912 Market St., East St. Louis, Ill. As President and General Manager of the company, it is my duty to supervise all activities of the business and I am thoroughly familiar with the type of commodities transported and the problems encountered by the contracting shipper with respect to the transportation of such commodities.

Dyer O'Hare Hauling Co. is a contract carrier and its principal contracting shipper is the Great Atlantic and Pacific Tea Company. Its operating authority is described generally as follows:

Transportation for shippers operating retail food stores between points and places in a territory generally described as Illinois, Eastern half of Missouri and including Terre Haute, Indiana.

I understand that the Interstate Commerce Commission in Ex Parte No. 230 is engaged in a rule making proceeding [fol. 1060] involving trailer-on-flatcar services. I further understand that the Commission has proposed certain rules which would govern intermodal trailer-on-flatcar services and that such rules would have the effect of prohibiting contract carriers from substituting rail service for truck service. As a carrier holding contracts with one of the Nation's largest users of contract carriage, we believe that we should be able to substitute rail service for truck service whenever the contracting shipper desires that such be done. We have not used piggyback service in the past because of the Commission's attitude toward this type of arrangement. I believe, however, in the future if the Commission permits contract carriers to participate in trailer-on-flatcar operations, such services could be utilized to advantage.

We have a large movement of canned goods in trailer load lots moving from Terre Haute, Indiana, to St. Louis, Missouri, and to Peoria, Illinois, which would lend itself to trailer-on-flatcar operation. We also have a heavy concentration of tonnage moving from St. Louis, Missouri, to Peoria, Illinois, which we would like to load in this service.

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[fol. 1061]

BEFORE THE INTERSTATE COMMERCE COMMISSION
Washington, D. C.

Docket Ex Parte No. 230

VERIFIED STATEMENT OF RAY M. CREAN
B & L MOTOR FREIGHT, INC.

My name is Ray M. Crean. I am Vice President in charge of operations of B & L Motor Freight, Inc., with offices located at 140 Everett Avenue, Newark, Ohio. As Vice President in charge of operations, it is my duty to supervise all of the operations of the corporation, and I am thoroughly familiar with the products transported by B & L and the services which it performs for its sole contracting shipper, Owens-Corning Fiberglas Corporation, hereinafter referred to as OCF.

B & L is authorized to transport property for the OCF pursuant to a permit issued by the Interstate Commerce Commission in Docket No. MC-81968. In conducting these operations, we dedicate an entire fleet of equipment to this shipper. In this fleet we have twice as many trailers as we have tractors. This ratio of tractors to trailers is maintained so that we can have at the shipper's platform trailers available for loading 24 hours a day, 7 days a week.

[fol. 1062] In conducting our services for OCF, we have both long and short hauls between Newark, Ohio, and Huntingdon, Penna., and the territory which we are authorized to serve. While our shipper has a plant located in Barrington, N.J., we are often called upon to serve points on the Eastern Coast and to transfer material between Newark and Barrington. In addition, we make deliveries to points as far distant from Newark, Ohio, as Chicago, Ill.; Louisville, Ky.; St. Louis and Kansas City, Mo.; Madison and Milwaukee, Wis.; Rochester and Buffalo, N.Y.; Hartford, Conn.; Providence, R.I.; Boston, Mass., and the District of Columbia.

I understand that the Interstate Commerce Commission in Ex Parte No. 230 is engaged in a rule making proceeding involving trailer-on-flatcar services. I further understand that the Commission has proposed certain rules which would govern intermodal trailer-on-flatcar services and that such rules would have the effect of prohibiting contract carriers from substituting rail service for truck service. As a carrier holding contracts with one of the Nation's largest users of contract carriage, we believe that we should be able to substitute rail service for truck service whenever the contracting shipper desires that such be done. We have not used piggyback service in the past because of the Commission's attitude toward this type of arrangement. I believe, however, in the future if the Commission permits contract carriers to participate in trailer-on-flatcar operations, such services could be utilized to advantage.

[fol. 1063] On many of our long hauls we could substitute for part of our over-the-road transportation, rail service. For example, the B & O Railroad has a ramp at Newark, Ohio, and we could move the shipments from the Newark plant to the ramp and have the rail carrier transport our trailers to points such as Chicago, Ill. The Pennsylvania Railroad has a ramp in Columbus, Ohio, and we could move shipments to that ramp from Newark and have the rail carrier transport such shipments to St. Louis, Philadelphia, New York, and many of the other points which I have indicated we serve. In some instances, we would have various materials, supplies, machinery and equipment moving back to Newark which could be transported in the reverse direction by rail, but even where we would have no return load, it would be economically advantageous to us under certain circumstances to pay the rail carrier for the return of the empty trailer.

During certain rush seasons we do not have sufficient tractors to pull all of our trailers. The use of trailer-on-flatcar services on long hauls during these rush periods would be particularly advantageous to our company for we would be in a better position to handle these peak periods for our shipper.

[fol. 1064]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF LEWIS O. PADGETT ASSISTANT TO THE VICE PRESIDENT THE MOTOR CONVOY, INC.

My name is Lewis O. Padgett. If an oral hearing were held in this proceeding, I would testify as follows:

I am Assistant to the Vice President of The Motor Convoy, Inc., P. O. Box 432, Hapeville, Georgia. I have held that position six years. Prior to that I served in the capacity of Sales Manager. I have been with The Motor Convoy, Inc. for over twelve years.

* * * * * * *

[fol. 1065] Motor Convoy is currently participating in the coordinated rail-motor movement of new automobile and truck traffic having concurrences with and participating in joint rates with the following rail carriers:

Atlantic Coast Line Railroad Company
Carolina, Clinchfield and Ohio Railway; Carolina Clinchfield and Ohio Railway of South Carolina, Lessees: Atlantic Coast Line Railroad Company; Louisville and Nashville Railroad Company
Central of Georgia Railway Company
Chesapeake and Ohio Railway Company (The)
Columbia, Newberry and Laurens Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago and Northwestern Railway Company
Florida East Coast Railway Company
Georgia Rail Road & Banking Company, operated as the Georgia Railroad by Lessees: Atlantic Coast Line Railroad Company; Louisville and Nashville Railroad Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company

Louisville and Nashville Railroad Company
Monon Railroad
New York Central Railroad Company (The)
Norfolk and Western Railway Company: N&W District
Savannah & Atlanta Railway Company
Seaboard Air Line Railroad Company
St. Louis-San Francisco Railway Company
Virginian District
Wabash Railroad Company
Winston-Salem Southbound Railway Company

* * * * * * *

[fol. 1066] In addition to the participation in joint through rail-motor or motor-rail-motor rates and routes, Motor Convoy also participates in the movement of traffic which has had a prior movement in rail MLRC service on a rail bill of lading and at rail rates from the plant to the rail-head distribution point. Under these arrangements, Motor Convoy receives the traffic at the rail-head distribution point for local movement beyond on local motor rates and Motor Convoy issues a separate bill of lading for the motor haul. This latter type of arrangement involves movements from plants at Lorain, Ohio, Norfolk, Virginia, Louisville, Kentucky, Mahwah, New Jersey, St. Louis, Missouri, Wayne, Michigan and Metuchen, New Jersey.

* * * * * * *

[fol. 1067] As I have demonstrated herein, Motor Convoy is participating in substantial measure in coordinated rail-motor service and desires and expects to continue such participation. Motor Convoy however is not participating in any true substituted service arrangements whereby it, at its own election and for its own convenience, substitutes rail service for a portion of its line-haul movements. It has been our experience and my observation throughout the automobile transporting industry that circumstances just do exist where a true substituted service is possible.

With the development of TOFC and MLRC service, obviously the shippers of new automobile and truck traffic have made every effort at moving this traffic in TOFC or MLRC service for the purpose of reducing their transportation costs. Obviously, under a true substituted service, the savings in cost do not necessarily result directly to the shippers but to the motor carrier.

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[fol. 1068]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF H. I. POWER, TRAFFIC MANAGER OF THE ATLANTA FREIGHT BUREAU, ATLANTA, GEORGIA

My name is H. I. Power. I am Traffic Manager for the Atlanta Freight Bureau located at 301 Walco Building, 26 Auburn Avenue, N. E., Atlanta 3, Georgia. I have been engaged in Traffic and Transportation work for 37 years and have been with the Atlanta Freight Bureau since 1952.

The Atlanta Freight Bureau is a voluntary, non-profit corporation existing under and by virtue of the laws of the state of Georgia; that it is not operated for pecuniary gain, representing in excess of 500 shippers and receivers of freight located throughout the Southeastern section of the United States.

* * * * * * *

[fol. 1069] There is nothing wrong with the leasing of equipment, *per se*. It is a well known fact that many motor carriers obtain all of their equipment by lease. The only problem in connection with leasing TOFC equipment is to safeguard against unlawful practices. If the provisions and compensation of leases are incorporated in tariffs filed pursuant to the statute and subject to all the controls provided by law, no abuses can arise.

It is our view that the operation and principle in this operation is the same as a box car moving into an industry beyond railway property and the use of this equipment in intra-plant service, storage or other purposes.

We further feel that Plan III is specifically designed to recover primarily traffic that is now moving in private carriage. Therefore, we do not feel that any rule should be promulgated that will frustrate the rail carrier's efforts to regain traffic.

The railroads are in the business for providing transportation service. This should include all the instrumentalities of those services. To secure maximum utility and usage of such equipment it is necessary that the rail carrier be the supplier.

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[fol. 1070]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF EUGENE J. MIELKE

I

My name is Eugene J. Mielke. I am Director of Traffic, Minneapolis Traffic Association, Minneapolis, Minnesota.

The Minneapolis Traffic Association is a non-profit corporation, created, organized and existing under and by virtue of the laws of the State of Minnesota, with offices and place of business in the City of Minneapolis, Minn. The Minneapolis Traffic Association is maintained by the Minneapolis Chamber of Commerce and represents the freight shipping and receiving members of said organization in traffic and transportation matters.

[fol. 1071] Included in the membership of the Minneapolis Traffic Association are firms and corporations engaged in manufacture, wholesale, retail, jobbing and distribution of

freight. Certain of these members have been and are using the various "piggyback plans" now available to them.

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[fol. 1072] V

Under Proposed Rule C, Item 3, it would immediately prevent the continuance of the program outlined above.

Our members would be required to either find new sources for the supply of leased equipment or be forced to purchase expensive units to continue these types of transportation.

A number of the rail carriers, or their affiliates, have already invested in this equipment and have it available for the interested shipping public. It does not appear reasonable to now change these rules to such an extent as to completely upset an existing practicable arrangement.

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[fol. 1073]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF GORDON STEDMAN, EXECUTIVE VICE PRESIDENT, GROWERS AND SHIPPERS LEAGUE OF FLORIDA

My name is Gordon Stedman. I am Executive Vice President of Growers and Shippers League of Florida, with offices at 45 W. Central Avenue, Orlando, Florida. (P. O. Box 3227, Orlando, Florida.)

Growers and Shippers League of Florida is a voluntary non-profit organization of growers and shippers of citrus fruits and vegetables in and from Florida. It is the duly authorized transportation agent of Florida Citrus Commission and of Florida Canners Association and is authorized to speak for Florida Citrus Mutual. The latter is a non-profit voluntary organization of growers and shippers of citrus fruits in and from Florida. The membership of

Florida Canners Association, a non-profit corporation, comprises the processors of citrus fruit products in Florida, consisting primarily of frozen citrus fruit juice concentrates, canned citrus fruit and juices, chilled citrus fruit juice, and chilled citrus fruit salad. Florida Citrus Commission is the lawfully constituted body established by the laws of Florida, charged with the statutory duty of protecting the interests of the Florida citrus industry in obtaining and enjoying reasonable, rapid and efficient transportation services and reasonable and otherwise lawful charges therefor.

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[fol. 1074] Citrus fruits are grown and produced in commercial volume in nearly all of the counties in the Florida Peninsula, the largest production being in the central portion of Polk, Lake and Orange Counties with additional substantial volume in the Indian River area on Florida's eastern seaboard and in other central and south Florida counties of the interior and Gulf coasts. Production has increased during the past ten seasons, and the current estimate of the U. S. Department of Agriculture forecasts a total of more than 160 million boxes of 1-3/5 bushel standard size in the 1962-63 season.

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[fol. 1075] In the past ten seasons, the interstate movement of fresh citrus fruit from Florida has ranged from 54,143 carlots to 88,526, with a total of 69,212 carlots in the last season, 1961-62. That total movement includes both rail and truck. The rail cars accounted for about half of the total movement in 1952-53 and for a little more than one-fifth in the 1961-62 season, when there were 14,897 rail cars. The first TOFC or piggyback service for Florida citrus started only two seasons ago on a limited and practically an experimental basis to about 4 eastern destinations. In that first season, there were 1970 trailers of Florida citrus fruit handled by rail TOFC service. In the next season, 1961-62, with some expansion both in rail

TOFC facilities and destinations to which such service was available, the rail TOFC movement of fresh citrus increased to 6,519 trailers. In the current 1962-63 season, the rail TOFC movement of 1,011 trailers of fresh citrus through November 24th contrasts with 623 trailers in the comparable period of 1961-62 season through November 25th, 1961. There have been times since the initiation of rail TOFC service for Florida citrus that the volume thereof has been limited only by the rail TOFC facilities available therefor. It is to be noted that the rail car movement of fresh Florida citrus was only 280 cars less in 1961-62 than in the preceding 1960-61 season, and therefore in one sense of the word the 6,519 rail TOFC trailers was rail traffic which otherwise probably would not have been handled by the rails. Also, it is important to note that the motor truck [fol. 1076] movement of Florida citrus has increased from 49.3% of the total in 1952-53 to 69.1% in 1961-62 season. However, the truck portion in the past four seasons seems to have stabilized at 67.6%, 70.9%, 68.4% and 69.1%. Thus, it seems reasonable to believe that the expanding flexible rail TOFC service should continue with even greater volume in the future with the continually increasing production of Florida citrus fruit.

It must be noted of course that the motor vehicle transportation of straight truck loads of fresh citrus fruit is exempt from regulation under sec. 203(b)(6) of the Interstate Commerce Act. The movement of fresh citrus from Florida by regulated motor carriers is not now and never has been of any substantial volume.

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[fol. 1077] 3. The term "shipper" ought to include not only shippers in the ordinary sense but also any person (whether a certificated motor common carrier, a motor carrier exempt from all economic regulation by reason of the nature of the lading, private motor carriers, freight forwarder or anyone else) who tenders a trailer to a railroad for TOFC service.

• • • • • • •

[fol. 1078] 6. Rail TOFC services and charges applicable thereto ought to be clearly and explicitly stated in tariffs filed with the Commission. Any rail TOFC service should be available to all shippers alike wherever the service is offered in a tariff, and the same charge ought to apply to each service regardless of the identity of the shipper. Of course, motor-rail-motor TOFC service tariffs, when mutually agreed upon and filed, would make that joint service available at the published charge to all shippers tendering traffic to the initial motor carrier.

7. To render practical service and to develop and utilize rail TOFC service to the greatest practicable extent, an initial rail carrier offering complete rail TOFC service (i.e. pickup, line-haul, and delivery) ought to be permitted to originate a trailer at any origin point on its line, when partially loaded or to be loaded at such point and to obtain a partial load or complete the load of the trailer at any other point in the general origin area served by it (hauling the trailer in pickup service from wherever loaded [fol. 1079] in the origin general area to origin ramp point served by it by rail). The flexibility is particularly important with respect to Florida citrus fruits and fresh vegetables and products thereof.

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[fol. 1080]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF N. W. PUTNAM, EXECUTIVE SECRETARY, CHICAGO SHIPPERS ASSOCIATION, INC., 1106 WEST 35TH STREET, CHICAGO 9, ILLINOIS

To the Interstate Commerce Commission:

My name is Norcross W. Putnam. I am employed as Executive Secretary of Chicago Shippers Association, Inc., a not-for-profit shippers association, operating under the State of Illinois general not-for-profit corporation act and

exempt from Interstate Commerce regulation under Section 402 (C), Part IV of the Interstate Commerce Act.

• • • • • • •

[fol. 1081] C.S.A. is vigorously opposed to Section C, Paragraph 3, since it would prohibit securing equipment directly or indirectly from the railroads.

C.S.A. believes that without the flexibility in securing equipment directly or indirectly from the rail carriers, when needed, costly delays will result.

C.S.A.'s charges are allocated to its members strictly on a cost basis and there can be no assurance that present costs for the use of equipment will be protected should railroads be prevented either directly or indirectly from supplying TOFC equipment.

The restrictions imposed by this rule could well mean the end of CSA's TOFC operations and we are certain that much of this business would leave the railroads in favor of private and common motor carrier.

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[fol. 1082]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.

Interest of AISA

American Institute For Shippers' Associations, Inc., hereinafter called AISA, is a trade organization for and composed of shippers' associations and shippers utilizing these associations. The members of AISA vigorously support regulated motor and rail carriage and are substantial users of piggyback services, particularly so-called plans III and IV.

• • • • • • •

[fol. 1083] The advantages now inherent in plans III and IV services may well be destroyed by the modified plan II which this Commission now proposes. Shippers through their assocations are striving to market their merchandise in the most economical and efficient way and at the same time to promote a just and healthy return for regulated interstate carriers who form the backbone of our transportation system. Plans III and IV have accomplished these objectives.

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[fol. 1084]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF JOHN B. HEDGES

My name is John B. Hedges. I am traffic manager of the Manufacturers Association of Connecticut with offices at 928 Farmington Avenue, West Hartford 7, Connecticut. I have held that position for approximately six and one half years.

I.

The Manufacturers Association of Connecticut is a voluntary, non-profit organization comprised of over 2,000 manufacturing firms within the State of Connecticut.

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[fol. 1085] Argument

The long-haul trucking industry and its organized labor force have made no secret of their joint desire and determination to do everything possible to stamp out Plans III and IV TOFC service, regardless of the effect of such action on the rail carriers or the general public. They would relegate the rails to the role of their humble and obedient servant in joint intermodal arrangements which would permit them to dictate, in a large measure, the terms on which such traffic is to move. Plan II has never been considered too great a menace by these interests since it does not

move a great volume of traffic and its rates are for the most part pegged at Part II carrier levels.

• • • • • • •

To condemn out of hand all Plan III and IV leasing arrangements and rates rather than trying to establish standards of publication of the leasing arrangements, would bring about the ultimate destruction of that form of all-rail TOFC service most useful to the public.

[fol. 1086]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT ON BEHALF OF THE NEW ENGLAND INDUSTRIAL TRAFFIC LEAGUE, INC., P. O. BOX 118, WEST HARTFORD, CONN., BY JOHN B. HEDGES, REGISTERED PRACTITIONER

Verified Statement of John B. Hedges

My name is John B. Hedges. I am a registered practitioner appearing in this proceeding for the New England Industrial Traffic League, Inc. hereinafter called the League. The League is a voluntary non-profit organization of approximately 190 members, who are manufacturers, associations, chambers of commerce and other commercial and industrial interests in the New England region.

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[fol. 1087]

II

Argument

The denial of trip leasing would sound the death knell of Plan III operations. It would serve to promote only the greedy interests of the long haul motor carriers, who seek to curtail all TOFC service that is not directly subservient to them and devoted primarily to their needs. In New

England the loss of Plan III traffic could mean the difference between life and death to the New Haven and the [fol. 1088] Boston and Maine. Shippers who dropped their private truck fleet operations to go to Plan III would face increased costs that would put them back on the highways with their own equipment. Shippers who are now receiving substantial benefits through cooperative shippers associations would face higher transportation costs and still others who rely on freight forwarders might find themselves paying higher rates if Plan III benefits were no longer available.

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[fol. 1089]

BEFORE THE INTERSTATE COMMERCE COMMISSION

I.C.C. Ex parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF JAMES B. GRIFFIN

My name is James B. Griffin, Director of Traffic, Scovill Manufacturing Co., Waterbury, Connecticut. I am Treasurer of The Charter Oak Shippers Cooperative Association, Inc., party participant in this case, and am personally familiar with the following facts and considerations, which are true and correct to the best of my knowledge and belief.

1. Charter Oak is an established non-profit cooperative consisting generally of major industry of Connecticut shipping through the association in carload or volume quantities to obtain the economy and efficiency of such service, in considerable volume to the South, the Southwest, the Middlewest, and the far West, with some return traffic from all areas.

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[fol. 1090] 4. In supporting generally the position of our origin rail carrier, the New Haven Railroad here, there are two overwhelming facts we wish the Commission to consider in this investigation, namely the vital importance

to Connecticut shippers and receivers of the flexible, economical and efficient service which Plan III (and the parallel box-car through service, where applicable) operation has afforded our industries, shipping jointly, and secondly, the fact that without this particular tailored and flexible rail transportation operation of the railroads, *much of our New England freight would not move at all,* owing to the relatively high cost and definite service disadvantages of other modes of transportation. It is definitely in the interest of each and every member of Charter Oak, as well as that of New England Territory generally, that the ability of the New Haven Railroad to participate increasingly in the Piggy-Back traffic to and from its entire New England service area be encouraged and sustained. Not only do these members depend on efficient and economical rail service for their long-distance volume movements to considerable extent on their own, but they also depend very heavily on availability of rail service generally as a primary factor in preserving the welfare of shipping areas.

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[fol. 1091]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT ON BEHALF OF PROGRESSIVE SHIPPERS COOPERATIVE ASSOCIATION, SHREWSBURY, MASSACHUSETTS, AND ITS MEMBERS

My name is S. W. Earnshaw, Attorney at Law & Transportation Counsel, 983 National Press Building, Washington 4, D. C. I am Commerce Counsel for Progressive Shippers Cooperative Association, Shrewsbury, Mass., which submits this statement herein on behalf of its members, and am familiar with the following facts and considerations bearing on this case, which is of most vital importance to the entire membership of our Association, serving as it does Central Massachusetts and surrounding areas.

Progressive Shippers Cooperative Association is a non-profit cooperative located just East of Worcester, Massachusetts, and serving the entire Central Massachusetts area, which is solely dedicated to arranging for and protecting through volume movements on behalf of its members (on a cooperative basis) between Massachusetts and Rhode Island, on the one hand, and various other parts of the United States in surface movement.

Progressive makes very substantial use of Plan III rail service, and in addition considerable use of Plan IV rail service involving far-Western hauls, and also consolidated Box Car movement for its members collectively. These rail services are indispensable to effective and efficient utilization by these shippers of railroad service, to preservation and promotion of our sources and markets in far-distant areas, and to the out-of State business of our members generally. Our interest in this case, as stated in the Statement of Position dated November 16th, 1962 is to support and encourage further expansion on a fair and efficient basis, the offering of Plan III and Plan IV services, with necessary coverage and flexibility by our rail carriers, which in the case of Progressive means primarily the New York Central.

Upon information and belief, the facts and considerations stated by Witness Milbourne of the New York Central are true and correct, and apply generally to the traffic, transportation, and circumstances, and cooperative shipping problems of Progressive Shippers Cooperative Association, so far as set forth at pages 10-26 inclusive of his testimony in this proceeding.

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[fol. 1092]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (PIGGYBACK SERVICE)

Part I

EXCERPTS FROM VERIFIED STATEMENT OF H. F. LACEY SUBMITTED IN BEHALF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

In accordance with the order of the Commission, Commissioners Herring and Tucker, dated October 11, 1962, this verified statement is submitted herewith in behalf of The National Industrial Traffic League. Under date of November 16, 1962, the League submitted a Special Pleading, also in accordance with the aforesaid order.

The National Industrial Traffic League (hereinafter referred to as the League) is a voluntary association of shippers throughout the length and breadth of the United States. It is immediately clear that the interest of the members of The National Industrial League in this proceeeding, and in the disposition thereof, is substantial.

My name is Hugh F. Lacey. My business address is 2621 West Fifteenth Place, Chicago, Illinois. I am General Traffic Manager of Joseph T. Ryerson & Son, Inc. I have been with the Company for seventeen years and have [fol. 1093] held my present position for the past eight years. I am responsible for administering the traffic functions for all the plants of our Company.

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[fol. 1094] Proposed TOFC Rules

A. Definitions

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In reviewing the proposed TOFC Rules overall two factors immediately become apparent. The first is that a severe and possibly fatal blow would be dealt to the con-

tinuation of current TOFC Plan III. This is particularly due to proposed Rule C-3 as well as by possible interpretation of other rules, specifically mentioned hereinafter. Presumably this is based upon alleged abuses which may have crept into, or might creep into, the use of Plan III. It is the view of the League that any such possible abuses can be prevented or eliminated by very complete tariff publications.

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[fol. 1095] B.

Rules Governing Joint Intermodal TOFC Service

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The League requests the elimination of Rule B-4 as unjustified. As stated this involves a grave and unwarranted encroachment upon the exercise of managerial judgment of railroads and motor carriers in providing joint intermodal TOFC service. This goes directly contrary to long experience under the Interstate Commerce Act, in connection with carrier divisions of any through rates.

[fol. 1096] The League objects to Rule B-5. While the League favors the expansion of joint intermodal TOFC service, appropriately defined, the Commission may not by rule make mandatory what is permissive under the governing statute. Further, the imposition upon the railroads of the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities is administratively undesirable. It will unduly obstruct the development of TOFC service.

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[fol. 1097]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders

EXCERPTS FROM VERIFIED STATEMENT OF HAROLD P. SIMPSEN, ASSISTANT GENERAL TRAFFIC MANAGER, SWIFT & COMPANY, IN OPPOSITION TO CERTAIN RULES PROPOSED BY THE INTERSTATE COMMERCE COMMISSION ON OCTOBER 12, 1961

My name is Harold P. Simpsen. I am Assistant General Traffic Manager of Swift & Company, 115 West Jackson Boulevard, Chicago, Illinois.

This verified statement is concerned with certain rules proposed by the Interstate Commerce Commission in connection with the investigation being conducted in Ex Parte 230.

Swift & Company is principally a meat packing company, although we produce and manufacture many products allied with the meat packing industry and additional products having no relation to that industry. We ship throughout the United States.

The nature of our business requires that we use all modes of transportation, including rail, motor, water and air. The meat packing business is traditionally highly competitive and we must constantly be alert to innovations and technological improvements in all modes which may enable us to meet these competitive conditions in all parts of the country. We have found that Plan III TOFC makes it pos-
[fol. 1098] sible for Swift & Company to compete with private carriage in the areas where Plan III is used.

Our use of Plan III TOFC has of necessity been confined to movements to the Eastern and Southeastern parts of the United States from origins from which such rates have been published. Our studies have indicated that the shipments of meats and packing house products which we

now move via Plan III formerly moved principally by common motor carrier. This service has enabled the railroads to compete with the common motor carrier, private and non-regulated competition.

The use of Plan III service has been advantageous to Swift & Company since it provides as great or greater flexibility than other modes of transportation. Rates are made on a ramp-to-ramp basis with the movement to and from the ramps handled either by our own tractors or through cartage agents. This allows multiple pick-ups and deliveries. In addition, it has reduced our costs, allowing us effectively to meet competition at the market place.

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[fol. 1099]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF JOHN P. ZUMWALT, ASSISTANT GENERAL TRAFFIC MANAGER, WILSON & CO., INC., IN OPPOSITION TO CERTAIN RULES PROPOSED BY THE INTERSTATE COMMERCE COMMISSION ON OCTOBER 12, 1962

My name is John P. Zumwalt. I am Assistant General Traffic Manager of Wilson & Co., Inc., Prudential Plaza, Chicago 1, Illinois.

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[fol. 1100] Wilson & Co., Inc. considers Plan III service a desirable and economical transportation facility which it would like to continue to use. Plan III service has enabled the Company to compete on more equal terms with other companies engaged in the meat business employing private carriage and other than certificated common or contract carriers, and at the same time, has provided the railroads with a substantial volume of the desirable traffic.

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[fol. 1101]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF J. E. BILBO, TRAFFIC MANAGER OF THE COCA-COLA COMPANY, ATLANTA 1, GEORGIA

I. Opening Statement

My name is J. E. Bilbo. I am Traffic Manager of The Coca-Cola Company, a corporation organized and existing under the laws of the state of Delaware with a principal office located in Atlanta, Georgia. I have been employed in the Traffic Department of the Company for over twenty years and have held my present position since 1955.

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[fol. 1102] Under the proposed Rule B-4 the railroads could not receive any greater compensation or charge from the motor or water carriers for their portion of the service than they would receive from a shipper or freight forwarder for ramp to ramp service under existing Plan III. We see no justification for giving the common carrier competitors of the railroads all the benefits of a shipper or freight forwarder.

We are opposed to Rule B-5 under which any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water carriers under similar circumstances or conditions. We believe that this rule contravenes the governing statute.

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[fol. 1103] IV. Conclusion

Prior to World War II approximately 97% of our intercity shipments of flavoring syrup moved in rail service. The remaining 3% moved via water or motor carriers. By 1950 the situation was reversed and the motor carriers

were handling approximately 97% of this business with the balance of 3% divided between rail and water carriers. Failure to maintain competitive rates and services caused this tremendous loss of business by the railroads.

In the last few years, as we have outlined, the railroads have made a small comeback in handling our traffic in TOFC service. The continuation and increased use of TOFC service for our traffic depends on our being able to lease the instrumentalities of this service from or to railroads. The alternative is the increased use of our private [fol. 1104] carriage operation. Therefore, we urge the Commission to prescribe only such rules as will permit maximum flexibility in the use of TOFC service.

Respectfully submitted,

The Coca-Cola Company, J. E. Bilbo, Traffic Manager, Registered Practitioner.

Dated in Atlanta, Georgia this 7th day of December, 1962.

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[fol. 1105]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF FACTS OF BROWN SHOE COMPANY

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[fol. 1106] Facts

Brown Shoe Company manufactures shoes and distributes its products throughout the United States. It also purchases shoes manufactured by other companies and distributes these products through retail subsidiaries. In the assembly of raw materials and the distribution of its products, Brown Shoe Company uses all forms of transportation. Since August 1958, Brown Shoe Company has utilized Plan III and service performed by the New York Central and others from Boston to East St. Louis.

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[fol. 1107] This method of operation has been of tremendous importance to Brown Shoe Company in its manufacturing and distributing processes. Prior to the inception of Flexi-Van service, third or fourth morning delivery from Boston was commonplace. Even after arrival at East St. Louis, transfer and switching movements had to be performed before the cars were placed for unloading at St. Louis. Out of the carload revenue of approximately $575 at that time, the line haul carrier was forced to absorb the cost of the additional switching and transfer at East St. Louis.

Use of either boxcar, Plan II or over-the-road motor carriers would raise the question of substantial increases in costs, even if our present service should be maintained. For example, our rail receiving dock can only unload three cars at one time, while on the other hand, we can unload 20 trailers simultaneously at our new truck dock. The importance of prompt delivery is emphasized by the fact that upon many occasions, we utilize air freight service for over-night deliveries of materials to St. Louis.

In prior years, more-over, we were unsuccessful on several occasions in seeking reasonable door-to-door rates from over-the-road common carriers which were at all comparable to the private boxcar rates plus our unloading and distribution charges at St. Louis.

[fol. 1108] We presently operate a substantial number of our own tractors and trailers out of St. Louis for distances up to 300 miles, and as an alternative to Plan III this equipment could be made available for private carriage of the Boston traffic.

Since our present operation is based to a large extent on the Plan III service and rates and the resulting speed and flexibility permitted in terminal and origin destination, it would be a severe blow to Brown Shoe Company if the Plan III rates were discontinued or restricted in such manner as might prevent their present use.

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[fol. 1109]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF JERVIS B. WEBB COMPANY, DETROIT, MICHIGAN

I

Comes now Jervis B. Webb Company of Detroit, Michigan, main office address at 9000 Alpine Avenue, Detroit 4, Michigan. Party filing is Traffic Manager of the Jervis B. Webb Company and we file herewith this Verified Statement in response to the Commission's Order in Ex Parte 230 dated October 11, 1962, served October 12, 1962, *In the Matter of Publishing Proposed Rules and Directing Special Procedure.*

[fol. 1110] Jervis B. Webb Company is a manufacturer of engineered conveyor systems, overhead cranes, automation machinery and systems.

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Our annual transportation within the United States proper approximates 18 million pounds with a total freight expense amounting to $500 thousand dollars paid to the Common Carriers.

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[fol. 1111] With the coming of Piggyback Service, and especially Plan II, *we were able to obtain open top equipment from the Railroads, and especially from Flexi-Van and the Wabash Railroad Piggybacks.* Piggyback Plan II System has afforded equipment when *many times we could not obtain open-top trailers from the Motor Carriers and the job site would not permit us to load in carloads* (gondolacars). Then with the use of Plan III in cooperation with our Southeastern Michigan Shipper's Cooperative *we have been able to expedite shipments,* trailer loads particularly, *to long distance job sites and at the same time*

effect a freight savings of $50 to $75 dollars per trailer load. Plan II and Plan III services (Piggyback) have served to expedite deliveries to our job sites for our field men for the erection of conveyor systems.

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[fol. 1112] In the various forms of TOFC Service, the railroads, either alone or in coordination with Motor Carriers, have provided shippers and receivers with a service tailored to meet their particular needs and are gradually returning to regulated transportation, much traffic which had formerly been moving in private carriage. The Commission's proposed rules would, to a very large extent, inhibit the growth of TOFC Service, and deny its advantages to the shipping public. If we were to lose the flexibility of the various Piggyback Plans, it could result in *loss of business, in higher freight costs, and might necessitate the use of increased private carriage in order to hold our competitive equality.*

We are whole-heartedly "all out" for the railroad Plan II and Plan III Piggyback Services. These offer us good service, lower rates, flexibility, door-to-door pick up and delivery, and a very low loss and damage experience. Many job sites or customer's plants are no longer located on a rail siding for carload deliveries.

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[fol. 1113] (5) Because of the short time available for study of the Commission's Proposed Definitions and Rules, your respondent wishes to reserve the right to modify, clarify and enlarge, if necessary, our position with respect to the proposed TOFC rules at a later time in this proceeding.

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[fol. 1114]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF SYLVANIA ELECTRIC PRODUCTS INC.

Sylvania Electric Products Inc. is a manufacturer of a wide variety of electrical and electronic products and components with forty-three plants and twenty-five warehouse distribution centers dispersed throughout the country. We use all types of carriers, principally railroad, motor common carriers and private motor carriage, at an annual aggregate cost of several million dollars, for transportation from and to our suppliers and customers and between our plants and warehouses.

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[fol. 1115] We have found Plan III to be especially advantageous on export traffic, for which we have been using the Flexivan services of the New York Central Railroad and their subsidiary, the New York Central Transport Company. We have enjoyed excellent availability of trailer equipment, specifically designed for transportation on the railroad's flat car equipment. The transit time service of the railroad has been completely dependable. Our savings in transportation cost versus motor common carrier has been an important factor in our continued ability to compete in foreign markets and make a contribution to the national effort to improve our national balance of payments problem. We long ago had to give up box car transportation to the port of export because of the short lead time allowed by competitive conditions before scheduled sailing dates and the inability of the railroads to provide the fast service required. We subsequently used motor common carrier service. It has only been since the advent of Plan III that the railroads have had a practical and economical

competitive service to offer on this traffic. If we were forced now to lease trailer equipment from third parties, our ability to use Plan III would be seriously hampered. As we do not have return traffic ourselves from the port, we would have to add the cost of the return empty movement of the trailers to our outbound cost. This would eliminate our savings, make Plan III more costly than motor common carrier and again remove this traffic from rail service.

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[fol. 1116] Our present planning for extending our use of Plan III TOFC service between Official Territory and the South and Southwest is predicated on the present or liberalized mixture rules and the leasing of trailers from the rail carriers or their subsidiaries. Much of this traffic is presently being transported by ourselves in private carriage operations, for the sake of savings in cost versus motor common carrier and in transit time versus rail box car service. Plan II service has not appeared to offer any saving in cost as the rate level has been the same as motor common carrier, with no advantage in transit time. Plan III, on the other hand, seems ideally suited to provide both low cost and good service. If Plan III is eliminated or seriously crippled by extension of regulatory restrictions, our present hopes for finding a better alternative to our private carriage operations in this area will be abandoned.

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[fol. 1117]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF ZENITH RADIO CORPORATION BY EDWARD C. MADDEN

My name is Edward C. Madden. I am Traffic Manager of Zenith Radio Corporation.

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Zenith Radio Corporation is the largest producer of television receiving sets in the country today.

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[fol. 1118] Plan III, as it operates today, offers many opportunities for savings in freight costs, and has enabled the railroads to handle more efficiently a large volume of high-value products. It allows the shipper or consignee to control directly various factors of transportation cost, such as origin and destination drayage, equipment utilization, etc.

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[fol. 1119] In general, it is my opinion that any rules which would result in a curtailment of Plan III, as we know it today, would adversely affect both Zenith and the distributors we serve. Plan III service has opened new horizons for the shipper and consignee to more directly control their individual transportation costs. It represents real progress in the pricing of transportation services and should be encouraged rather than curtailed.

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[fol. 1120]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

VERIFIED STATEMENTS OF E. M. BRINCKMAN—JEWEL TEA CO., INC., ROME P. CLINTON—MINNEAPOLIS-HONEYWELL REGULATOR CO., GEORGE C. HILLENBRAND, JR.—TIME, INCORPORATED, HUGH F. LACEY—JOSEPH T. RYERSON & SON, INC., GEORGE A. MCELROY—CECO STEEL PRODUCTS CORPORATION, AND FRANK L. O'NEILL—MINNESOTA MINING AND MANUFACTURING COMPANY FILED UPON BEHALF OF INDIVIDUAL PARTIES NAMED IN THE APPENDIX HERETO

Comes now the individual parties named in the Appendix hereto, hereinafter referred to as Intervenors, and file the Verified Statements set forth in the above heading upon behalf of all said Intervenors. Because of the number of said Intervenors, it was felt that the time and energies of the Commission and the parties could best be conserved by the filing of Statements by a representative group of the individual Intervenors. It is requested that said Statements be considered upon behalf of all Intervenors.

[fol. 1121]

VERIFIED STATEMENT OF E. M. BRINCKMAN—JEWEL TEA CO., INC.

Part I

My name is E. M. Brinckman and my business address is 1955 W. North Avenue, Melrose Park, Illinois. I am General Traffic Manager of Jewel Tea Co., Inc., having been associated with that company for 40 years, primarily in Traffic and Distribution. I have functional jurisdiction in connection with all of the company's traffic activities, in-

cluding Jewel's Home Service, Jewel Food Stores, Eisner, Jewel-Eisner Perishables, Osco Drugs and Turnstyle.

Jewel Tea Co., Inc., is a manufacturer and distributor of food items and household supplies. It distributes these products through supermarkets, home service routes, self-service department stores and drugstores. It operates 27 plants and warehouses located in 20 states, with principal facilities being located in Barrington, Chicago and Melrose Park, Ill. The annual sales of Jewel for the fiscal year ending January 31, 1963 will exceed $600 million.

Jewel uses all forms of transportation, including air freight and inland waterways. The annual freight bill of Jewel is in excess of $25 million, including freight on goods purchased on a delivered basis.

The use of private carriage varies between the different company's divisions. In the Home Service Division (approximately 15 percent of the total annual sales) private carriage represents approximately 40 percent of the total intercity movement. In the company's overall operations, private carriage represents about 15 percent of the intercity movements.

Jewel began to use rail piggyback service practically from its inception, starting with Plan II service. At the present time, Plans II, III and V piggyback service are used. During October, 1962, 63 trailer loads moved in piggyback service as follows: Plan II—20 trailers; Plan III—36 trailers; and Plan V—4 trailers.

[fol. 1122] The use of Plan III service has been somewhat limited in the past because the location of the principal plant of Jewel. However, in October, 10 to 15 trailer loads per month were converted from rail box car service to Plan III service. This movement should add approximately 200 trailer loads annually moving in Plan III service. Plan III service is used to ship mixed loads of foodstuffs and general merchandise and straight loads of food store items to Chicago from the East and South, and from Barrington to the East and Southeast. It is anticipated that as Plan III

service expands into other territories Jewel will make increased use of this type of service.

Jewel will be in a position to use Plan III service to avoid the necessity of using local warehouses. For example, a distribution warehouse—currently maintained in Nashville, Tenn. is served by weekly carload shipments from Barrington. Distribution to route salesmen's stock rooms is made in Jewel's own tractor and trailer unit. Through the use of Plan III service, we would be in a position to assemble the individual salesmen's shipment in Barrington, load them in a trailer as is now done in Nashville, and ship on a rail flat-car to Nashville for peddle distribution to the salesmen. In this way, the necessity of maintaining a warehouse at Nashville can be eliminated. The same method of distribution can be used at other points.

In addition to the use of Plans II and III service as above indicated, Jewel also used Plan V service, and it is anticipated that the use of this service will expand. During the next two years, we plan to serve self-service department stores located at smaller cities in the Midwest by using piggyback service to major cities and by using motor carriers beyond directly to the stores.

It is important to Jewel to have available all of the present plans of piggyback service. In particular, Jewel desires a continuation of Plan III service in its present form. Plan III service has been beneficial in providing lower overall costs, improving transit time, and practically eliminating [fol. 1123] damage in transit. In connection with the use of Plan III service, trailers are leased from the railroads or railroad subsidiaries; and Jewel has found this to be advantageous. It has afforded great flexibility in the use of the service and has eliminated any requirement for the return of the trailers. Jewel desires to be in a position to use these trailers either in connection with the pick-up or distribution of freight within a terminal area or beyond. For example, meat and packinghouse products move into Chicago in piggyback service; and Jewel desires to utilize

these trailers in effecting delivery to its stores either through its own tractor equipment or a local cartage operator. In my opinion, much of the benefits of Plan III Service would be destroyed if leasing between a shipper and the railroad or its subsidiary was discontinued as a result of the proposed rules. So far as Jewel is concerned, there is no objection to the publication of the charges for the leasing of trailers or for the rendition of any other accessorial services connected with TOFC service.

Jewel has experienced no confusion between the various plans of piggyback service. The tariff provisions are clear and Jewel has a competent staff of traffic personnel to review and interpret the piggyback plans and the tariff provisions relating thereto. The proposed rules should not be promulgated simply to eliminate any alleged confusion between the various plans.

Jewel has not experienced any difficulty in interpreting or applying the present mixture rules. The use of the Uniform Freight Classification would not be a realistic basis for determining the percentage of items to be included in a mixture. For example, Jewel has a Plan II movement of clothing and wearing apparel from Boston, Mass. to Chicago, Ill. The mixture provisions governing this movement are published in Item 877A of New York Central Tariff No. 6602 which in substance states that the all freight rate will apply on mixed shipments of 5 or more commodities [fol. 1124] with no one commodity to exceed 50 percent of the lading weight. If this rule was applied on the basis of the Uniform Freight Classification, in accordance with Item 5 Section D of the proposed rules, Jewel would not be in a position to use the service, even though the commodities involved are substantially different. The use of the mixture rule must be predicated upon factors other than the Uniform Freight Classification.

[fol. 1125]

Part II

Statement of Position and Argument
E. M. Brinckman—Jewel Tea Co., Inc.

It is the position of Jewel that no rules or regulations governing TOFC are necessary or desirable at this time. Jewel has found that the various plans of piggyback service have afforded it a flexibility which has not heretofore existed and has permitted the use of rail or truck service in the most economical and efficient manner possible. For example, Plan III service has permitted the use of rail TOFC service from terminal to terminal, or ramp to ramp, which appears to be the most efficient and economical use of the rail service; and at the same time it has permitted the shipper to utilize either private carriage or for-hire carriage in effecting pick-ups and deliveries.

Piggyback service is certainly in its infancy. The various plans of piggyback service have developed as the needs of shippers and receivers have dictated and the economics of any particular type of service have been explored. The five basic plans of piggyback service are now well understood by the entire shipping fraternity and any variations in these plans are covered by tariff provisions easily understood by any qualified traffic man. Therefore, no useful purpose is served by promulgating regulations simply to categorize TOFC service into two basic classifications, i.e. joint intermodal and all-rail TOFC service. Moreover, it [fol. 1126] is of extreme importance that nothing be done to discourage the growth of piggyback service in its present form.

Jewel is particularly concerned with Sections C and D of the proposed regulations. Section C has the effect of destroying Plan III TOFC service in its present form and possibly of eliminating many of the basic economies and efficiencies inherent therein. It should be clear from my prior statement that the primary benefits of Plan III service stem from the flexibility and economies which it offers

to the shipping public. First, the shipper or receiver is free to provide pick-up and delivery service either in its own equipment or through a for-hire carrier. Moreover, such pick-ups and/or deliveries can be effected either within the terminal area of the railhead or beyond. Such pick-up and delivery service can be effected at the *actual* cost to the shipper or receiver, and not on the basis of a pre-determined and artificially fixed allowances.

Secondly, the trailer equipment used in connection with Plan III TOFC service can be furnished by the shipper from its own fleet or from equipment leased from the railroad, a railroad affiliate or an outside leasing company. The particular method of furnishing trailer equipment can be varied according to the particular requirement or circumstances of the shipper or receiver. For example, in the event my company, or any other company, has a balanced movement between certain points, it would possibly be more economical for us to purchase equipment or to [fol. 1127] lease it on a permanent basis for use in the operation. However, where a movement is unbalanced, it is more economical in most instances to lease that equipment on a trip basis from the railroads or their affiliates.

Item 1(b) of Section C of the proposed rules would purportedly provide for a ramp to ramp, or terminal to terminal service. However, *all* the services and equipment in connection with this category of service would be required to be furnished by the rail carrier. This would destroy Plan III TOFC service in its present form, and would obligate the railroads to furnish, among other things, the trailer equipment to be used in the operation.

Presumably, if a shipper furnished the trailer in connection with this ramp to ramp service, it would receive an allowance under Item 2(f) of Section C. Based upon my experience, such allowances are often inadequate and would not fairly compensate my company for the furnishing of such equipment. Moreover, it is not clear from the proposed rules whether Jewel would be permitted to lease

equipment to the railroads for the TOFC movement, or to lease trailers from the railroads for the rendition of pick-up and delivery service. Item 3 of Section C prohibits leasing of any equipment between a shipper and the railroads or their affiliates. This item would appear to raise a question of whether the trailer furnished by a shipper to the railroads in connection with the TOFC movement would be [fol. 1128] considered a lease of the type prohibited by said Item, and whether the railroads would be able to lease equipment to the shipper for the rendition of pick-up and delivery service either in private carriage or by a for-hire carrier. If either or both of these practices are prohibited, it would destroy much of the flexibility and economies of Plan III service in its present form.

Even if the above considered inconsistencies in the proposed rules can be clarified and the terminal and terminal TOFC service contemplated under the proposed rules will permit some of the same services now a part of Plan III TOFC service, Jewel opposes the proposed rules. It is the opinion of Jewel that there is no valid reason for the proposed rules at this time. Plan III service has flourished under the present arangements, and there is no reason why a terminal to terminal TOFC service offered by the railroads should be restricted to obligate the carrier to provide the trailer equipment. The only possible argument which can be advanced for such a restriction or for the prohibition against leasing between the carriers or their affiliates and the shippers is the fact that in most instances the charges for the lease of the equipment to the shipper is not published. Jewel advocates that these charges be published in tariff form. Such a requirement could be included within the framework of the Commission's present tariff regulations. In this manner, any criticism concerning the level [fol. 1129] of the charges or the manner in which they are assessed can be obviated, and in my opinion eliminates any need which allegedly might exist for the proposed rules contained in Section C.

Jewel does not feel that there is any necessity for the rules promulgated in Section D of the proposal. The Commission now has the power to require the railroads to publish tariff provisions to make it clear under what conditions rail TOFC service would apply, and no useful purpose would be served in setting forth such rules separate and apart from any necessary tariff regulations.

Item 5 of Section D is particularly objectionable, since it would restrict the application of any mixture rule to the current Uniform Freight Classification. Such a restriction is not realistic or workable. There are a number of items included under a single classification of the Uniform Freight Classification which are in actuality different commodities with different transportation characteristics. Moreover, many of the items are subject to separate commodity rates. In my opinion, the application of the mixture rule must be realistic, and permit mixture of two or more items which in common usage are dissimilar. The proposed rule is not realistic and will not permit mixtures of articles which can be handled in connection with private carriage. The proposed restriction will limit the use of piggyback service and will force shippers into private carrier operations.

[fol. 1130] In summary, it is the position of Jewel:

(1) That the proposed rules governing TOFC service are not required or necessary at this time;

(2) That any rules defining all rail TOFC terminal to terminal service should not be restricted to require the railroads to furnish all the services and equipment in connection therewith;

(3) That leasing between the railroads or their affiliates and shippers should not be prohibited;

(4) That the Commission can promulgate regulations within the framework of present tariff regulations requiring the railroads to publish the charges for the lease of

equipment to a shipper or for the rendition of other accessorial services, and Jewel favors such action;

(5) That there is no justification for the rules proposed in Section D of the proposed regulations and particularly Item 5 thereof. Any mixture rule should not be applied on the basis of the Uniform Freight Classification.

E. M. Brinckman.

Dated: December 6, 1962.

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[fol. 1131]

EXCERPTS FROM VERIFIED STATEMENT OF ROME P. CLINTON—MINNEAPOLIS-HONEYWELL REGULATOR CO.

My name is Rome P. Clinton. I have been General Traffic Manager for Minneapolis-Honeywell Regulator Company, 1885 Douglas Drive, Minneapolis 22, Minn. for one year and was Traffic Manager of the Aeronautical Division for 8 years prior thereto.

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All forms of transportation are used by the company. Our transportation expenses are approximately $5 million per year.

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[fol. 1132] We have found Plan III piggyback service to be of substantial advantage to the company. It has not only resulted in improved service but has reduced transportation costs on shipments formerly moving in less-than-truckload quantities from Minneapolis to the New York area. We now assemble less-than-truckload shipments into a trailer load and ship by Plan III service to the New York railhead for pool-truck distribution service beyond. Minneapolis-Honeywell has a branch at Union, N.J. to which shipments are consistently made. Set forth below is a recent check of the transit service by various forms of transportation from Minneapolis to Union, N.J.

	Number of Shipments	Average Calendar Days in Transit
Plan III/Central Frt. Trucking	9	6.0
Rail Express	2	6.5
Freight Forwarder	11	9.4
Truck	4	8.5

Set forth below are examples of the savings in transportation costs resulting from the use of Plan III service and pool-truck distribution as compared to less-than-truckload rates:

Destination	Weight	Dollar Savings	Savings Per Cwt.
Kenilworth, N.J.	1950	$29.25	$1.50
Midland Park, N.J.	1831	$27.46	$1.50
Jamaica, N.Y.	3890	$85.58	$2.20
Northvale, N.J.	2447	$53.83	$2.20
Brooklyn, N.Y.	2132	$46.90	$2.20
Garwood, N.J.	559	$ 7.38	$1.32

The advent of piggyback service and the reduced cost resulting therefrom has deterred Minneapolis-Honeywell from instituting private carriage. In 1958, a study was [fol. 1133] made of the feasibility of conducting private carriage on volume shipments of the type here considered. However, as a result of that study of the cost of conducting private operations, Minneapolis-Honeywell was able to secure reduced common carrier rates and, with the advent of Plan III piggyback service, the traffic was retained by common carriers. If the proposed rates destroy Plan III piggyback service or substantially increase the cost thereof, Minneapolis-Honeywell will up-date its study of private carriage and give serious consideration to the institution of such proprietary operations. We definitely feel that the present plans of piggyback services and particularly Plans

III and IV permits a shipper to use the "inherent advantages" of both rail and truck service. The rail service is used in connection with the line-haul movements between terminals, whereas the flexibility of truck service is utilized for the shorter haul from and to the railheads.

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[fol. 1134]

EXCERPTS FROM VERIFIED STATEMENT OF GEORGE C. HILLENBRAND—TIME, INCORPORATED

My name is George C. Hillenbrand and my business address is 330 East 22nd Street, Chicago 16, Illinois. I am Assistant Traffic Manager of Time, Incorporated and have been employed in that capacity for 19 years. * * *

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All forms of transportation are employed, including private carriage. Time's total annual transportation bill is approximately $25 million annually.

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The use of Plan III service has proven to be of great advantage to Time. First, Plan III service has resulted in a substantial improvement in the over-all rail service and has permitted the use of Plan III service in lieu of rail express service and in some instances of motor carrier service.

[fol. 1135] Secondly, and probably most important, the use of Plan III service has permitted Time to substantially reduce its internal plant handling costs at Chicago. On a typical movement from Chicago to Atlanta, the in-plant handling costs have been reduced from 29 cents per cwt when using an express car to 2½ cents per cwt through the use of Plan III piggyback service.

Thirdly, Plan III service permits the direct delivery of shipments to consignees without the necessity of rehandling the traffic from express cars. This results in further savings of at least 12½ cents per cwt.

Lastly, the claim experience of Time in connection with Plan III service has been very favorable and, at the present time, claims in connection with this traffic are practically non-existent.

Since Plan III service has proved so advantageous to Time, it opposes any proposed rules or regulations which would either destroy Plan III service in its present form or substantially change the method of operations thereunder. Time feels that Plan III service in its present form provides substantial flexibility to the shipper and permits it to reduce its transportation and handling cost. The discontinuance of Plan III service would increase the transportation costs of Time by at least $250 thousand per year.

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[fol. 1136]

EXCERPTS FROM VERIFIED STATEMENT OF HUGH F. LACEY—JOSEPH T. RYERSON & SON, INC.

My name is Hugh F. Lacey, and my business address is 2621 West 15th Place, Chicago, Ill. I am General Traffic Manager of Joseph T. Ryerson & Son, Inc. and have been associated with that company for 17 years and in my present position for 8 years.

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[fol. 1137] Ryerson utilizes all forms of transportation, except air freight. Approximately 40 percent of the outbound transportation is performed in private carriage. Its total transportation bill is approximately $12 million annually.

Ryerson has been using Plan II piggyback service for 5 years and Plan III service for approximately 3 years. Approximately 10 to 12 truckloads per week move in piggyback service as follows: Plan II—3 loads, and Plan III—8-10 loads. In addition, an unknown amount moves in Plan I service.

The use of Plan III service has proven to be particularly advantageous to Ryerson. It has resulted in substantially lower overall transportation cost and has permitted greater flexibility in the distribution of our products. It has also permitted Ryerson to open up new markets to direct volume deliveries. For example, Plan III service, and the lower transportation cost resulting therefrom, have permitted Ryerson to make volume shipments of manufactured iron and steel products from Chicago, Ill. to Boston, Mass., Philadelphia, Pa. and Charlotte, N. C. This is new traffic which heretofore was not moving by either motor carrier or rail. A discontinuance of Plan III service or a substantial change therein would force Ryerson to maintain additional stock of materials at warehouses closer to these destinations and would substantially increase Ryerson's distribution costs.

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[fol. 1138]

EXCERPTS FROM VERIFIED STATEMENT OF GEORGE A. MCELROY—CECO STEEL PRODUCTS CORPORATION

My name is George A. McElroy and my business address is 5601 W. 26th Street, Chicago 50, Illinois. I have been associated with Ceco Steel Products Corporation for over 28 years and I am the Manager of their Transportation Department. • • •

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Ceco is the largest fabricator of the general line of products listed above. Its sales for 1961 totaled $78 million and it is anticipated that they will be over $80 million in 1962. The company is in the so-called "500" group of United States firms.

All modes of transportation, and combinations of these, are used by Ceco. The company also engages in private carriage and utilizes approximately 100 power units and approximately 100 non-power units in such service. Local and long-hauls are made in private carriage although the

latter are usually limited to hauls not exceeding 300 miles one-way. Including the expenditures made for private carriage, Ceco's annual transportation expenses would equal approximately $5½ million.

[fol. 1139] Ceco has consistently used piggyback or TOFC service since 1954 or 1955. All plans, except Plan I service, have been utilized. Total tonnage figures concerning over-all piggyback shipments and/or shipments under the various plans are not retained by the company. However, this tonnage has been substantial, and there have been progressive increases each year. It is estimated that Ceco's use of piggyback service has increased over 300 percent in the past few years. Equally significant is the fact that for service between certain points such as Cicero, Ill. and Washington, D. C., piggyback service is used almost exclusively.

Plan III service is now used from Cicero, Ill. and Broadview, Ill. to Boston, Mass., New York, N. Y., Philadelphia, Pa., Baltimore, Md., and Washington, D. C. and there are plans to utilize it more extensively in the future.

Since starting to use Plan III service, the trend towards increased private carriage by Ceco has stopped. This resulted from the fact that Plan III service enables us to coordinate deliveries with erection work, a result we had previously thought could only be accomplished through private carriage.

The advantages that Ceco sees in Plan III service are as follows: (1) the ability to coordinate deliveries with erection work, a result previously thought to be accomplished only through private carriage, (2) lower over-all costs, and (3) reduced claims. As a result of the ability to coordinate shipments as described in (1) above, cost reductions have been effected both in the transportation department and the field, and we have been able to close certain warehouse facilities. For example, because of Plan [fol. 1140] III service we have been able to close a warehouse at Hillside, N. J. and efficiently and effectively serve

our customers in the New York, N. Y., Philadelphia, Pa., and Boston, Mass. areas from Cicero, Illinois.

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Discontinuance or substantial restriction of Plan III service would hinder the progress we are making in providing for cheap and more efficient shipments of our [fol. 1141] products. It would deprive us of the benefits we have already received through such service and preclude us from expanding to other areas of operations. For these reasons, Ceco opposes any proposed rules or regulations which would either destroy Plan III service in its present form or substantially change the method of operations thereunder.

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[fol. 1142]

EXCERPTS FROM VERIFIED STATEMENT OF FRANK L. O'NEILL—MINNESOTA MINING AND MANUFACTURING COMPANY

My name is Frank L. O'Neill and business address is 2501 Hudson Road, St. Paul 19, Minn. I am General Traffic Manager of Minnesota Mining and Manufacturing Company, hereinafter referred to as "3 M." I have held this position for the past 21 years and have been associated with the company for a period of 29 years. As General Traffic Manager, I am responsible for all domestic, export and import transportation.

3 M is a manufacturer of tapes, gift wrap ribbons, industrial tapes, sealers, gummed papers, adhesives, chemicals, coated abrasives, duplicating products, printing products, paper products, reflective products, magnetic products, electrical products, roofing granules, plastics, cameras and tape recorders.

The company has 37 manufacturing plants and 19 warehouses in the United States and 20 foreign plants. It had gross sales of $608 million in 1961, and ranked as the 71st largest manufacturer in the United States according to the poll conducted annually by Fortune Magazine.

3 M utilizes all modes of transportation except private carriage. Its total transportation bill is approximately $16,225,000.

Piggyback service has been utilized by 3 M since November, 1959. Although Plan III has been utilized primarily, Plans II and IV have also been used. Perusal of 1962 records shows that 95 percent of the piggyback movements were in Plan III service and 5 percent moved under Plan II.

During the year 1960, 832 trailers were moved via piggy- [fol. 1143] back. In 1961, this total increased to 1402 trailers. Based on the approximate 125 trailers moving per month in 1962, it is anticipated that 1500 trailers will have moved by piggyback this year.

Plan III service is used from St. Paul, Minn. to Atlanta, Ga., Boston, Mass., Bristol, Pa., Freehold, N.J., Middleway, W. Va., Newark, N.J., New York, N.Y., and Philadelphia, Pa.: from Bristol, Pa., to Atlanta, Ga., Chicago, Ill., Cleveland, Ohio, Detroit, Mich., St. Louis, Mo., and St. Paul, Minn.: from Chicago, Ill., to Bristol, Pa. and St. Paul, Minn.: and from New York, N.Y. to St. Paul, Minn.

Prior to November, 1959, about two-thirds of the traffic was moved by motor common carrier and the remainder by rail box car service. In the absence of Plan III service, additional studies would have to be made to determine the feasibility of private carriage, as only approximately one-fourth of our present traffic could move via rail box car service.

It is 3 M's experience that Plan III service is more advantageous than motor common carriage in that it provides faster and more reliable service at lower costs. In respect to box car service, Plan III service offers a third advantage in that a shipper has greater flexibility in securing equipment and in pick-up and delivery service.

Plan III service has enabled us to reduce our average freight rate from St. Paul, Minn. to Philadelphia, Pa. from $1.96 cwt to $1.61 cwt. Comparable savings were effected for shipments to other branches. Plan III service has also

enabled us to increase the frequency of our shipments of finished goods from St. Paul, Minn. to distribution branches, thereby reducing inventory levels at the branches.

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[fol. 1144] It is felt that discontinuance or a substantial restriction of Plan III service would be disadvantageous to 3M, and entry into private carriage would have to be seriously considered if such were to occur. 3M therefore opposes any rules or regulations which would destroy or substantially alter Plan III service in its present form.

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[fol. 1145]

APPENDIX TO VERIFIED STATEMENTS OF
E. M. BRINCKMAN, ET AL.

List of Parties

Acme Steel Company

American Paper Specialty Company

Ceco Steel Products Corporation

F. D. Farnam Co.

The Glidden Company

Jewel Tea Co., Inc.

Joanna Western Mills Company

Minneapolis-Honeywell Regulator Co.

Minnesota Mining and Manufacturing Company

Munsingwear, Inc.

Onan Division of Studebaker Corporation

Joseph T. Ryerson & Son, Inc.

The Sherwin-Williams Co.

Time, Incorporated

[fol. 1146]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT ON BEHALF OF MANUFACTURING CHEMISTS' ASSOCIATION, INC.

Introduction

The Manufacturing Chemists' Association, Inc., hereinafter called the Association, is a non-profit trade association of chemical manufacturers organized ninety years ago. Its members comprise over ninety percent of the productive [fol. 1147] capacity of the chemical industry within the United States. They have more than one thousand plants in the United States with at least one representation in almost every State.

The members of the Association use all agencies of transportation for the movement of numerous commodities in connection with the assembly of raw materials to be used in the manufacturing processes and in the distribution of finished products. They ship in various quantities from small minimum-charge shipments to truckloads, carloads, bargeloads, and shiploads.

Many members of the Association avail themselves of motor carrier service part of which is performed under Plan I in which the motor carriers substitute railroad trailer-on-flatcar service for their over-the-road service. Many members also utilize the railroads' Plan II and III services, and some are using or contemplating the use of Plan IV. Members of the Association consider that in the public interest, including that of shippers, the Commission should encourage the expansion of this service, including Plan V and other modifications of existing plans.

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[fol. 1148] 4. *Relation between rates and division.*

It is not clear whether the proposed Rule is intended to apply to Plan V rates and divisions only or to both Plan I and Plan V rates and divisions. In either case, we oppose the proposed Rule.

The effect of the proposed Rule would be to make the rates the shippers pay for all-rail TOFC terminal-to-terminal services the ceiling for railroad divisions on Plan I and V services "for like service between the same points."

The proposed Rule would be difficult if not impossible to apply. There are three terminal-to-terminal types of all-rail TOFC service, Plans II, III, and IV. Each of the all-rail TOFC services are different, and each properly is subject to differing levels of rates. It would be difficult under the proposed Rule to determine which of the rates the shippers pay (Plan II, III, or IV) for all-rail TOFC service would be the maximum which a railroad could receive as its division.

The considerations which enter into the determination of a reasonable and otherwise lawful rate are entirely different from those which govern the determination of lawful divisions. Yet it is proposed to provide by the proposed [fol. 1149] Rule that one shall be related to another.

If the proposed Rule were to be adopted, the divisional arrangements between carriers participating in Plans I and V would have to be filed with the Commission, posted at railroad stations affected and kept open for public inspection. Otherwise, it would be impossible for the public to determine whether the carriers were in compliance with the proposed Rule. All this would add to the carriers' cost of doing business, and these added costs ultimately would be borne by the shippers.

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[fol. 1150]

5. *Preference of, and prejudice to connecting motor and water carriers. Determination by railroad of motor and water operating authorities.*

It is not clear whether the proposed Rule would apply to Plan I or Plan V services or both. The Interstate Commerce Act makes unlawful certain types of undue preference by railroads to one connecting railroad or water carrier to the undue prejudice of another. Section 3(4). The Act is silent with respect to undue preference of or prejudice to motor carriers by railroads. To the extent Section 3(4) forbids undue prejudice to water carriers, the proposed Rule is unnecessary. To the extent the proposed Rule would prohibit undue preference of, and prejudice to connecting motor carriers, it goes beyond the statute, and the Commission by adopting the Rule would be enacting legislation which Congress in its wisdom has not seen fit to adopt.

Further, in view of the numerous motor carriers of various degrees of financial strength and reliability, it is only good business for a railroad not to enter into Plan I arrangements or into through routes and joint rates under Plan V with financially unstable and unreliable motor carriers. Adoption of the proposed Rule would discourage the growth of Plan I services and the establishment of Plan [fol. 1151] V through routes and joint rates because a railroad would not enter into arrangements with a reliable motor carrier if at the same time it had to enter into like arrangements with other motor carriers of questionable reliability.

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[fol. 1152]

7. *Substitution of rail for truck services for entire line-haul movement.*

We advocate adoption of this Rule. Substitution of rail services under Plan I for the entire line-haul movement would in many instances result in lower costs of transporta-

tion than if motor carriers were required to transport all Plan I shipments part way over the highways. In a Plan V movement if rail services can be substituted for the motor service, the carriers should be permitted to make the substitution. Carriers in all instances should be encouraged to and aided in reducing their costs of operation. Reductions in costs promote sound financial positions of the carriers in furtherance of the National Transportation Policy, and some of the benefits of savings in costs gravitate to the shipping public.

[fol. 1153] 3. *Lease of equipment used in trailer-on-flatcar service by railroads to shippers and freight forwarders.*

If railroads and their subsidiaries were required to discontinue their present practice of leasing equipment to shippers and freight forwarders, Plan III services would be effectively killed and Plan IV would be stifled before it has had an adequate opportunity to get started. The New York Central Railroad's Flexi-Van could not survive and similar railroad services would not be instituted.

If in the past there were any violations of law by railroads and shippers with respect to leased vehicles, the existence of such violations forms no justification for practically abolishing a service which has proved to be an efficient method of transporting freight and from a cost standpoint advantageous to both railroads and shippers. [fol. 1154] It would be prohibitive for all who use Plan III services to own the semitrailers in which their products are transported. Some of the smaller shippers who use Plan III services for some of their movements do not have enough shipments to justify the purchase of equipment to take advantage of Plan III if the present leasing practices were to be abolished. If the proposed Rule were adopted, these small shippers would be discriminated against in favor of the larger shippers having a volume of movement which justifies owning their own semitrailers.

[fol. 1155]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF THE DOW CHEMICAL COMPANY BY KENNETH R. DROTTAR

1. Qualification of Witness

My name is Kenneth R. Drottar. I reside at 2108 Brookfield Drive, Midland, Michigan. I am a registered practitioner before the Interstate Commerce Commission and am a certificated member of the American Society of Traffic and Transportation. I have been a full time employee of The Dow Chemical Company for fifteen years. At present I hold the title of Traffic Manager, Distribution and Traffic—Central Region. My duties and responsibilities require that I insure adequate [fol. 1156] and reasonable transportation facilities to meet the needs of my company. In this proceeding I have been delegated to represent all of our shipping points.

2. Description of the Company

The Dow Chemical Company manufactures industrial and agricultural chemicals, plastic materials, and light metals at 38 locations throughout the United States. Its annual sales are presently at the rate of 900-million dollars per year. Transportation of raw materials, supplies, and finished products costs the company about 80-million dollars per year. One billion dollar sales per year appear to be attainable within the next calendar year. We ship to numerous destinations on a nation wide basis. The wide range of products and national scope of our business make it necessary for us to use all modes of transportation.

3. Competitive Conditions

Although Dow uses and will continue to use conventional rail and motor transportation for the greater part of its requirements, there are certain transportation needs which can only be satisfactorily and economically satisfied through the use of trailer-on-flat-car (TOFC) service. Our plants in many cases are located more distant from the market than the plants of our competitors. To meet competition, it is necessary that Dow be able to ship over comparatively long distances at relatively low line-haul costs and still make highway deliveries. Trailer-on-flat-car (TOFC) service has made it possible for us to meet these conditions. Prior to the advent of trailer-on-flat-car (TOFC) service, we could [fol. 1157] only meet these competitive factors by extensive warehousing of our sales products in the metropolitan areas.

4. Use of Piggyback Service

One of Dow's largest plants located at Midland, Michigan, has been using various types of trailer-on-flat-car (TOFC) service since 1958. In that year, the company started to ship via Plan V service between its plant at Midland, Michigan and a plant and warehouse located in the commercial zone of St. Louis, Missouri. The shipments moved on joint rates published by the C&EI Railroad. Saginaw Transfer Company as a participating carrier, in the tariff publication, moved the loaded trailers over the highway from Midland, Michigan to Chicago, Illinois. At that point, the trailers were put on flat cars of the C&EI Railroad and moved to St. Louis, Missouri by that railroad in Piggyback service. Although this service was used in both directions for the next few years on a regular consistent basis, substantial movements by trailer-on-flat-car (TOFC) service did not start until the New York Central Railroad

provided Plan II rates and service from Midland, Michigan to the eastern destinations of Boston, Massachusetts and New York, New York in the Spring of 1960. In the 12 month period from July 1960 to June 1961 inclusive, Dow's Midland plant shipped nearly 50-million pounds of freight in Piggyback service. On June 28, 1961, The Chesapeake and Ohio Railroad, and shortly after the New York Central Railroad, published Plan III trailer-on-flat-car (TOFC) rates from Midland, Michigan to various Official territory destinations. During the 12 month period, from July 1, 1961 to June of [fol. 1158] 1962 inclusive, Dow's use of trailer-on-flat-car (TOFC) service from Midland increased to 153-million pounds. Although some of the freight moving in Piggyback service had previously moved in either motor carrier or conventional rail service, the total tonnage moving via rail and truck also increased. From these statistics it appears that Piggyback service supplements but does not replace either truck or rail service. Perhaps stated differently, what Piggyback service really replaces is extensive warehousing in the market area. For example, if no Piggyback service were available to us, our only alternative method of serving distant markets from Midland, Michigan would be that of making shipments to warehouses for subsequent distribution. At the present time, Dow is utilizing Plans II, III, and V Piggyback service. In addition, some of the motor carriers serving Dow are making use of Plan I Piggyback service. With respect to our participation in the various plans, the rail and motor carriers respectively supply the trailers in conjunction with Plan II and Plan V Piggyback service. In the case of Plan III service Dow leases the trailers on a one-way trip basis from either the rail carriers or a motor carrier subsidiary of the rail carriers. The pickup and delivery service necessary in Plan III shipments is accomplished by motor carriers.

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[fol. 1159] Rule 2 requires that charges be made for all services involved in all-rail TOFC movements. We object to this rule because it would virtually eliminate Plan III service. Under Plan III provisions, the shipper has several options available to him with respect to pickup and delivery, accessorial services, etc. He has these because Plan III was designed to take long distance private carriage off the highway. In other words, on each segment of the movement, the shipper must critically decide whether he or the for-hire carrier can perform the service more economically. The flexibility would be lost completely were Rule 2 adopted unless the shipper turned to a program of extensive private carriage. Under present conditions even though Plan III movements are private carriage we do employ for-hire motor and rail carriers. Certainly this is beneficial to the transportation industry. We object to the adoption of a rule that would prohibit such a practice from continuing.

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[fol. 1160]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF ROBERT RICKER, ASSISTANT DIRECTOR OF TRAFFIC, THE STANLEY WORKS, NEW BRITAIN, CONNECTICUT

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I

Preliminary Statement

My name is Robert Ricker. I am Assistant Director of Traffic, The Stanley Works, 195 Lake Street, New Britain, Conn., and have been employed in various traffic capacities by The Stanley Works for the past four years.

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[fol. 1161] We have used various phases of TOFC service, including Plan II, Plan III, Plan IV, and probably indirectly Plans I and V, and have found that these services have resulted in more efficient and economical marketing and distribution of our products. Petitioner owns and/or leases a large fleet of private trucks to augment public carrier service and is constantly striving to substitute efficient commercial carrier service for its private trucking operation. We have found TOFC service to be an economical substitute for our line-haul service on many occasions. Consequently, Petitioner is vitally interested in these proceedings.

As explained in its Special Pleading in this investigation, Petitioner is in agreement with the substantial provisions of the proposed rules for TOFC service. Petitioner is apprehensive, however, that the proposed rules may hamper and impede the development of TOFC service to the detriment of your Petitioner and the public and may eliminate much of the flexibility of operation and the managerial discretion which has been exercised by the railroads in recent years in fostering and developing this new mode of service.

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[fol. 1162] V

Proposed Trailer Leasing Rules

Petitioner operates private carrier trucks in interstate commerce, transporting its raw materials and its finished products to and from its factories and warehouses.

The advent of TOFC service has been a tremendous deterrent to Petitioner in the operation of its private trucks and, indeed, Petitioner has diverted many thousands of pounds of private trucking tonnage to controlled Plan III TOFC service.

Therefore, Petitioner urges that Part C, Paragraph 3, which would prohibit railroads from leasing trailers to shippers, should be either eliminated in its entirety or should be amended to add the phrase ". . . *without ap-*

propriate tariff authority." Failure of the proposed rules to provide for the lease of trailers would restrict, hinder, or eliminate present operations under so-called Plan III service which have enabled the railroads to recapture untold quantities of traffic to their service.

[fol. 1163]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF GRIFFIN TRANSFER CO., INC. BY BEATTIE H. HIPPS

My name is Beattie H. Hipps, I am General Manager of Griffin Transfer Co., Inc. Griffin Transfer Company, Inc. is a corporation organized and existing under the laws of South Carolina and engaged as a Common Carrier. Its principal offices are located in Columbia, South Carolina.

The Plan III piggyback operation has enabled Griffin Transfer Co., Inc. to effectively meet the competition of much larger companies which have been and are financially capable of owning a large fleet of motor carrier equipment. Since we have been able to lease such equipment from the railroads, to the extent that it is needed, we have been able to provide a more economic and efficient service. However, Rule C-3 now proposed by the Interstate Commerce Commission, will prohibit the railroads from leasing such equipment to companies, such as Griffin Transfer Co., Inc. giving an undue advantage to the larger carriers who are in a financial position to own a large fleet of motor carriers equipment.

[fol. 1164] Griffin Transfer Co., Inc. is well aware of the past and continuing conflicts between the railroads and motor carriers generally, we feel that these self-serving interests should be set aside in favor of coordinated services to meet the needs of the general public. It is our position that this could be accomplished without minimizing the competition between various modes of transporta-

tion by continuing in effect the separate plans heretofore established in connection with TOFC operations. Those plans as now established are tailor made to meet the specific needs of the general public and this Company and have the effect of maximizing competition between different modes of transportation. On the other hand, if all forms of TOFC operations are thrown into a hodgepodge, it will complicate rather than clarify the situation and destroy the purpose of separating the various plans; i.e., tailor made TOFC operations to fit the needs of the user.

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[fol. 1165]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF PRIVATE CARRIER CONFERENCE, INC.

Comes Now, the Private Carrier Conference Inc. of the American Trucking Associations, Inc. (hereinafter sometimes referred to as PCC) and submits its verified statement in accordance with the Commission's Order in this proceeding, dated October 12, specifically paragraphs (c) and (e) thereof.

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[fol. 1166] 6. The Commission has professed grave concern over the so-called plight of the railroads and is deeply worried about their purported loss of revenues. It is a compounded anomaly, in PCC's view, therefore in the instant proceeding to move to shut off the railroads from the considerable revenues which they are now enjoying from this service derived from Plan III. Certainly, this should be the farthest from the Commission's intention, yet it will most surely accomplish just that result.

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[fol. 1167] 9. PCC understands that the railroads of the country either directly or through subsidiaries or through affiliated companies are leasing trailers of a specialized nature to meet the requirements of individual shippers for all rail TOFC service under Plan III. If this were prohibited, the presumption would be that such trailers could be obtained from independent leasing sources. PCC believes this is an unfounded presumption. Specialized trailers are not available from independents at this time and it is highly unlikely that they would become available to meet the needs of many types of shippers. Product specialization would preclude significant leasing from independents. For example, meat packers need insulated trailers. These are presently obtainable for Plan III service from the railroads. There is no indication that this demand could be answered by any other source without a significant increase in cost to the shipper and, of course, to the general public as a result of increased transportation expense. Apart from specialized needs, even the standard trailers owned by shippers or leased from other than a railroad source are not as adaptable as those supplied by the railroads. To cut off this source would compromise the present effectiveness of this TOFC service.

10. On the assumption that an independent leasing company could supply trailers practical for piggyback service of such size and construction so as to meet a specialized [fol. 1168] shipper need, the rates for such trailer leases would inevitably have to be considerably higher than those charged by railroads. Such increased cost would relate to the return of an empty trailer. The railroads with regard to the trailers that they lease need only put the trailer for the return haul on an empty flat car at no expense to the shipper. On the contrary, a leased trailer from an independent source would be subject to a significant transportation charge on the return haul. Furthermore, assuming such availability from independent leasing sources, the cost

would have to be much greater to the shipper-lessee because of the more restricted outlet the individual lessor would have for such specialized trailers as compared to the wider leasing outlet that a railroad would have. PCC believes that this is of vital concern to the public interest. Because of the obvious result in increased transportation costs, the Commission should carefully consider the effect of this proposed rule.

11. PCC doubts whether an independent leasing source, assuming the availability of specialized trailers, would be willing to lease such trailers at acceptable rates if such trailers were going to destinations where a lease for return to its point of origin would not be available. Such is not the case when a shipper leases a trailer from a railroad. In the opinion of PCC, independent leasing companies, if at all, would only be able to supply trailers to major points. Otherwise, the shipper would have to pay for the return of an empty trailer. Such economics do not make for reduced consumer costs.

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[fol. 1169] 15. PCC believes that the Commission's concern about the amount of traffic carried by for-hire car-
[fol. 1170] riers would even be heightened by the adoption of this rule inasmuch as it would inevitably increase the amount of private carriage that shippers who formerly had been able to use Plan III piggyback service will have to use in order to effect comparable transportation costs. Such transportation costs cannot be duplicated by either all rail or by all motor common carrier transportation.

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[fol. 1171]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT FILED ON BEHALF OF AMERICAN RADIATOR & STANDARD SANITARY CORPORATION

[fol. 1172] Comes now the American Radiator & Standard Sanitary Corporation and submits the following statement in the entitled proceeding.

* * * * * * * *

Rail, motor, express, air and freight forwarders are used in the procurement of raw material and distribution of products. Water carriage is used extensively for receipt of raw material and product distribution by the division producing pig iron. It is estimated that the annual transportation cost is in excess of $16,000,000.

* * * * * * * *

[fol. 1173] To the extent that the adoption of proposed Rule C-3 prohibiting the leasing of equipment would tend to eliminate present Plan III service, American-Standard would consider enlarging the area of its private operation. The present Plan III provides a flexibility comparable to private carriage. Current availability of equipment and the provisions permitting one way movement make for widespread utilization of carrier equipment which is to the public benefit. Should carriers be prohibited from leasing trailers, the necessity of securing its own equipment would discourage the use by American-Standard of carriers' facilities to transport its trailers.

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[fol. 1174]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF RESPONDENT REVERE COPPER AND BRASS INCORPORATED

[fol. 1175] Comes now Revere Copper and Brass Incorporated, hereinafter referred to as Revere, which filed for appearance in above numbered case before the Interstate Commerce Commission, by telegram on November thirteenth, nineteen hundred and sixty-two. My name is Harry D. Beaver, Jr., and I am employed by Revere as its General Traffic Manager, and herewith submit a statement in opposition to the proposed rules in Ex Parte No. 230.

• • • • • • •

[fol. 1176] In its distribution pattern, Revere uses Rail, Motor and Water Carriers in intercity transportation. Revere's total transportation bill for outbound traffic exceeds seven million dollars annually. Prior to World War II, Revere's shipments of products to customers in the [fol. 1177] United States were almost exclusively by rail. However, since that time, there was a trend to an increasing use of motor carriers until the time that TOFC service began to be available. The availability of Plan III has stabilized our percentage uses of rail and motor carriers but the proposed elimination of Plan III will force Revere to make increasing use of motor carriers and a decreasing use of railroads. Also, during the past two years, Revere has been using private carriage operated from its plant at Baltimore, Maryland in order to remain competitive with other suppliers of similar products who have expanded their use of private carriage. * * *

Revere has begun to make use of Plan III Trailer-On-Flat-Car services from Baltimore, Maryland, to Southern Freight Association destinations and plans to expand this use as rapidly as possible. This traffic formerly moved by

Common Carriers, both Rail and Motor. However, if the present Plan III TOFC service was not available, much of the traffic would move in private carriage. At present, about 400,000 pounds monthly is moving in this class of service, and our present plans are that in a very short time this tonnage will be doubled, at least. As indicated before, one of the primary advantages of Plan III is the availability of prompt delivery service. Chief among the other [fol. 1178] advantages of this type of service are lower delivery cost, the option to pick up and make our own delivery and the use of leased equipment.

Proposed Rule 3 of Section C would prohibit a railroad or its subsidiary from leasing trailers to or from a shipper. The effect would obviously "dry up" much of the present Trailer-On-Flat-Car service of the Railroads. It is commonly known that a great share of their TOFC traffic is now in Plan III service, and most of it moves in equipment leased from the Railroads. The only alternative would be for a shipper to purchase his own trailers, receive a published allowance and assume the responsibility for the return haul. This would certainly only be practical for the largest shippers and would thus discriminate against most of the shipping public.

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[fol. 1179]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF R. A. COOKE, MANAGER, TRAFFIC DEPARTMENT, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, ON BEHALF OF ITS MEMBERS

Comes now R. A. Cooke, Manager of the Traffic Department of the American Newspaper Publishers Association, a voluntary membership organization incorporated under the laws of the State of New York, which has for its purpose the protection and fostering of the interests of its

[fol. 1174]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

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* * * * * * *

[fol. 1179]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF R. A. COOKE, MANAGER, TRAFFIC DEPARTMENT, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, ON BEHALF OF ITS MEMBERS

Comes now R. A. Cooke, Manager of the Traffic Department of the American Newspaper Publishers Association, a voluntary membership organization incorporated under the laws of the State of New York, which has for its purpose the protection and fostering of the interests of its

members, and says the American Newspaper Publishers Association's principal place of business is located at 750 Third Avenue, New York 17, New York, and it represents 861 daily newspapers published in the United States and Canada. This Verified Statement is filed in response to the Commission's order in Ex Parte 230 dated October 11, served October 12, in the matter of publishing proposed rules and directing special procedure.

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[fol. 1180] ANPA, on behalf of its members, pioneered in the use of piggy-back service for the transportation of printing presses beginning with 1954. It did so, and continues to use Plan II, because of the inherent transportation economies. This can be better realized by stating more than 95% of the 861 daily newspapers, members of this association, are without the benefit of private rail sidings. Prior to the advent of Plan II piggy-back service, it was necessary, when shipping via railroad, to pay heavy local destination trucking and rigging costs from team track or station facility of the delivering rail carrier to the newspaper plant. With the establishment of Plan II piggy-back, it afforded the newspaper the opportunity of having its commodities delivered from point of production to the newspaper plant direct.

Another important factor is that the use of Plan II piggy-back by the newspaper publishing business practically eliminates the movement of printing presses via private carrier and restores movement to common carriers by rail, be-[fol. 1181] cause of the latter's ability to provide a delivered service at common carrier rates considerably below those of private carriers. This not only provides a plant-to-plant delivery but a corresponding reduction in transportation costs.

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[fol. 1182]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF THE CUNEO PRESS OF NEW ENGLAND, INC. BY LUTHER M. CHILD, JR.

My name is Luther M. Child, Jr., General Manager of The Cuneo Press of New England, Inc., with business headquarters at 215 First Street, Cambridge, Massachusetts.

* * * * * * *

[fol. 1183] Under the above mentioned proceedings there has been presented a draft of proposed rules to serve as a framework upon which can be developed the rules ultimately to be adopted—if it is determined by the Commission that such rules are necessary. This action appears to be unnecessary since present tariff provisions have been adequate to care for much of our tonnage and forestall our use of private carriage.

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[fol. 1184]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF GINN AND COMPANY BY JOHN J. AIELLO

My name is John J. Aiello, Traffic Manager of Ginn and Company, with business headquarters at The Statler Office Building, Boston, Massachusetts.

* * * * * * *

[fol. 1185] Under the above mentioned proceedings there has been presented a draft of proposed rules to serve as a framework upon which can be developed the rules ultimately to be adopted—if it is determined by the Commission that such rules are necessary. This action appears to be unnecessary since present tariff provisions have been

adequate to care for much of our tonnage and forestall our use of private carriage.

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[fol. 1186]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF DENNISON MANUFACTURING COMPANY BY P. J. JOHNSON

My name is P. J. Johnson and I am General Traffic Manager of the Dennison Manufacturing Company, business address Framingham, Massachusetts.

* * * * * * *

[fol. 1187] Under the above mentioned proceedings a draft of proposed rules to serve as a framework upon which can be developed the rules ultimately to be adopted —if it is determined by the Commission that such rules are necessary. This action appears to be unnecessary since present tariff provisions have been adequate to care for much of our tonnage and forestall our use of private carriage.

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[fol. 1188]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF GILLETTE SAFETY RAZOR COMPANY BY GERARD C. CROWLEY

My name is Gerard C. Crowley, Traffic Manager of the Gillette Safety Razor Company, Boston, Massachusetts.

* * * * * * *

[fol. 1189] Under the above mentioned proceedings a draft of proposed rules to serve as a framework upon which can be developed the rules ultimately to be adopted

—if it is determined by the Commission that such rules are necessary. This action appears to be unnecessary since present tariff provisions have been adequate to care for much of our tonnage and forestall our use of private carriage.

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[fol. 1190]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF GENERAL ELECTRIC COMPANY

General Electric Company, a New York Corporation and a large user of Piggyback Service, has made a careful study of the Commission's proposed T. O. F. C. Rules, and makes the following statement regarding certain of these rules:

* * * * * * *

[fol. 1191] In fact, after a careful review of the Commission's proposed T. O. F. C. Rules, we find the present plans much less confusing than the proposed plans.

* * * * * * *

[fol. 1192] Plan III has enabled General Electric Company to place in rail T. O. F. C. service a considerable amount of tonnage which formerly moved by private carriage. It has also prevented our expansion of private carriage to additional areas. We have found the service under Plans III and IV to be excellent, with lower transportation costs.

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[fol. 1193]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF WILLIAM H. BINGHAM (TROJAN STEEL CORPORATION)

My name is William H. Bingham. I am Chief Engineer of Trojan Steel Corporation.

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Prior to the availability of trailer-on-flatcar Plan III, this corporation operated private carriage. To carry out its private carriage operations, it leases and operates two to seven tractors and units. The volume of traffic moving in private carriage amounted to between 10 and 15 trailer loads per week.

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[fol. 1194] While Trojan Steel Corporation is familiar with the continuing conflicts between the railroads and motor carriers generally we feel that these self-serving interests should be set aside in favor of coordinated services to meet the needs of the general public. It is our position that this could be done without minimizing competition between various modes of transportation by continuing in effect the separate plans heretofore established in connection with TOFC operations. Those plans as now established meet specific needs and have the effect of creating competition between different modes of transportation.

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[fol. 1195]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF CARLISLE KNOWLTON, GENERAL TRAFFIC MANAGER, CHAMPION PAPERS INC., KNIGHTSBRIDGE, HAMILTON, OHIO

[fol. 1196] Champion Papers Inc. is a party of record in Ex Parte 230. We have manufacturing plants located at Hamilton, Ohio; Canton, North Carolina, and Houston, Texas. Approximate annual production at these plants is 3,800 tons of pulp and paper. We have a vital interest in these proceedings in that we make regular use of TOFC Plans II, III and/or V on shipments outbound from these three plants.

* * * * * * *

No other public carrier service can offer as satisfactory a combination of speed, reliability, damage control and total through costs as does Plan III. In the absence of this service, our only alternatives are loss of business to closer-in competitors or the establishment of greatly expanded private carriage operations. Faced with this choice, we would not hesitate for one moment to expand our private operation far beyond the point of operating it profitably (as a transportation system) in order to achieve these other ends of speed, reliability and reduced damage. It was the need for these ends which attracted us to Plan III initially and the competitive factors existing at that time have greatly increased in the interim period.

[fol. 1197] Against this background, it is important that we emphasize our position that the convenient availability of equipment is an integral and necessary part of the Plan III service. This is simply because a significant part of the benefit of Plan III is in the immediate, precise and flexible control which we can exercise over the efficiencies of the operation at each end of the terminal to terminal

move. (Control which is otherwise possible only under private carriage and constitutes one of its main attractions also.) Therefore, since there is on the horizon no leasing service comparable to that offered by the railroads, prohibition of such service by the railroads will inevitably eliminate Plan III.

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[fol. 1198]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF DAVID FLINT
(THE SINGER MANUFACTURING COMPANY)

My name is David Flint, Rate Consultant for The Singer Manufacturing Company, Singer Building, 149 Broadway, New York 6, N. Y., and its subsidiary companies, who are hereinafter referred to as Singer.

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Singer is a user of the currently popular Plan III TOFC Service. This excellent concept provides our needs with the fastest and the most dependable service at the lowest possible cost. We are taking advantage of this optimum for shipments between our eastern and southern plant locations, and from these plants to our distribution warehouses located throughout the U.S.A. The products consist of sewing machines, electric motors, and related articles.

We have been using Plan III continuously since August of this year. Previously, the preponderance of our traffic moved over the road in motor carriage, a portion of it being carried in our own vehicles.

Our analysis of the economical feasibility of Plan III not only projected potential savings of precious transportation dollars together with premium service as opposed to our private carrier operation; it came at a time when much of our equipment was in need of replacement, and so obviated the necessity of additional capital investment. This analysis also showed us that the remaining portion of our

private fleet could be deployed to short-haul areas where specialized service at low cost is mandatory to our operation.

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[fol. 1199] It appears that the Commission, concerned with the preservation of the long-haul motor common carrier, has drafted tentative rules that may restrain the flexibility and inherent advantages of the low cost rail carrier, which, of course, would effect the interest and needs of the shipping public who in these struggling times is ever aware of the need for economies. The proposed rules, designed for so-called "intermodal" TOFC service, seem to obligate the railroads to subsidize their competitors.

The fact that so many motor carriers avail themselves of Plan I (substituted) service is tantamount to an admission that the railroad is the true low cost carrier. The motor carrier uses this means of transporting his over-the-road trailers, and charges the shippers his regular tariff rates which were designed for the performance of a higher cost service. Hence, the users of Plan I reap the fat profits derived from the difference in their cost by TOFC and their existing tariff rates, and the shipper pays for this superficial service.

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[fol. 1200]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices
of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF C. B. GREGORY
(GULF OIL CORPORATION)

My name is C. B. Gregory, Manager, Facilities and Supply, Gulf Oil Corporation and have jurisdiction over the operations, distribution and transportation of petro-

leum products within the company's Southern Region. My address is 1375 Peachtree Street, N. E., Atlanta, Georgia.

As a result of our negotiations with one of the rail carriers, we recently instituted the handling of packaged petroleum products from Charleston, S. C., to Knoxville, Tenn., in Plan III TOFC service, but due to operational difficulties on our part, we discontinued this service until we could further evaluate the economics. Our study has now been completed and we contemplate resuming this service in the very near future.

We have only made two shipments under Plan III TOFC service which were in October of this year, but as a result of our distribution study, we have found this type of service will prove more economical in some instances than operating our company equipment. We contemplate using the services of a contract carrier from and to the rail yards to [fol. 1201] handle the trailers.

Our consumption at Knoxville, Tenn., will exceed a 1,800,000 pounds a year and our past experience indicates this volume will increase.

* * * * * * *

[fol. 1202] It is my opinion that in instances where we find the use of TOFC service to compare favorable economically with the use of company equipment, unless some operational reason should intervene, we would in all probability use TOFC service. To cite one advantage, the use of TOFC service in such instances would allow us to avoid large capital outlays by keeping company owned equipment at a minimum.

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[fol. 1203]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF B. T. BABBITT, INC. BY ROBERT G. ALCORN

Now comes B. T. Babbitt, Inc., a party to this proceeding under the provisions of Paragraph 3(B) of the Order of the Commission dated October 11, 1962, and respectfully submits the following statement by its Traffic Manager, Robert G. Alcorn.

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[fol. 1204] Net sales of B. T. Babbitt, Inc. in 1961 were $20,485,416. Distribution costs for the same year amounted to $1,937,693., of which $1,623,786 was paid to transportation companies.

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[fol. 1205] Prior to the initiation of Plan III service between Albany and Chicago, all shipments by B. T. Babbitt, Inc. were moved by Motor common carrier at a considerably higher cost than that afforded by use of Plan III.

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In the products which we manufacture we have found that the production and sale of liquid detergent is becoming increasingly important as a contributor to our gross sales and consequently our profit. By its nature, this product is low priced, and any increase in transportation costs to the Middle West would eliminate our present competitive position.

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[fol. 1206]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF NATIONAL DISTILLERS & CHEMICAL CORPORATION

National Distillers and Chemical Corporation is a corporation organized under the laws of the state of Virginia with headquarters at 99 Park Avenue, New York 16, New York. We are engaged in the manufacture and nationwide distribution of alcoholic beverages, chemicals, fertilizers, plastics and metals, as well as related products, with plants and warehouses located in all sections of the country.

[fol. 1207]

I

Factual Information

In the conduct of our business we make use of virtually all forms of common carrier transportation in addition to a smaller proportion of private and contract carriage. Our products are in competition with those of other manufacturers, requiring constant attention to seek more efficient and economical means of distributing our commodities to market. While our use of Piggyback Service has been predominantly in our alcoholic beverage division, we recognize and believe it will have great potential for our other lines.

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[fol. 1208] *In General*

In conformity with the spirit of the Commission's stated admonition that persons finding themselves with common interests endeavor to consolidate their presentations and in the interest of avoiding unnecessary repetition, we also hereby align ourselves with the position of the National Industrial Traffic League, of which we are members, insofar as it affects our interests as hereinbefore outlined.

In common with the League, it is our view that TOFC service together with the rates or charges applicable thereto, represent a healthy development in this country's transportation system. We are equally concerned that the proposed rules, however well intentioned, will inhibit TOFC service, or their effect will be to discourage the development of TOFC service. We respectfully urge, therefore, that the views of the National Industrial Traffic League as well as our individual interests be given full consideration in the Commission's disposition of this vital subject.

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[fol. 1209]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED STATEMENT OF ALBERT J. SAWICKI, TRAFFIC MANAGER, THE AP PARTS CORPORATION, TOLEDO, OHIO

My name is Albert J. Sawicki, Traffic Manager of The AP Parts Corporation, Toledo, Ohio, which manufactures automotive exhaust systems, with national distribution of its products. • • •

The AP Parts Corporation vigorously opposes any adoption of rulings which would result in the elimination of The AP Parts Corporation's utilization of Plan III Transportation.

We have for a period of one (1) year utilized Plan III Service. The majority of these shipments moved via motor carrier prior to the introduction of Plan III Service. Also, prior to the introduction of Plan III we employed private carriage. This was discontinued with inception of the service.

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[fol. 1210]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

Substituted Service: Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF SAMSON CORDAGE WORKS BY WILLIAM F. MIX

Come now Samson Cordage Works, 470 Atlantic Avenue, Boston 10, Massachusetts, hereinafter referred to as Samson, and file this Verified Statement in response to the Commission's Order in Ex Parte 230 dated October 11, 1962, served October 12, 1962, *In the Matter of Publishing Proposed Rules and Directing Special Procedure.*

Samson is a manufacturer of braided cotton, synthetic fibre, and plastic cordage with mills located at Anniston, Alabama; Icard, North Carolina; Shirley, Massachusetts; and Bellingham, Washington. Its products are shipped to wholesalers and/or warehouses in all fifty United States.

• • • • • • •

[fol. 1211] 2. Samson has been using Plan III piggyback service for eighteen months within Official Territory. In December, 1962, Samson will expand its use of Plan III piggyback service substantially. This service will be utilized between points in Southern Territory, between points in Southern Territory and points in Trunk Line Territory, and from points in South-[fol. 1212] ern Territory to points in Official Territory. It is estimated that more than four million pounds of freight will be so routed annually.

• • • • • • •

[fol. 1213] *Section C with exception of Rule 5 and Rule 7* would totally eliminate Plan III. Samson is vehemently opposed to any rules which will change Plan III from its present state.

As stated above, Samson is drastically expanding its use of Plan III service. To avail itself of the economies offered by Plan III, an extensive addition to one of its mills has to be made. This will entail construction of an unloading platform and ramp, and the purchase of additional materials handling equipment. Samson has gone to considerable expense, but without these additional facilities, Plan III service would be impossible.

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As this movement is all in one direction, it is impractical to use private carriage. Highway trailers are trip leased from the railroad and are moved by motor contract car-
[fol. 1214] rier, acting as an agent of Samson to and from the mills and the railroad ramp. • • •

• • • • • • • •

[fol. 1215] Prior to the establishment of this co-ordination of transport media, purchasers of transportation were, in many instances, stymied as to which mode of transportation they could use. With industry expanding today, many could only use highway carriers or freight forwarders for a rail facility did not serve both the point of origin and the point of destination. Large manufacturers were in a better competitive position, for because of their volume, lower rates could be established, and because of this volume, better service was available—and they always had the option of using private carriage to improve either or both of these advantages.

Today, because of TOFC service, the small and medium size manufacturer has the facilities to put himself in the same position as his large competitors. The key to the use of these facilities is the ability to trip lease highway equipment from the railroads. Now, all a purchaser of transportation need do is carefully analyze his production and distribution policies and co-ordinate them with the services offered by an improving and flexible transportation system.

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[fol. 1216] It is the desire of Samson that any rules adopted through these proceedings will not curtail TOFC services as are now in general use, and that they will not stunt the growth of future TOFC services—it is the public that any rules should be formed to protect, not to harm them. • • •

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[fol. 1217]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF COLGATE-PALMOLIVE COMPANY BY D. W. CRANE

Comes now Colgate-Palmolive Company and states the following:

Statement of Facts

Colgate-Palmolive Company is a Delaware Corporation with principal offices located at 300 Park Avenue, New York 22, New York and manufacturing plants at Jersey City, New Jersey, Jeffersonville, Indiana, Kansas City, Kansas and Berkeley, California. We are engaged in the manufacture, sale and distribution of Soap, Washing Compounds, Toilet Preparations and related articles, on a nationwide basis.

We make extensive use of Plan II and limited use of Plan III present TOFC service in the distribution of our products and are thus interested in the general rules your Commission has proposed to govern TOFC services.

Argument

In our telegram of November 14, which was specifically directed to proposed Rule C-3 and should have so indicated, we stated our opposition to any regulation which would prohibit rail carriers under Plan III from furnishing trailers to shippers on the ground that such action would in-

[fol. 1218] crease the cost for the distribution of our products. For example, we carry a large warehouse stock of Soap, Washing Compounds, etc., in Jacksonville, Florida, from which less-than-truckload shipments are made to our customers located throughout the state of Florida. During the past several months we have been able to consolidate these small shipments for Miami and Tampa into trailerloads and move them to destination under Plan III rates, in trailers leased from the rail carrier. At destination, a local cartage operator delivers the individual shipments and returns the empty trailer to the rail carrier. This arrangement has been saving us around $400 or $500 per month over current L.T.L. rates and charges. Under proposed Rule C-3 trailers could not be leased from the rail carrier, the arrangement would be terminated and our distribution cost for this tonnage would be increased. • • •

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[fol. 1219]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF LITHONIA LIGHTING, INC. BY GEORGE P. BELL, JR.

[fol. 1220] Comes now Lithonia Lighting, Inc., a duly organized corporation doing business under and by virtue of the laws of the State of Georgia and hereby files its verified statement and views in accordance with paragraph (e) of the Commission's Order on the above matter served on October 12, 1962.

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[fol. 1221] Lithonia Lighting, Inc., main point of manufacturing is in Conyers, Georgia. In our distribution system we maintain and operate twenty (20) warehouses which are located in strategic points throughout the United States. For a number of years we have operated a private

truck fleet which handles the preponderance of the volume movement from our factory to these different warehouses for distribution to our customers in the area served by each warehouse. With the intervention of TOFC Plan 3 Service we have found that to many of the localities that we have been previously using our private truck operation that we could utilize the Plan 3, TOFC Service, which would enable us to continue giving the service demanded by our customers at virtually the same cost as it was costing to operate private trucks. • • •

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[fol. 1222]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF THE WESTERN ELECTRIC COMPANY, INC. BY W. L. BAIRD

[fol. 1223] The Western Electric Company, Incorporated, as the manufacturing, procurement and distribution arm of the Bell Telephone System has the duty to see that communications equipment is available at point of use when needed. In the performance of this duty Western uses practically every form of domestic transportation.

In recent years, the expansion of railroad TOFC services has offered Western many opportunities for increased efficiency and better control of transportation costs. In the three month period of April, May and June, 1962, a typical period, a total of 1,020 trailerloads were shipped by or for the account of this company in railroad TOFC service, which when projected indicates annual shipments in excess of 4,000 trailerloads with a weight of 120,000,000 pounds. TOFC shipments were approximately 65% Plan III and 35% Plan II.

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[fol. 1224] Use of Plan III has resulted in many benefits both tangible and intangible. Smaller shipments can be consolidated from multiple origins for a single destination or at a single point of origin for distribution to many destinations from a central point. This operates to reduce transportation charges, to reduce the complexity of the billing, to permit scheduled arrivals, to reduce loss and damage claims and it offers an overall reduction in clerical effort and paper work.

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[fol. 1225] Plan II service would be of little value in connection with consolidations because it offers little if anything not already available via over-the-road motor carrier service. The large number of commodities contained in any consolidated shipment would require individual billing and rating and considerable additional clerical expense. Plan III on the other hand offers a single rate for all commodities without the necessity of listing each on the bill of lading. Only a certification that the mixture does not contain an excess of a specified percentage of any one commodity is required. Because of the low Plan III charge it is possible to draw on an extended origin territory for small shipments to an extended destination territory, a feature not possible under the higher Plan II rates. Therefore, if Western Electric is to continue as an extensive user of railroad TOFC service, Plan III must be available on terms closely paralleling those currently in use.

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[fol. 1226] Western has experienced no difficulty in understanding and utilizing the TOFC arrangements currently in existence. While it concedes the possibility of a need for uniform rules, it submits that any finding which would operate to disturb the present satisfactory arrangements or prevent their extension to other areas would create an unjustified financial burden and would be a serious threat to the efficient management of its highly complex transportation problems. In view of Western's relationship to the Bell Telephone System, any finding that

would adversely affect either the cost or quality of Western's transportation function would have a corresponding adverse effect upon its Bell Telephone System customers.

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[fol. 1227]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte #230

EXCERPTS FROM VERIFIED STATEMENT OF W. J. DESANA, TRAFFIC MANAGER, CHAMPION SPARK PLUG COMPANY, TOLEDO, OHIO

My name is William J. DeSana and I am Traffic Manager of the Champion Spark Plug Company, Toledo, Ohio, and have been since 1955.

Our company manufactures all types of spark plugs which are shipped to large numbers of distributors located in each of the fifty states. In distributing our product to these customers, we make use of rail, motor, air, and water carriers, and our total transportation bill for 1961 was in excess of $900,000.

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Regarding Piggyback Service, we use Plan III only, and although we would be considered a small shipper, this plan has saved us considerably in freight costs with no penalty in service. We have been using this service for the past one and one-half years.

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[fol. 1228]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF WITNESS, J. R. THORNBERRY, REPRESENTING THE AMERICAN THREAD COMPANY, INC.

My name is J. R. Thornberry, General Traffic Manager of The American Thread Company, P.O. Box 71, Marion, N.C.

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The American Thread Company is presently using Plan III services between Charlotte, N.C. and Alexandria, Va. and between Spartanburg, S.C. and Dallas, Texas. We ship our own products consisting of unfinished and finished threads and yarns. We have been using Plan III between the above points regularly since January, 1962. Our monthly tonnage on Plan III averages 2,300,000 pounds.

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[fol. 1229] Were it not possible to lease trailers from the Railroad it would be necessary for us to either ship by motor common carrier or to purchase our own trailers and enter into private carriage between the aforementioned points. We find both of these prospects both uneconomical and impractical.

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[fol. 1230]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT FILED ON BEHALF OF NATIONAL DAIRY PRODUCTS CORPORATION BY WILLIAM H. OTT

Comes now National Dairy Products Corporation and submits the following Verified Statement in this proceeding pursuant to the Commission's Order therein served October 12, 1962:

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[fol. 1231] National Dairy has a substantial interest in the present operation and possible future development of TOFC services. Since the inception of Plans II, III, and V, National Dairy has made use thereof. Kraft Foods Division alone, during the first ten months of 1962, made over [fol. 1232] 2,400 shipments under TOFC Plans II, III, and V, this in addition to any TOFC shipments of Kraft tonnage which may have been made in the name of bona fide

voluntary shipper associations of which Kraft Foods is a member.

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[fol. 1233]

If the record shows TOFC service practices, or rate and charge situations, which raise question as to the desirability of change in prior Commission holdings, the point should be determined in a proceeding directed primarily to that end, rather than by attempted coverage in general rules and regulations covering the whole scope of TOFC subject matter. Illustrative is the question of the relation between motor common carriers and rail lines performing TOFC service, and the distinctions between Plan I origin to destination substituted service, joint motor-rail service, and the use of published rates versus divisions as methods of determining payment or apportionment of revenue.

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[fol. 1234] Except as a regulated freight forwarder (in this instance in the role of a shipper) may tender freight to an underlying rail carrier for TOFC movement, no carrier regulated under the Act should assume simultaneously the role of a carrier with respect to tonnage on which it has issued a bill of lading to a shipper, and the role of a shipper in tendering that same tonnage to a rail line for TOFC service. If, contrary to the above, substituted TOFC service is to be allowed for the whole of a motor carrier [fol. 1235] operation from origin to destination, that service should be separately defined, furnished only under appropriate tariff authority (substituted service tariff), and be on the basis of published tariff rates.

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[fol. 1236] Only a regulated freight forwarder is privileged by law to assume the status of a carrier with relation to its patrons, and a shipper with relation to the rail line performing the actual transportation service, all as to the same traffic. Under Part IV of the Act a freight forwarder is not allowed to deal with the TOFC rail line on a contract basis—the forwarder must pay published tariff rates. Un-

der what provision of the Act should a common motor carrier be allowed to deal with a TOFC rail line under these same circumstances (origin to destination TOFC service) either on a contract basis or as a shipper under tariff rates?

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[fol. 1237] Rule B-5, to which National Dairy also objects, requires joint arrangement by rail carriers with any and all carriers of another mode if agreed to with one such carrier. If the Commission held statutory authority to compel joint arrangements between rail lines and other mode carriers, a conclusion of this general scope might be arrived at in a proper proceeding, but lacking that authority no such rule should be prescribed.

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[fol. 1238]

Conclusion

National Dairy, in its Special Pleading of November 16, 1962, and herein, has attempted a succinct expression of its views with respect to the proposed TOFC rules. The authorship of these rules is unknown and they have been submitted to shippers and carriers without explanation or specific justification. Facts within the knowledge of the author or authors of these rules, if known, might change substantially the views of others with respect to them. The subject matter is complex and the rules in part at variance with prior Commission decisions. By determination of the Commission within its discretion, the time allowed for analysis, counter suggestion, and reconciling of the views of [fol. 1239] individual parties into possible group statements, has been inadequate.

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[fol. 1240]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF EASTMAN KODAK COMPANY BY H. L. VERBRIDGE

Comes now Eastman Kodak Company (hereinafter sometimes referred to as the Company) incorporated under the laws of the State of New Jersey, with general offices and principal manufacturing plants located at Rochester, New York, and files this Verified Statement in response to the Commission's order in Ex Parte 230—Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service).

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[fol. 1241] The Company therefore has a very vital and particular interest in the continued growth and development of both Plans II and III TOFC service. It urges the Commission, in promulgating rules to govern the various TOFC services, to do nothing to curtail the full use and development of *any* of the present or future plans of either intermodal or all-rail TOFC services.

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[fol. 1242] The originally stated purpose of Plan III was to meet the serious actual and potential competition of private carriage. This meant utilizing not only trailers owned by shippers, but also leased equipment of potential private carriers. The ambiguity of the suggested rule could give impetus to increased use of private carriage, clearly recognized by the Commission itself in Docket 32533.

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Charges for tractor service within commercial zones should not be required to be published by the railroad. There are a number of methods whereby a shipper can provide itself with such service, such as, by leasing from

[fol. 1243] a cartage company, or a common carrier, or a truck rental company.

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Rule C-3

The Company is unalterably opposed to this rule, which would forbid leasing of trailers by railroads or railroad-controlled subsidiaries to shippers for use in Plan III. It should be deleted.

The proposed regulation would completely eliminate the Company's present supply of trailer equipment now obtained solely from a rail subsidiary. The alternative, independent leasing companies, would be totally unsatisfactory and absolutely impracticable. Such companies could not effectively or economically distribute or maintain a proper supply of trailers for all shippers on a nationwide basis.

The railroad itself can most efficiently control the movement of empty trailers to those points on their lines where they are needed by utilizing them to the best advantage in the various TOFC plans. As a result of that control, they can obtain the greatest possible use of their trailers. Such maximum utilization enables many carriers to trip lease. Trip leasing is an essential factor contributing to the use of Plan III. In fact, without it the Company would have to discontinue its use of Plan III.

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[fol. 1244]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM SPECIAL PLEADINGS OF ROCHESTER GERMICIDE CO. AND ALSO ON BEHALF OF ROCHESTER INDUSTRIAL TRAFFIC MANAGERS COUNCIL BY CHARLES W. SNOW

[fol. 1245] Rochester Germicide Company, an interested shipper with its principal offices in Rochester, New York, hereby files this special pleading with respect to the pro-

posed Rules and Regulations promulgated by the Commission in the above proceedings.

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[fol. 1246] On behalf of the Rochester Industrial Traffic Managers Council, it is our desire to enter our protest against Rule C-3, which is part of Question 12. Many of the members are presently using Plan II and Plan III. If these plans are denied to the shipping public, many of our members will be forced to consider private carriage or return to the over-the-road common carrier.

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[fol. 1247]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF ALBERTO-CULVER COMPANY

Alberto-Culver Company is a manufacture of cosmetics and related products. In distributing our products, we utilize the services of warehouses and/or local cartage companies in certain key cities such as New York City, New York, Boston, Massachusetts, Buffalo, New York, and several others through out the country. To effect this distribution we ship full trailer loads to these warehouses and/or local cartage companies, for delivering locally and reshipment to other destinations in a prescribed area.

We make extensive use of Plan II and limited use of Plan III present TOFC service in the distribution of our products and are thus interested in the general rules your Commission has prepared to govern TOFC services.

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[fol. 1248] The use of Plan III has enabled us to save approximately $300 or $400 per month over current motor carrier or Plan II rates and charges.

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[fol. 1249]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT FILED ON BEHALF OF BEST WAY OF INDIANA, INC. BY DAVID N. INWOOD

[fol. 1250] My name is David N. Inwood and I reside at Terre Haute, Indiana. Pursuant to the order entered in this proceeding, I am authorized to and offer, on behalf of Best Way of Indiana (sometimes referred to as "Best Way"), the following Verified Statement:

* * * * * * *

[fol. 1251] In the case of Plan III traffic, your respondent transports such traffic under rates published in our own individual Tariff. The Rates are restricted as proportional rates in connection with rail carriers applicable only at certain interchange points. Your respondent does not act at any time as the agent of the shipper nor as the shipper.

Your respondent transports Plan V traffic at the present time in connection with rail carrier under joint through rates of Tariffs published by the Eastern Central Motor Carriers Association, and also the rail carriers individual Tariff in which your respondent has granted a concurrence. At the present time negotiations are being conducted with two other rail carriers and in the case of one rail carrier, concurrence has been granted and certain rates are published as joint through rates in that rail carriers individual issue. On other occasions your respondent has sought, without success, with certain other rail carriers, to establish Plan V LTL and truckload arrangements.

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[fol. 1252]

BEFORE THE INTERSTATE COMMERCE COMMISSION

ICC Docket Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF R. W. GRUVER

My name is R. W. Gruver. I am General Traffic Manager of Thomas Industries, Inc., with offices at 207 East Broadway, Louisville 2, Kentucky. I have been engaged in various traffic capacities in both carrier and industrial traffic for over thirty years. I have been with Thomas Industries for the past 15 years.

Thomas Industries manufactures and distributes a variety of articles, including lighting fixtures, bath cabinets, lamp posts, advertising display boards, electric dimmers, power hand saws, spraying equipment, paint applicators and some glassware. These products are manufactured in the middle west and are distributed to all parts of the United States and exported.

This is a highly competitive business. Rapid and safe delivery are necessary, and we must be competitive costwise.

In 1961, we operated our own truck fleet a total of 4,000,000 miles in the United States, east of the Rocky Mountains. This operation consisted of a fleet of 60 tractors and 75 trailers. We had, over a period of ten years, gradually turned to Private Carriage to distribute our products. In this we could control delivery service, hold down handling and damage. We had expected to operate at a loss as compared to common carrier, as much of our operation was without backhaul. However, by economical operation, and backhauling raw materials to our plants where possible, we managed to keep our operation on a profitable basis.

Common carrier truck at this time did not handle over 15% of our traffic. Stock movements to the West Coast were handled via railroad in carload quantities. We have never hauled exempt commodities, as we did not wish to go into [fol. 1253] the trucking business and were only interested

in delivering our own products. Our freight cost for 1962, projected to December 31, should be about $3,500,000.

Our Company was reluctant to go into the private trucking operation. However, it had become very clear that our distribution was a prime factor in the prosperity and growth of our business. We went into private carriage on a very gradual basis, but each new territory we served with our own trucks showed immediate increase in business.

In 1947, when the writer was first employed by the company, our volume was approximately $50,000 per month. Improved distribution rapidly developed this to $200,000 per month with continued growth. Our total sales this year (1962) should be about $44,000,000.

In 1947, only one local truck line would pick up our freight. He handled two points, Milwaukee, Wisconsin, and Appleton, Wisconsin. It was not until the writer threatened to file a complaint with your commission that other motor carriers would accept our shipments. Our merchandise was bulky and fragile. Even after the motor carriers did pick up our shipments, they were delayed, as transfer terminals invariably held them for "top loading". This delayed shipments and increased handling and breakage. Our private fleet overcame these troubles and did not increase our cost.

In 1958, the writer checked on Trailer on Flat Car, but was unable to find a use for this service. In 1959, the writer experimented with Pool Cars into Florida, in an effort to maintain quality of service at a reduced cost. Many of our trucks returned empty from their deliveries as much as 1200 miles. If we could eliminate or reduce this empty mileage, we could cut costs.

[fol. 1254] In 1961, we started an investigation into our distribution for the purpose of reducing cost where possible and to eliminate as much of our private carrier service as possible without a reduction or depreciation of service. After a year of intensive investigation and study, we have gone to Trailer on Flat Car on most long runs.

Most of these operations are under Plan III, and we lease the trailers. The trailers are loaded at our Hopkinsville, Kentucky plant in rotation of delivery. The trailers are Piggy Back'd to a central point where we have two tractors stationed. Here our drivers take the trailers on their delivery routes. These loads will have from 10 to 30 deliveries and often are delivered over a distance of several hundred miles. Where we have return hauls of raw materials, or where we have interplant movements, we use our own trailers. These regular route movements are on weekly schedules. We move on a schedule. If at certain times of the year business is slow and the trailers do not fill, they still move, as we have promised our customers weekly service. On any of these regular routes, the rail carrier is assured of 50 cars per year to each point.

Our principal advantage is the elimination of the empty return haul. However, we are also saving a lot of wear and tear on tractors. The tractor that used to be good for 4 years should now last 7 or 8 years. We still retain the direct delivery contact to customer.

As a Private Carrier we cannot haul back "for hire" or common carrier freight. When we release a leased trailer to a carrier, he is in a position to develop common carrier business for the return haul. This certainly is a more economical approach than running the empty equipment of the Private Carrier.

[fol. 1255] We load a box car weekly to Denver. It is a Pool Car consigned to a warehouse for distribution. It moves at a carload freight rate. When it has been unloaded, it is turned back to the railroad. The use of trailers under lease is practically parallel. The units are unloaded and turned back to the carrier. The carrier has the same opportunity to return load the trailers as they have to return load a box car.

Our use of Trailer on Flat Car will reduce our Private Fleet Operation in 1962, by approximately 1,800,000 miles.

This is all traffic that has been private carriage returned to common carriage by the mileage indicated. If the Plan III lease is eliminated, we will have only one choice, to go back to practically 100% Private operation. This would take at least 350 carloads a year from the railroads. It would give nothing to the motor common carriers.

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[fol. 1256]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT FILED ON BEHALF OF:—RADIO CORPORATION OF AMERICA—ELECTRONIC INDUSTRIES ASSOCIATION, TRAFFIC COMMITTEE

[fol. 1257]

Introduction

The Radio Corporation of America ("RCA") with offices at Front and Cooper Streets, Camden, N. J., is engaged in the manufacture and sale of electronic products (including radio and television receiving sets, phonographs, and electron tubes) and their distribution in carload and truckload lots throughout the country from its various plant and warehouse locations. RCA has been using trailer-on-flat car service (TOFC) to advantage in transporting both incoming materials and outgoing products. This is particularly true of the currently designated Plan III service, which has been used in place of or in connection with its private carrier operation. RCA is participating in Ex Parte No. 230 for the purpose of opposing the possible adoption of any unnecessary restrictions that would jeopardize the continuation and expansion of this valuable type of TOFC service.

RCA is a member of the Electronic Industries Association (generally referred to as EIA), which is a national association representing approximately 330 manufacturers of electronic equipment systems and components. The

headquarters of the Association is 1721 DeSales Street, N. W., Washington, D. C.

The undersigned, Edward J. Derenthal, Director, Traffic and Transportation for RCA, is also Chairman of EIA's Traffic Committee. At a meeting of EIA's Traffic Committee on November 14, 1962, he was directed by a unanimous vote to oppose certain portions of the proposed rules of Ex Parte No. 230 that appeared detrimental to the continued use of TOFC. Therefore this statement is also made on behalf of the Traffic Committee of the Electronic Industries Association.

[fol. 1258] *Statement of Facts*

RCA now uses Plan III TOFC service extensively in the movement of materials and finished products. Two typical operations are described below:

(a) There is a regular Plan III movement of color picture tubes from RCA's tube plant at Lancaster, Pa., to its television plant at Bloomington, Ind., and partial return movement of packing material. In both instances, two trailerloads of the single commodity weigh less than 60% of the Plan III minimum weight so there is no need for mixing two or more commodities. Whenever the return loads are available, RCA trailers are used for the Plan III round trip. If there are no return loads to Lancaster, trailers are trip-leased by RCA from Excelsior Truck Leasing Company for the one-way trip from Lancaster to Bloomington. After the leases are terminated at Bloomington, these trailers are usually reloaded by RCA in Plan II service with television sets for shipment to various distributors along the East Coast. This Plan III movement was formerly handled by RCA Lancaster private carrier fleet, which is no longer utilized to Bloomington. Without Plan III this fleet would have been expanded substantially during the past year to accommodate the greatly increased shipment of color tubes for television set manufacture.

(b) There is a regular Plan III movement of black and white picture tubes from RCA's tube plant at Marion, Ind., to New York Harbor piers for reshipment overseas to the Middle East via States-Marine Lines. Trailers are trip-leased from New York Central Transport at Marion and the leases are terminated upon RCA's delivery of trailer to States Marine's pier at New York. Trailers (actually demountable containers) are reshipped via ocean freight without any rehandling of contents. Actually, States Marine Lines is the owner of the trailers and it has an interchange arrangement with the New York Central System. The savings in freight costs derived from this Plan III service and through containerized handling, have helped RCA to meet competition in this foreign market.

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[fol. 1259]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT ON BEHALF OF ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, REGARDING PROPOSED RULES

Come now the undersigned, on behalf of Orville L. Freeman, Secretary of Agriculture of the United States, hereinafter sometimes referred to as the Secretary, a party to this proceeding, and file this verified statement.

Preliminary Statement

The Secretary is participating in this proceeding pursuant to the provisions of § 201 of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1291), § 203(j) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1622(j)), and the congressional declaration of purpose in § 202 of the latter Act (7 U.S.C. 1621) that a prosperous agricultural community shall be fostered through the development of a

sound, efficient, and privately operated system for distributing and marketing agricultural products.

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[fol. 1260] We believe that certain matters regarding the views expressed herein should be made clear at the outset. Our comments are based on the way we construe the proposed rules governing TOFC service. Our lack of objection to various rules stems from our opinion as to how they should be interpreted from a legal standpoint. It has not been and is not feasible, or even possible, to consider and comment on all possible interpretations of the proposed rules. Moreover, it may be that some aspects of certain rules, such as their implications or full import, have escaped us since the time has not permitted a thorough analysis of the proposed rules and their import on the present and future transportation of agricultural commodities.

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[fol. 1261] Position of the Secretary

It is the position of the Secretary that, with respect to agricultural commodities, the various categories of TOFC service presently available to shippers are desirable forms of service and that there should be no prohibition of the normal growth of additional TOFC service. Such service is considered necessary to provide flexible and efficient service to the shipping public. In short, the Secretary is opposed to any rules which would have the effect of impairing the future development of TOFC service or of restricting the flexibility of such TOFC service as has been so far developed.

As indicated in the special pleading filed by the Secretary on November 16, 1962, we at this time advocate changes in the provisions of Rules 1 and 9 of Part B (Rules Governing Joint Intermodal TOFC Service) and Rule 3 of Part C (Rules Governing All-Rail TOFC Service). Additionally, we suggest what are believed to be clarifying changes in language in Rule 1 of Part A (Definitions) and in Rule 7 of Part C.

Material Facts

TOFC service is of considerable importance in the movement, in one or more steps, of agricultural commodities from the farms, orchards and other places of production or origin to the places of temporary storage, processing and consumption or other ultimate disposition in the United States. Except perhaps in rare instances, farms, orchards and other places of production or origin are not located on rail sidings. The same is true, in many instances, of [fol. 1262] places of temporary storage and, generally, of plants engaged in processing agricultural commodities. Consequently, motor vehicles are extensively used in the movement of such commodities, not only in the initial stages but also at later stages of the total movement. Moreover, there is a natural tendency to extend the movements by such vehicles, once the truck or trailer is loaded and a movement commenced. In any case trucks are normally used in transporting agricultural commodities to rail heads and frequently if not generally used in transporting them to other and final destinations. For this reason many farm cooperatives or associations of farm cooperatives and other agencies in the marketing or processing of such commodities maintain fleets of tractors and trailers.

Trailer-on-flat car service combines the flexibility and low cost of short haul by truck with the inherent economies of long haul by rail. The end result is the economical utilization of available transportation facilities. These economic factors are present irrespective of whether the originating common carrier is a railroad or a motor carrier utilizing rail piggy-back service. Similar factors are present in the case of the less frequent use of water carriers for a part of the total haul.

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[fol. 1263] 4) *Part C, Rule 3*

This rule prohibits railroads, or persons under common control with railroads, from leasing highway trucks, trail-

ers or semi-trailers, and/or rail cars, *to* or *from* shippers or freight forwarders, for use in TOFC service. This rule would interfere with the efficient operation and management of railroads since it would prevent them from handling promptly and efficiently increased traffic which arises during peak traffic seasons when there is an attendant shortage of trailers. The railroads should be permitted to lease additional equipment, in lieu of purchasing it, from anyone in lawful possession of adequate equipment. Moreover, we can see no valid reason why railroads should be prohibited from leasing equipment to shippers or other carriers. We believe such leasing would allow the most [fol. 1264] efficient use of available equipment. The rule would promote inefficient operations and therefore be contrary to the public interest. If the purpose of the rule is to eliminate the possibility of discrimination, it is submitted that §§ 2 and 3 of the Interstate Commerce Act are adequate to take care of the situation without amplification by a rule. The rule should be deleted.

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[fol. 1265] It is the position of the Secretary that all rules finally adopted by the Commission to govern TOFC service should be broad enough to permit and encourage the growth of this valuable service, in conformity with the National Transportation Policy. Moreover, we believe that the carriers are well aware of their statutory obligations and that it is unnecessary to attempt to spell out such obligations in the form of rules governing TOFC service.

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[fol. 1266]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service; Charges and Practices of For-Hire Carriers and Freight Forwarders. (Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF BURLINGTON INDUSTRIES, INC.

Comes now Burlington Industries, Inc., a Corporation charfered under the laws of Delaware, whose principal office is located at 301 North Eugene St., Greensboro, N. C., and through its Traffic Manager of Rates, C. W. Guthrie, makes the following statements of fact in support of its position in connection with the proposed rules distributed by the Commission for consideration in the subject proceeding.

I

Burlington Industries, Inc. is engaged in the manufacture, sales, and distribution of textile products throughout the United States and between the United States and foreign countries.

[fol. 1267] Burlington Industries, Inc. maintains facilities for the manufacture and distribution of textile products at more than 100 different locations throughout the United States.

In order to meet competitive markets, it is necessary for Burlington Industries, Inc. to take advantage of all of the different modes of transportation, including, but not restricted to, the several forms of T. O. F. C. services now being provided by the railroads in the United States. Competitive necessity demands that the products of Burlington Industries, Inc. be transported from point of manufacture to point of distribution and/or ultimate customer at the lowest possible cost consistent with the service requirements in the circumstances.

The need for more effective controls of raw material inventories in order to reduce financial investment in such inventories as well as the need for more effective controls on the transportation costs and services to shippers and receivers of property, has necessitated a departure from conventional forms of for-hire carriage and the development of the various forms of piggyback services now in existence and the subject of this proceeding.

Burlington Industries, Inc. is presently engaged in using the T. O. F. C. services of the railroads in the transportation of property under the present Plans II and III descriptions. In order for Burlington Industries, Inc. to continue using the T. O. F. C. services of the railroads, there must be available T. O. F. C. services that will satisfy [fol. 1268] the service requirements of the manufacturing plants and customers at a cost that will halt increases in transportation costs that may be considered inflationary.

* * * * * * *

[fol. 1269]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF INTERNATIONAL SHOE COMPANY BY L. T. EGGERING

Comes Now: International Shoe Company, a Delaware corporation, by its General Traffic Manager, L. T. Eggering, who will show this Honorable Commission with this Verified Statement why we filed our Special Pleadings on November 21, 1962.

* * * * * * *

We have been using the Piggyback service of the railroads since 1954 and by the use of Plans III and IV we have increased our use of these services extensively since August 1958.

International is the world's largest manufacturers of shoes for the whole family and we distribute these shoes to

over 35,000 accounts in the United States and foreign countries.

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[fol. 1270] As the Commission well knows, Plan III and IV have been helpful in slowing down the trend toward private carriage.

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We are opposed to Part C, Paragraph 3 because it is unnecessarily restrictive in that it prevents leasing of trailers by railroads or their subsidiaries to shippers, freight forwarders. This practice is also necessary to the free flow of commerce. This rule would make Plans III and IV inoperative. The elimination of these two plans would force us to resort to more and more private carriage.

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[fol. 1271]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

EXCERPTS FROM VERIFIED STATEMENT OF JOHN W. WILLIAMS, TRAFFIC MANAGER, LANEY & DUKE WAREHOUSES, INC., JACKSONVILLE, FLORIDA

My name is John W. Williams. I am affiliated with Laney & Duke Warehouses, Inc., Jacksonville, Florida, in the position of Traffic Manager. This company is in the warehousing, consolidation and distribution business and performs as an agent for several large interests. It has been our practice as an integral part of our operation to make shipments from Jacksonville to various destinations in Florida, such as Miami, Tampa, Lakeland and Clearwater areas, under Plan III TOFC service.

Plan III has enabled us to offer to our various accounts a diversified and economical consolidation and distribution

of shipments to their downstate Florida customers not previously available by other modes of transportation. Originally when this consolidation service was first offered we used Common Motor Carriers. We quickly found that due to carriers' restriction of maximum number of five stopoffs plus final destination, some of our principal accounts could not take advantage of our consolidation services because of numerous small shipments. Also, actual delivery of shipments to ultimate consumers in downstate locations required several days and was unsatisfactory. [fol. 1272] By using Plan III and establishing our own delivery service in the Miami, Tampa, Lakeland and Clearwater areas, we were able to overcome difficulties experienced in using Common Truck Carriers. This Plan III arrangement made it possible for customers to receive goods from several accounts, which store merchandise with us, at the same time, thus eliminating the congestion and waste of time by many different trucks making individual deliveries of items from separate principals during the day.

Plan III makes it possible for us to offer daily service from Jacksonville to downstate destinations, whereas the limitations on small shipments described above via Common Truck Service required the accumulation of such shipments over several days' time.

The rapid and steady growth of our use of Plan III is evidence of the overwhelming acceptance of this new service by our own customers. It has placed us in a better competitive position with warehouses located nearer the actual markets and enabled our customers to enjoy substantial savings as well as greatly improved delivery service.

* * * * * * *

[fol. 1273]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF INGERSOLL-HUMPHRYES DIVISION, BORG-WARNER CORPORATION

* * * * * * *

Ingersoll-Humphryes Division, Borg-Warner Corporation is engaged in the manufacturing of plumbing fixtures. We use rail, water, motor and air transportation amounting to approximately one and a half million dollars per year.

We have been able to obtain more business in some areas through various forms of piggyback service. We have been able to meet competition and have priced our material accordingly.

If we were to lose the flexibility of the various piggyback plans, it would result in loss of business or necessitate the use of private carriage.

[fol. 1274] We are wholeheartedly in favor of Plan III Piggyback, as it offers us good service, lower rates, flexibility, door to door pick-up and delivery, and very low loss and damage experience.

We are currently moving about 650,000 pounds of freight per month via Plan III. This traffic formerly moved by truck. If Plan III is abolished the traffic will probably, due to competitive conditions, move via private carriage.

* * * * * * *

[fol. 1275]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM SPECIAL PLEADING SETTING FORTH POSITION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION

Now comes the Intervenor Railway Labor Executives' Association, an unincorporated association representing [fol. 1276] twenty-three of the standard railroad labor organizations, and as required under the Commission's Special Rules of Procedure in this proceeding, tenders its Statement of Position.

* * * * * * *

[fol. 1277]

II.

The Proposed TOFC Rules are undesirable in the public interests in that they would impose on the railroads participating in TOFC traffic a number of restrictive requirements not applicable to other forms of transportation.

* * * * * * *

[fol. 1278]

III.

Trailer-on-flat-car (TOFC) service is a comparatively recent transportation innovation which has enjoyed consistent and spectacular growth during the past 20 years. Its continued expansion is of critical economic importance to the railroads whose losses of numerous types of freight traffic are all too well known by the Commission. Further growth in TOFC service can best be fostered by regulations which provide for considerable flexibility in acceptance and handling of such traffic rather than the rigid, fixed formula envisaged by the Commission under these Proposed Rules.

IV.

Restrictive regulations such as are envisaged by Proposed Rules B(3), B(4), B(5), B(8), C(3), and others are

not only vexatious and restrictive but wholly unnecessary as of the present time. The Intervenor is not aware of any abuses to shippers or the public with respect to TOFC service. Certainly, no pattern of abuses in or of such service on a widespread scale has been shown. The service has, as aforesaid, grown over the past decade due to the advantages inherent in combined railroad, motor carrier and/or water carrier intermodal transportation, and the Commission's existing regulations and attitude have been adequate to protect the paramount interests of the public. While the Intervenor believes that there has been no [fol. 1279] demonstrated need for a revision of the present TOFC service rules, it submits that, even if some revision should be necessary, it should not be a restrictive revision such as is contemplated under the Proposed Rules herein.

V.

The Commission must be aware of the fact that motor carriers are being discouraged in the use of TOFC service by the national labor organization that represents the majority of their drivers, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Teamsters Union). The Teamsters Union is, in fact, a party to this proceeding. The Teamsters Union, among other things, has negotiated into its collective bargaining contracts with a number of motor carriers a penalty payment of $5.00 per trailer for each trailer or car shipped intermodally in TOFC service. These contractual penalty payments constitute a serious deterrent to the future growth of this transportation medium. In view of the actions and attitudes of the Teamsters Union with regard to TOFC service, of which, in view of their notoriety, the Commission may take administrative notice, the additional restraints that would be imposed under these Proposed Rules would virtually assure that TOFC growth would be inhibited in the future.

[fol. 1280]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXERPTS FROM VERIFIED STATEMENT OF JOSEPH B. PHILLIPS, TRAFFIC MANAGER (COLUMBIAN ROPE COMPANY), AUBURN, NEW YORK

My name is Joseph B. Phillips, Traffic Manager of the Columbian Rope Company, Auburn, New York, which manufactures various cordage products and paper items, including padded paper bags. I have been employed by the Columbian Rope Company for a period of ten (10) years, all of which has been spent in the Traffic Department, five, (5) years as Traffic Manager.

* * * * * * *

We have utilized for a period of over three years Flexivan Service within trunk line territory and from official territory to southern territory. We have also utilized Plan 2 service. The majority of these shipments moved via motor carrier prior to the introduction of Plan 3 Service. Originally, the total movement moved by boxcar but because of poor service the mode of transportation was changed to motor carrier.

We have for this period moved approximately five million pounds a year in units that have been leased from New York Central Transport. During this period, without exception, we have received second morning delivery to destinations that originally took sixth or seventh morning delivery by rail movement. This type of service has enabled us to more readily compete with manufacturers within destination areas.

The availability of Flexivan equipment from New York Central Transport has allowed us to enjoy this excellent service, and if proposed Rule C-3 should be established, the Columbian Rope Company would either have to revert to motor carrier transportation to the destinations in question and/or enlarge its already existing privately owned vehicles.

* * * * * * *

[fol. 1281]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED STATEMENT OF UNITED SHIPPERS ASSOCIATION, INC.

Comes now United Shippers Association, Inc., a corporation organized under the laws of Missouri with business headquarters at 229 Biddle Street, St. Louis 2, Missouri.

United Shippers Association, Inc., is a non-profit association engaged in the consolidation of freight for 153 members primarily in the vicinity of St. Louis, Missouri. We ship from St. Louis, Missouri to the East Coast, West Coast, Texas, Twin Cities and to Chicago.

* * * * * * *

[fol. 1282] The membership has benefited immeasurably by utilizing Plan III piggyback service. Not only have their transportation costs been lowered, but there has been an improvement in service. By allowing the shipper or consignee to use vehicles under his control to effect pick-up and delivery it enables them to coordinate for their own requirements. The economies realized from this type of coordination would be needlessly lost under railroad control. This control factor also benefits the railroad in that it allows them to better determine their cost by eliminating relatively unknown and somewhat uncontrollable terminal costs.

The membership is well pleased with Plan III in its present form and have no difficulty in maintaining cost figures, nor in interpreting the present mixture rule.

We feel the following proposed rules and regulations would deter the progress of piggybacking which has been so beneficial to both shipper and carrier alike.

* * * * * * *

[fol. 1283]

BEFORE THE INTERSTATE COMMERCE COMMISSION

RE: Ex Parte 230

Substituted services, charges and practices of for hire carriers and freight forwarders (Piggy back services)

VERIFIED STATEMENT OF PHALO PLASTICS CORPORATION—December 10, 1962

Comes now Phalo Plastics Corporation, a Delaware Corporation doing business at 530 Boston Turnpike, Shrewsbury, Massachusetts.

Phalo Plastics Corporation, an insulated wire, cable and component parts manufacturer, servicing industry throughout the United States, and constantly using Plan III Piggy back into the Central, Mid West and Far West Marketing Areas.

Our participation in Plan III is through the Progressive Shippers Cooperative Association, a non-profit shippers co-op of which we are a member.

With the advent of this association and the Plan III piggy back plan Phalo Plastics Corp. found a solution to the continually spiralling costs of LTL Common carrier charges.

Phalo Plastics Corp. is continually striving to reduce manufacturing and transportation costs consistent with a high quality product, and our use of Plan III method of shipping, which is apparently compensatory to the railroads, has enabled us to stay competitive.

If Plan III operations are held unlawful or if its flexibility is restricted or if rates are denied, the resulting conditions would be unfavorable to Phalo Plastics Corp. It would mean our shipping costs would increase 30%-40%, service to our customers would be delayed by 3 to 7 days, our office help would have to be increased to take care of

expediting and tracing. Our damage claims would definitely be more substantial. All of these conditions would create additional marketing problems in the central mid west and far west areas which presently account for more than 30% of our business. The increase in cost for transportation and related activities could amount to $50,000/yr.

In view of the foregoing statements Phalo Plastics Corp. respectfully request the Interstate Commerce Commission not change rules and regulations which would affect the present Plan III method of shipping.

Very truly yours,

William J. Skarin, Traffic Manager.

[fol. 1284]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED STATEMENT OF DAN F. HART

My name is Dan F. Hart. I am State Senator of the 53rd Senatorial District of Georgia.

I am Chairman of the Senate Agricultural and National Resources Committee and have served in this capacity since January, 1961. In this position I have the responsibility of promoting the agricultural interests of the State of Georgia through the development of a sound, efficient and economical system for distributing and marketing its agricultural products. This encompasses not only growers and shippers but packers, warehousemen and brokers of these commodities.

* * * * * * *

[fol. 1285] Prior to the availability of trailer-on-flat car service, many of these growers and shippers used their own equipment in private carriage for the shipment of their agricultural commodities. However, trailer-on-flat car service now offers a means by which this traffic may be re-

turned to the regulated carriers unless its use is unduly restricted by agency prescribed rules.

* * * * * * *

[fol. 1286] In addition to the above objections, Rule C-3, now proposed by the Interstate Commerce Commission, would interfere with efficient operations and the expeditious handling of traffic since it would prevent the railroads [fol. 1287] from handling properly and efficiently the increased traffic that occurs during peak traffic seasons when there is an attendant shortage of trailers. It has been noted that during peak harvesting periods a serious shortage of over-the-road equipment occurs. This has caused, in the past, the loss of perishable crops to the market, the movement of peaches being one of the best examples of this problem. As the harvest season moves to other sections of the country so do the available over-the-road trucks. In utilizing Plan III piggyback under a lease arrangement, a source of equipment is assured.

* * * * * * *

[fol. 1288]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders
(Piggyback Service)

LIST OF VERIFIED STATEMENTS SUBMITTED IN EX PARTE NO. 230

V.S. No.	Submitted By	On Behalf Of
1.	Harvey Gobetz John H. Fallon Asa J. Merrill	Bureau of Inquiry and Compliance, Interstate Commerce Commission
1-A	Joseph F. Kucera, Jr.	Bureau of Safety and Service
1-B	J. F. Duffy	Bureau of Safety and Service
1-C	Thomas J. Byrne	Bureau of Safety and Service
1-D	John B. O'Connell	Bureau of Safety and Service
1-E	Herman Rinke	Bureau of Safety and Service
1-F	Frank E. Labbe	Bureau of Inquiry and Compliance
1-G	William D. Thomas	Bureau of Inquiry and Compliance
1-H	William J. Gray, Jr.	Bureau of Water Carriers and Freight Forwarders
1-I	Anthony Chiusano	Bureau of Water Carriers and Freight Forwarders
1-J	William J. Love	Bureau of Inquiry and Compliance
1-K	David M. Laird	Bureau of Inquiry and Compliance
1-L	Clyde M. Brown	Bureau of Water Carriers and Freight Forwarders
1-M	W. H. Woerner	Bureau of Safety and Service

V.S. No.	Submitted By	On Behalf Of
2	Arthur E. Baylis	The New York Central Railroad
2-A	Roy L. Milbourne	The New York Central Railroad Co., Flexi-Van Sales and Service
2-B	Vincent C. Borman, Jr.	American Biltrite Rubber Co., Inc.
	John A. Daily (Argument)	The New York Central Railroad Co.
[fol. 1289]		
3	R. G. Bleakney, Jr.	Boston and Maine Railroad
4	Charles E. Ragland	The New York, New Haven and Hartford Railroad Co.
5	Fred Carpi	Pennsylvania Railroad Co.
5-A	R. W. Talbot	Pennsylvania Railroad Co.
5-B	Roy L. Hayes	Excelsior Truck Leasing Co.
	Paul R. Duke Margaret P. Allen (Argument)	Pennsylvania Railroad Co.
6	R. H. Holter	Baltimore and Ohio RR Co.
6-A	C. M. Wrightson	Baltimore and Ohio RR Co.
	C. C. Rettberg, Jr. (Argument)	Baltimore and Ohio RR Co.
7	James H. Suthann	Chesapeake and Ohio Ry. Co.
8	P. W. Johnston, Jr.	Erie-Lackawanna RR Co.
9	Richard S. Tolan	New York, Chicago and St. Louis RR Co.
10	W. B. Ellard	Atlanta & Saint Andrews Bay Railway Co.
10-A	J. W. Plant	Atlantic Coast Line RR Co.
10-B	J. G. Middleton	Atlantic Coast Line RR Co.

V.S. No.	Submitted By	On Behalf Of
10-C	Wade M. Richards	Illinois Central RR Co.
10-D	Thomas E. Conway	Illinois Central RR Co.
10-E	Daraee M. Pedigo	Louisville and Nashville RR Co.
10-F	John A. Parsons	Louisville and Nashville RR Co.
10-G	H. T. Harrell	Seaboard Air Line RR Co.
	(Argument) John W. Adams, Jr. John H. Doeringer James W. Hoeland Richard A. Hollander E. R. Leigh Albert R. Russ, Jr. John F. Smith, Jr.	Railroad Respondents in Southern Freight Assn. Terr. (Except Southern Ry. System and St. Louis-San Francisco Railway Co.)
11	William C. Schafer	Western Maryland Ry. Co.
12	William V. Burke	Southern Railway System
[fol. 1290]		
12-A	Joseph A. Kirkman	Southern Railway System
	(Argument) W. D. McLean James A. Bistline Ray M. VanHook Walter J. Myskowski	Southern Railway System
13-A-1	T. H. Maguire	Executive Committee of the Western Railroad Traffic Association
13-A-2	Herman C. Kroll	Western Railroad Traffic Association
13-A-3	Louis A. Harris	Railroads in the Western District
13-A-4	L. D. McFadden	Western Railroads, Atchison, T. & S.F. Ry. Co., Santa Fe Trail Transp. Co. Santa Fe Transp. Co.

V.S. No.	Submitted By	On Behalf Of
	(Argument) Roland J. Lehman Thormund A. Miller	Railroads in the Western District
13-A-5	Robert Bennett	Western Railroads Chicago, M., St.P., and Pac. R. Co.
13-A-6	Charles D. McGehee	Chicago and Northwestern Ry. Co.
13-A-7	T. P. Wadsworth	Western Pacific RR Co.
	(Argument) William P. Higgins	Western Railroads
13-A-8	J. H. Lyons	Southern Pacific Co.
	(Argument) Charles W. Burkett, Jr. Thormund A. Miller	Western Railroads
13-A-9	J. H. Lyons	Southern Pacific Co.
13-A-10	T. P. Wadsworth	Western Pacific RR Co.
	(Argument) Walter G. Treanor James A. Gillen	Western Railroads
13-A-11	Amos M. Mathews Thormund A. Miller Robert F. Munsell	Western Railroads
13-A-12	E. W. Bergstrom	Great Northern Ry. Co.
13-A-13	J. A. Christiansen	Chicago, Rock Island and Pacific RR Co.
	(Argument) George M. Mariner	Western Railroads

[fol. 1291]

13-B-14	T. M. Caiazza	Atchison, T. & S.F. Ry. Co.

V.S. No.	Submitted By	On Behalf Of
13-B-15	D. A. Baumgartner	Atchison, T. & S.F. Ry. Co.
13-B-16	R. S. Sandgren	Northern Pacific Ry. Co.
13-B-17	Edward F. Grasser	St. Louis-San Franciso Ry. Co.
	(Argument) James A. Gillen Louis A. Harris John E. McCullough Roland J. Lehman	Western Railroads
13-B-18	W. H. Carr	St. Louis Southwestern Ry. Co.
13-B-19	Robert Bennett	Chicago, Milwaukee, St. Paul and Pacific RR Co.
13-B-20	D. P. Valentine	Chicago, Milwaukee, St. Paul and Pacific RR Co.
13-B-21	D. A. Keller	Chicago, Milwaukee, St. Paul and Pacific RR Co.
13-B-22	J. G. Donnelly	Pacific Fruit Express Co.
13-B-23	A. J. Stilling	Union Pacific RR Co.
13-B-24	T. P. Wadsworth	Western Pacific RR Co.
	(Argument) William P. Higgins	Western Railroads
13-B-25	T. P. Wadsworth	Western Pacific RR Co.
13-B-26	Grant S. Allen	Western Pacific RR Co.
13-B-27	T. P. Wadsworth	Western Pacific RR Co.
	(Argument) William P. Higgins	Western Railroads
13-B-28	Charles D. McGehee	Chicago and North Western Ry. Co.

V.S. No.	Submitted By	On Behalf Of
13-B-29	Robert Bennett	Chicago, Milwaukee, St. Paul and Pacific RR Co.
13-B-30	Thor H. Sjostrand	Southern Pacific Company
	(Argument) J. D. Feeney W. A. Gregory C. G. Niebank, Jr. J. A. Wilcox	Western Railroads

[fol. 1292]

14	Philip F. Welsh	Association of American Railroads
15	Morris Forgash	Freight Forwarders Institute Acme Fast Freight, Inc. National Carloading Corp. Pacific & Atlantic Shippers, Inc. Republic Carloading & Distributing Co., Inc. Springmeier Shipping Co., Inc. Universal Carloading & Distributing Co., Inc. Western Carloading Co.
16	Leonard Stelzer	Clipper Carloading Company
17	Martin Whitten	American Freight Forwarding Corp.
18	Norman G. Kleisley	C & M Forwarding Company
19	R. L. Dausend	Sea-Land Service, Inc.
20	Joseph Hodgson, Jr.	Seatrain Lines, Inc.
21	Donald P. Kipp	American Trucking Assns., et al.
21-A	Robert E. Cooper, Jr.	Cooper-Jarrett, Inc.
21-B	Kenneth T. Sheehy	Denver-Chicago Trucking Co., Inc.

V.S. No.	Submitted By	On Behalf Of
	(Argument) Peter T. Beardsley Richard R. Sigmon Harry Jordan F. G. Freund Bryce Rea, Jr. R. Edwin Brady Roland Rice James E. Wilson C. Austin Sutherland Guy H. Postell Harvey A. Welty James E. Haydon Francis P. Desmond Homer S. Carpenter William M. Watt Ferdinand Born George D. Michalson Herman Matthei Robert Gawley Arlus C. Morris LeGrand A. Carlston John S. Fessenden Houston Lynch, Jr.	American Trucking Assns., Inc., et al.
22	William E. Patterson	Local and Short Haul Carriers National Conference
[fol. 1293]		
23	Douglas F. Bettis	Howard Sober, Inc.
24	Gene T. West	Consolidated Freightways Corp., New York Consolidated Freightways Corp. Missouri Consolidated Freightways Corp.
25	Loren Hendix	Midwest Haulers, Inc.

V.S. No.	Submitted By	On Behalf Of
26	R. B. Gotfredson	Transamerican Freight Lines, Inc.
27	R. P. Sohan	Central & Southern Motor Freight Tariff Association, Inc.
28	Robert C. Johnson	Bekins Van Lines Co.
29	Joseph W. Watson	Yale Transport Corp.
30	Harold T. Bangs	Burlington Truck Lines, Inc.
31	Alexander Markowitz	Helm's Express, Inc.
32	M. G. Rein	Eazor Express, Inc.
33	Rainsford A. Brown, Sr.	Dyer O'Hare Hauling Co.
33-A	Rainsford A. Brown, Sr.	Meadows Transfer Co.
33-B	Ray M. Crean	B & L Motor Freight, Inc.
34	L. F. Weisler	Convoy Company
35	Lewis O. Padgett	The Motor Convoy Company
36	T. V. Breitenbeck D. W. Rentzel	National Automobile Transporters Assn., and its individual members, except The Motor Convoy, Inc., National Trucking Co., and Auto Convoy Co.
37	Dudley B. Barrett	General Motors Corporation
38	H. I. Power	The Atlanta Freight Bureau
39	Eugene J. Mielke	Minneapolis Traffic Association
40	Gordon Stedman	Growers and Shippers League of Florida
40-A	James T. Duncan	Florida Fruit and Vegetable Assn.
41	Patrick M. Browne	Associated Shippers Inc.
42	N. W. Putnam	Chicago Shippers Assn., Inc.

V.S. No.	Submitted By	On Behalf Of
[fol. 1294]		
43	Ronald N. Cobert	American Institute for Shippers' Assns., Inc.
44	John B. Hedges	Manufacturers Assn. of Conn., Inc.
45	John B. Hedges	The New England Industrial Traffic League
46	James B. Griffin	Charter Oak Shippers Cooperative Association
46-A	S. W. Earnshaw	Progressive Shippers Coop. Assn.
47	Theo. F. Behler	Xtra, Inc.
48	Charles A. Washer	American Retail Federation
49	H. F. Lacey	National Industrial Traffic League
50	Lawrence Reedquist	John Morrell & Co.
50-A	Harold A. Soules	The Rath Packing Co.
50-B	Robert A. Propf	Geo. A. Hormel & Co.
50-C	George P. Shuler	Oscar Mayer & Co.
	(Argument) Warren H. Wagner	John Morrell & Co. The Rath Packing Co. Geo. A. Hormel & Co. Oscar Mayer & Co.
51	Harold P. Simpsen	Swift & Company
52	John P. Zumwalt	Wilson & Co., Inc.
53	W. E. Lemke	The Cudahy Packing Co.
54	J. E. Bilbo	The Coca-Cola Co.
55	J. H. Gass	Brown Shoe Co.
56	R. K. Keas	Laclede Steel Co.
57	C. C. Hibbard	Hygrade Food Products Corp.
58	W. F. Schnaitmann	Montgomery Ward & Co., Inc.

V.S. No.	Submitted By	On Behalf Of
59	Freda Silver	Silco Products, Inc.
60	William G. Norris	E. F. Hauserman Co.
61	Donald M. Droste	Jervis B. Webb Co.
62	Frederick R. Brennen	Sylvania Electric Products, Inc.
[fol. 1295]		
63	Edward C. Madden	Zenith Radio Corporation
64	E. M. Brinckman	Jewel Tea Co., Inc.
64-A	Rome P. Clinton	Minneapolis-Honywell Regulator Co.
64-B	George C. Hillenbrand	Time, Incorporated
64-C	Hugh F. Lacey	Joseph T. Ryerson & Son, Inc.
64-D	George A. McElroy	Ceco Steel Products Corp.
64-E	Frank L. O'Neill	Minnesota Mining and Manufacturing Co.
65	Charles H. Mayhood	Manufacturing Chemists' Assn., Inc.
66	Kenneth R. Drottar	Dow Chemical Co.
67	Robert Ricker	The Stanley Works, Inc.
68	Beattie H. Hipps	Griffin Transfer Co., Inc.
69	Vincent O'Donnell	Private Carrier Conference, Inc.
70	P. M. Gish	American Radiator & Standard Sanitary Corp.
71	Harry D. Beaver, Jr.	Revere Copper and Brass, Inc.
72	R. A. Cooke	American Newspaper Publishers Assn.
73	Luther M. Child, Jr.	Cuneo Press of New England, Inc.
74	John J. Aiello	Ginn and Company
75	P. J. Johnson	Dennison Manufacturing Co.

V.S. No.	Submitted By	On Behalf Of
76	Gerard C. Crowley	Gillette Safety Razor Co.
77	Sheldon R. Lewis	General Electric Co.
78	William H. Bingham	Trojan Steel Corporation
79	Carlisle Knowlton	Champion Papers, Inc.
80	David Flint	The Singer Manufacturing Co.
81	C. B. Gregory	Gulf Oil Corporation
82	Walter Heisler	McKesson & Robbins, Inc.
83	Robert G. Alcorn	B. T. Babbitt, Inc.
84	Carl P. Greeley	National Distillers and Chemical Corp.
[fol. 1296]		
85	James R. Hammall	Rexall Drug & Chemical Co.
86	Albert J. Sawicki	The AP Parts Corp.
87	William F. Mix	Samson Cordage Works
88	D. W. Crane	Colgate-Palmolive Company
89	George P. Bell, Jr.	Lithonia Lighting, Inc.
90	Robert H. North	International Assn. of Ice Cream Manufacturers
91	W. L. Baird	Western Electric Co., Inc.
92	W. J. DeSana	Champion Spark Plug Company
93	J. R. Thornberry	The American Thread Co., Inc.
94	William H. Ott	National Dairy Products Corp.
95	James E. O'Boyle	Ford Motor Company
96	H. L. Verbridge	Eastman Kodak Company
97	Palmer Bayer	R E A Leasing Corporation
98	Charles W. Snow	Rochester Germicide Co. Rochester Industrial Traffic Managers Council

V.S. No.	Submitted By	On Behalf Of
99	R. R. Hanson	Oxford Chemical Corp.
100	John B. Stern	Alberto-Culver Company
101	David N. Inwood	Best Way of Indiana, Inc.
102	Clyde W. Cart	J. T. S. Brown's Son Co.
103	Harold C. Foreman	Individual
104	R. W. Gruver	Thomas Industries, Inc.
105	Edward J. Derenthal	Radio Corporation of America
106	C. H. Williams	U.S. Dept. of Agriculture
107	Roy G. Woods	United Transports, Inc.
108	Roy G. Woods	Auto Transports, Inc.
109	C. W. Guthrie	Burlington Industries, Inc.
110	D. N. Zirkle	Fruit Growers Express Co.
[fol. 1297]		
111	L. T. Eggering	International Shoe Company
112	Richard E. Knudson	Owens-Illinois Glass Co.
113	Caughey B. Culpepper	National Conference of Non-Profit Shipping Associations, Inc.
114	John W. Williams	Laney & Duke Warehouses, Inc.
115	D. L. Long	Ingersoll-Humphryes Division Borg-Warner Corporation
116	Donald W. Fisher	Railway Labor Executives' Assn.
117	J. B. Phillips	Columbian Rope Company
[fol. 1298]		
118	Harry Bradt	United Shippers Assn., Inc.
119	Gordon Hall	Auto Convoy Co.
120	Joseph J. Hennessy	Berman Leasing Co.

[fol. 1299]

Service Date

February 6, 1963

INTERSTATE COMMERCE COMMISSION
Washington

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

February 1, 1963

Notice

The List of Verified Statements which was served on January 10, 1963, was incomplete in that the following verified statements were inadvertently omitted:

V.S. No.	Submitted By	On Behalf Of
121	F. H. Floyd	Heavy-Specialized Carriers Conf.
122	William J. Skarin	Phalo Plastics Corporation
123	Dan F. Hart	State Senator, 53rd Senatorial District of Georgia

Harold D. McCoy, Secretary.

[fol. 1300] [Service Date—omitted in printing]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders

In the Matter of Petition for Leave to Intervene

Present: Clyde E. Herring and William H. Tucker, Commissioners, to whom the above-entitled matter has been assigned for action thereon.

ORDER ALLOWING DEPARTMENT OF DEFENSE TO INTERVENE AND FILE REPLY STATEMENT—February 28, 1963

Upon consideration of the record in the above-entitled proceeding and petition filed on behalf of the Department of Defense to intervene in such proceeding and to file a verified statement of position and opinion.

It is ordered, That the Department of Defense be, and it is hereby, permitted to intervene and be treated as a party to this proceeding for purposes of filing replies to the verified statements of the other parties only, and to participate in the proceeding thereafter; provided, however, that the permission to intervene herein granted shall not be construed to allow the intervenor to unduly broaden the issues raised in the proceeding. Petition is denied in all other respects.

It is further ordered, That a copy of this order be served upon each of the parties to this proceeding.

Dated at Washington, D. C., this 28th day of February, A. D., 1963.

By the Commission, Commissioners Herring and Tucker.

Harold D. McCoy, Secretary.

[fol. 1301]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY STATEMENT FILED ON BEHALF OF THE BUREAU OF INQUIRY AND COMPLIANCE

[fol. 1302] Rule C-3

This rule, as proposed, reads as follows:

> Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

And this one short rule has elicited more discussion in the verified statements filed than any other proposed rule attached to the Commission Order of October 11th.

* * * * * * *

[fol. 1303] *Rule C-7*

Rule C-7 with emphasis supplied reads as follows:

> [fol. 1304] The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is *permissible* under all-rail TOFC tariff.

* * * * * * *

[fol. 1305] C-7 would, if prescribed by the Commission in its present form, permit a motor or water carrier to become a shipper of property when allegedly transporting said property for the actual shipper. As pointed out by the National Dairy Products, Corp., "Only a regulated freight forwarder is privileged by law to assume the status of a carrier with relation to its patrons, and a shipper with relation to the rail line performing the actual transporta-

tion service, as to the same traffic." We believe this is a correct statement of the law and accordingly we must reaffirm our suggestion that Rule C-7 be amended so as to *prohibit* that which in its present form it permits.

• • • • • • •

[fol. 1306]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY STATEMENT ON BEHALF OF THE SINGER MANUFACTURING COMPANY BY DAVID FLINT

[fol. 1307] Comes now The Singer Manufacturing Company and file their reply to the verified statements filed by those interested and affected parties in response to the Commission's modified order in Ex Parte 230, dated and served January 10, 1963, *In the Matter of Publishing Proposed Rules and Directing Special Procedure.*

• • • • • • •

[fol. 1308] However, after examination of the numerous statements filed in this proceeding, it appears that much confusion exists in the minds of respondents as to the proper interpretations to be placed upon the proposed rules, and as to the intent of those responsible for drafting said rules, as opposed to the intent of the Commission's announced statement of October 9, 1962, referred to above.

• • • • • • •

[fol. 1309] Many of the statements filed on behalf of the motor carriers offer no argument opposing the practices, or divisional monetary arrangements they are currently enjoying under Plan I (substituted service). However, many words have been written opposing the Plan III concept as offered by the railroads to the shippers and freight forwarders.

One example, favoring Plan I but opposing Plan III, was submitted by Cooper-Jarrett, Inc., identified as V.S. No. 21-A. Their statement suggests that Cooper is a great

advocate of co-ordination of rail and motor services and claims to be a "substantial participant in railroad piggyback service as a substitute for the over-the-road operations of Cooper-Jarrett trailers." The Cooper statement elects to define this substituted service as a "co-ordinated service" and is of the opinion that such service "is good and can be of inestimable benefit to the public as well as to the cooperating carriers."

The Cooper statement attacks the inherent low cost mode of transportation (the railroads) and refers to the pricing of Plan III as the establishment of "wholesale rates". The statement continues from that point to imply that such method of pricing causes the destruction of the Cooper rate structure. Cooper does not object to the concept of T.O.F.C. transportation, per se; however, the statement objects rather vigorously to the method of pricing that service when offered to the public.

It appears that Cooper-Jarrett, Inc. is in complete accord with the T.O.F.C. concept as long as the motor carrier is the *only* recipient of this low-cost service. Cooper's position seems to be that these same cost-saving benefits should not be passed on to the public in the form of the current Plan III rates and practices, because to do this will destroy the Cooper rate structure which, even though Cooper is a "substantial participant" in the low-cost Plan I service, is designed for the high cost over-the-road service.

We reply directly to the Cooper-Jarrett, Inc. statement only because it represents the typical position taken by most motor carriers utilizing Plan I T.O.F.C. service and competing with the Plan III concept. It is our firm belief, after digesting the many verified statements submitted in behalf of the motor carriers, that it is their desire to destroy the flexibility of Plan III T.O.F.C. and preserve and foster the advantages they may derive from the substituted service permitted under the Plan I T.O.F.C. arrangements, thereby creating an unfair advantage.

* * * * * * *

[fol. 1310]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY STATEMENT FILED ON BEHALF OF THE DEPARTMENT OF DEFENSE

[fol. 1311] Comes now the Defense Traffic Management Service, an element of the Defense Supply Agency, through its duly authorized Counsel, and on behalf of the Department of Defense respectfully files its reply statement to the verified statements of the participants in this proceeding.

Introduction

The Commission's order dated 28 February 1963, served 5 March 1963, permitted the Department of Defense to intervene and be treated as a party to this proceeding for the purposes of filing replies to the verified statements of other parties only and thereafter to participate in the proceedings. The caveat to the Commission's order was that the permission should not be construed as to allow the intervener to unduly broaden the issues raised in the proceeding. * * *

* * * * * * *

[fol. 1312] The Department of Defense is perhaps the largest single shipper in the United States; as such, it employs the services of all modes of transportation. Its interest in preserving the national defense and retaining military capability through the use of commercial carriers is the overriding consideration of the Defense establishment in making its views known in this proceeding through its reply to the verified statements of the many participants herein. * * *

* * * * * * *

[fol. 1313] Broadly speaking, the position of the Department of Defense in this proceeding is that the problem

areas to be corrected by the proposed rules may be accomplished through the simple expedient of the rail carrier's being required in simple tariff form to set forth the services it proposes in complete detail under each of its proposed plans or under separate proposals and services as all rail or intermodal TOFC service. * * *

* * * * * * *

[fol. 1314] Rule B-4

This rule would restrict a railroad providing TOFC service jointly with motor or water common carriers to receiving no greater compensation or charge for its portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal to terminal rates or charges maintained for like service between the same points. This rule appears ultra vires of the Commission. (*Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 105 (1954), Sec. 216(c) of the Interstate Commerce Act. In this connection discrimination practiced by one carrier against another is nothing more than competition and this is true even when by statute through routes are mandatory. *Crown* v. *MO-ARK,* 27 M.C.C. 746, 44 F. Supp. 547.) Additionally, motor carrier precedent establishes that divisions are a proper subject for negotiations between carriers. Equity alone would suggest that similar negotiations are in order with respect to rail and motor divisions in intermodal TOFC service.

[fol. 1315] Rule B-5

This rule provides that a railroad providing TOFC service jointly with a motor common carrier or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions. Moreover, it requires the rail carriers to ascertain whether the connecting motor or water common carriers hold proper authority to transport the commodities involved. The Defense estab-

lishment opposes the adoption of this rule, prineipally on the basis that there appears no statutory authority or legislative history to support it. (75th Annual Report of the Interstate Commerce Commission, Fiscal Year ended June 30, 1961, Legislative Recommendation #3, p. 186.) Through routes are not required under the Interstate Commerce Act as between rail and motor common carriers (Section 1(4), Section 3(4)), nor are motor carriers required to establish through routes with rail carriers (Section 216(c) of the Interstate Commerce Act). The Department of Defense suggests in this connection that legislative amendment be sought to provide that, in the establishment of TOFC service jointly with any motor or water common carrier, the rail carrier may not unjustly discriminate against or unduly prefer or prejudice motor common carriers and water common carriers desiring to establish similar through route arrangements.

* * * * * * *

[fol. 1316]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED REBUTTAL STATEMENT OF CHARLES D. McGEHEE ON BEHALF OF WESTERN RAILROAD RESPONDENTS

Charles D. McGehee
Assistant Director—Motor Services
Chicago and North Western Railway Company
Chicago 6, Illinois

I am the same Charles D. McGehee who has testified on behalf of Class I railroads in the Western District concerning proposed Rule B-2.

* * * * * * *

[fol. 1317] My attached Exhibit 1 indicates the average cost curves of Rail Form A piggyback versus Highway

Form B straight truck operations from 0 to 1,000 miles, based on most recent 1960 data released by the Cost Finding Section. This again clearly indicates and substantiates that Plan I as known today is much more economical at distances of 210 miles and beyond, than motor carrier highway service alone.

* * * * * * *

[fol. 1318]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXCERPTS FROM VERIFIED REPLY STATEMENT OF J. H. LYONS

My name is J. H. Lyons and I am employed by Southern Pacific Company as Assistant Freight Traffic Manager, Rates and Divisions. My office address is 65 Market Street, San Francisco 5, Calif. I have previously testified in this proceeding on behalf of the Class I railroads of the Western District, and my experience in transportation is set forth at page 75 of the Verified Statements filed by the Western District railroads on December 10, 1962.

* * * * * * *

[fol. 1319] The railroads and the general-commodity motor common carriers have experienced an imbalance in their north-south general-commodity traffic along the Pacific Coast. There is more traffic available for movement northbound than there is southbound, because of the volume of manufactured and miscellaneous commodities from central and southern California factories moving north to points in Oregon and Washington, which has no counterpart in the reverse direction. * * *

* * * * * * *

[fol. 1320]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

EXCERPTS FROM REPLY STATEMENT ON BEHALF OF THE FREIGHT FORWARDERS INSTITUTE AND THE FREIGHT FORWARDING COMPANIES LISTED IN THE APPENDIX HERETO

ARGUMENT

Preliminary Statement

The proposed rules include provisions which the entire Commission has unanimously rejected in the very recent leading case of *Eastern Central Motor Carriers Association* v. *Baltimore & Ohio Railway Co., et al.*, 314 I.C.C. 5 (1961). Those proposed provisions would abolish all of the very popular Plan III and Plan IV trailer-on-flatcar services, nationwide. These are the Plans under which the shippers (including the freight forwarders) now pay the railroads to transport freight-laden or empty equipment which is either owned or leased by the shippers.

The proposed abolition of those Plans III and IV would close off piggyback service from economical use by the forwarders. The proposal would prohibit the nation's [fol. 1321] freight forwarders from continuing to compete effectively with the motor carriers for the volume shipments of over 10,000 pounds.

* * * * * * *

[fol. 1322] The Bureau did not produce a single fact to support its broad assertion that shippers have not purchased piggyback equipment. The Bureau made numerous field investigations and produced numerous exhibits but it did not see fit to adduce any evidence to support this key assumption of fact.

[fol. 1323] We have no way of knowing how extensively commercial shippers may have invested in piggyback equipment, but the Bureau's statement is inaccurate and contrary to fact as applied to freight forwarders. The table hereunder contains pertinent data with respect to the forwarding industry:

FACTS RELATING TO INVESTMENT BY FREIGHT FORWARDERS IN TOFC EQUIPMENT

(As of January 1, 1963)

Equipment Owned		*Investment*
Trailers	1,414	$10,538,189.00
Tractors	226	
Flat Cars	6	
Bogies	70	

Long Term Lease		*Obligations (Annual)*
Flat Cars	342	$ 1,599,366.00
Trailers	298	

Forwarders Represented: Acme Fast Freight, Inc.; International Forwarding Co.; Lifschultz Fast Freight; Lone Star Package Car Co.; Merchants Shippers Assn.; National Carloading Corporation; Republic Carloading & Dist. Co., Inc.; Springmeier Shipping Co., Inc.; Texas Freight Company; Universal Carloading & Dist. Co., Inc.; Western Carloading Company, and Westland Forwarding Co.

* * * * * * *

[fol. 1324] RULE B-4:

This rule provides that a railroad could charge no more for hauling motor carriers' trailers under joint inter-

modal service than it charges shippers under published rates for the same service.

We oppose the rule and suggest, instead, that it be revised to require the filing of divisions to be received by the railroads under joint service with the Commission.

The rule, as framed, raises an interesting question. If the railroads should receive no more for hauling a motor [fol. 1325] carrier's trailers than for hauling a shipper's trailers, why should it receive any less? We do not think it is possible properly to fix an arbitrary ceiling on true divisions any more than it is to fix an arbitrary floor. But we agree there should be some control over divisions, and our suggestion that they be filed and open to public inspection would provide a measure of control.

* * * * * * *

[fol. 1326] RULE C-1:

This rule apparently would eliminate Plans III and IV. We are opposed to the rule for reasons stated in Part I of this Reply.

[fol. 1327]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY ARGUMENT FILED ON BEHALF OF:

American Trucking Associations, Inc.
National Motor Freight Traffic Association, Inc.
Regular Common Carrier Conference
Common Carrier Conference—Irregular Route
National Tank Truck Carriers, Inc.
Central and Southern Motor Freight Tariff Association, Inc.
Central States Motor Freight Bureau
The Eastern Central Motor Carriers Association, Inc.
Eastern Tank Truck Carriers, Inc.
Indiana Motor Rate & Tariff Bureau

Middle Atlantic Conference
Middlewest Motor Freight Bureau
The New England Motor Rate Bureau
Niagara Frontier Tariff Bureau, Inc.
Pacific Inland Tariff Bureau, Inc.
Rocky Mountain Motor Tariff Bureau, Inc.
Southern Motor Carriers Rate Conference
Southwestern Motor Freight Bureau, Inc.
Cooper-Jarrett, Inc.
Eastern Express, Inc.
Eastern Motor Dispatch, Inc.
Kramer Bros. Freight Lines, Inc.

* * * * * * * *

[fol. 1328] * * * While joint intermodal TOFC service is not today as widespread as all-rail TOFC service, or considered as important by the railroads holding out TOFC service,[12] it is a growing service and is the one most readily adaptable to making TOFC transportation available to the thousands of smaller shipping points and off-rail points.

* * * * * * * *

[fol. 1329] The motor carrier position is shared by other vitally affected parties. In particular we refer to the numerous railroads which also believe that joint service is necessary and desirable whether it be established in situations where the participating motor carriers could themselves perform the entire movement or whether it be established where the participating motor carriers can perform only a portion of the movement. For instance, the Sea-[fol. 1330] board Airline Railroad Company presently participates in what is now termed Plan I in conjunction with 55 motor carriers and vigorously supports the continuation of such arrangements. The Atlantic Coast Line Rail-

[12] Commission's prehearing conference document distributed to parties October 9, 1962, Appendix II, General Summary of Piggyback Questionnaires, Sh. 1.

road Company engages in what is termed Plan I and regards this as an important facet of its operations. The Chicago Northwestern Railway Company and the Western Pacific Railroad Company participate in Plan I as does the New York Chicago and St. Louis Railroad Company and the New York, New Haven and Hartford Railroad Company. The Pennsylvania Railroad Company regards Plan I as of particular importance and points out that in 1961 such joint service resulted in the transportation by it of 54,000 trailer loads of freight. In 1962 the Pennsylvania estimates that its participation with motor carriers in Plan I will result in the transportation by it of approximately 80,000 trailer loads of freight.

* * * * * * *

[fol. 1331]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY VERIFIED STATEMENT OF R. W. TALBOT

My name is R. W. Talbot. I am General Manager—Freight Rates of The Pennsylvania Railroad Company. * * *

* * * * * * *

[fol. 1332] * * * The motor carriers' contention appears to be based on the belief that there is no such thing as a shipper who wishes to provide his own trailer and perform his own drayage in the terminal areas (See V.S. No. 21-A). On the Pennsylvania Railroad, we handle many such shipments every day.

One example of this fact can be found in a study which was introduced in Docket 33133 by a witness for the Bureau of Inquiry. The study was introduced as Exhibit No. 49 and I have had that Exhibit reproduced and it is attached to this Reply Statement as my Exhibit RWT-1. That study indicates that of the 274 Plan III trailers received at

[fol. 1333] Kearny during the week of January 14, 1962, 129 of those trailers carried the designation P.O., "Privately Owned," namely, neither the Railroad nor any subsidiary or affiliate of any Railroad had anything to do with the provision of those trailers. It can also be noted from the exhibit that as to certain trailers under the column "Inbound Lease" there is the designation "None found." Subsequent investigation has disclosed that of these trailers 10 were actually privately owned trailers, that is, no lease was found on those trailers because no Railroad or affiliate was in any way involved in the leasing of the trailers. I am referring to the following trailers shown on that exhibit at the following places: Trailer TC-207 in Shipment 1 on Sheet 1; Trailer GFT-40460 shown in Shipment 6, Sheet 1; Trailer GFT-40248 shown in Shipment 8 on Sheet 3; Trailers GFT-40284, GFT-40263, both shown in Shipment 12 on Sheet 6; Trailer 47047 shown in Shipment 3, Sheet 8; Trailers GFT-40285, GFT-40395, GFT-40275 and GFT-40377 shown in Shipments 7 and 8 on Sheet 8.

Thus, it can be seen that of the Plan III trailers covered by Witness Rinke's study 139 of the 274 or approximately 51% were trailers which the shippers obtained from private sources, i.e., neither a railroad nor any affiliate thereof was involved in leasing the trailers to the shipper.

* * * * * * *

[fol. 1334]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY VERIFIED STATEMENT OF H. O. BROWN

My name is H. O. Brown. I am an Assistant Cost Analyst for The Pennsylvania Railroad Company and my office is located at Room 1238 Transportation Center, Philadelphia 4, Pa. * * *

Attached to my statement is Exhibit HOB-1, which shows the summary of the computation of a ratio of empty to loaded trailer miles on the movements covered by Exhibit No. 49 of Witness Rinke, presented to the Commission in Docket 33133, et al. That exhibit included a study of all Plan III trailers received at the P.R.R. South Kearny, N. J. TrucTrain Terminal in the week of January 14-20, 1962. • • •

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EXHIBIT NO. HOB-1 TO REPLY
VERIFIED STATEMENT OF H. O. BROWN

Summary Of Witness Rinke's Exhibit No. 49
Presented in Docket No. 33133, Et Al.
P.R.R. South Kearny, N.J. T.O.F.C. Terminal
Trailer Miles - Jan. 14 to 20, 1962

Sheet Number	Inbound Loaded	Outbound Loaded	Total Loaded	Outbound Empty	Grand Total
1	29,512	20,880	50,392	917	51,309
2	33,630	12,799	46,429	1,140	47,569
3	28,508	17,344	45,852	-	45,852
4	19,996	7,375	27,371	5,787	33,158
5	31,014	4,435	35,449	5,907	41,356
6	27,296	11,271	38,567	8,034	46,601
7	28,186	14,934	43,120	3,317	46,437
8	26,698	14,990	41,688	1,490	43,178
9	10,740	6,252	16,992	-	16,992
Total	235,580	110,280	345,860	26,592	372,452

Ratio: Empty to Loaded Trailer Miles 7.69%

Sheet Numbers refer to Witness Rinke's Exhibit No. 49.

[fol. 1336]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY VERIFIED STATEMENT OF ROY L. MILBOURNE

My name is Roy L. Milbourne. I am Director of Flexi-Van Sales and Service of The New York Central Railroad Company. I submitted Verified Statement No. 2-A in this proceeding on December 10, 1962.

In the course of this statement, I shall refer to certain matters presented by motor carrier interests, by the Bureau of Inquiry, and by certain shippers.

In my earlier statement, I expressed my concern that the proposed rules would bring an abrupt end to existing Plan III and Plan IV operations. The motor carriers, the Bureau of Inquiry, and the shipping public have confirmed my apprehension in that respect, all parties expressly agreeing that just such a result will follow.

[fol. 1337]

1. ATA

The verified statements filed on behalf of the ATA are general in nature. Its argument, however, states that ATA members have here "been able to subordinate their individual interests and to present to the Commission virtually a united front in favor of regulation for the benefit of the public at large . . ." This is questionable.

The long-line carriers, of course, embrace Plan I. On the other hand, the Local and Short Haul Carriers Conference objects to Plan I where the motor carrier performs only pickup and delivery within exempt zones at origin and destination.

Transamerican Freight Lines suggests that joint Plan V operations be prohibited, a view apparently shared by other long-haul motor carriers, as demonstrated recently by Eastern Central Motor Carriers Association.

For some time, the New York Central had been a participating carrier in the tariffs of Eastern Central for the purpose of concurring in joint rail-motor rates proposed by certain members of that Association which operated primarily in short-haul service beyond rail terminals. On October 31, 1962, Eastern Central filed with this Commission a "Petition For Approval of Bylaw Amendments" * in which the principal change sought would restrict the [fol. 1338] short-haul members to establishing new or changed joint rates in the Eastern Central tariffs only when concurred in by a long-haul motor carrier. After such rate was established, of course, the railroad was free to join in it as a concurring carrier.

Upon objections filed by the New York Central, the Baltimore & Ohio, and other, the proposed amendments were withdrawn, at least temporarily.

I do not attempt to discuss any legal questions involved, but the spirit of Eastern Central's proposal was all too plain. It meant that any Plan V rates published henceforth by Eastern Central for its members would be only those approved by the long-haul motor lines, and since these carriers have uniformly resisted Plan II and Plan V rates if published on any basis other than that presently in effect for all-highway movement, the obvious end was to freeze Plan V coordinated service to the existing all-highway rates.

* * * * * * *

[fol. 1339]

A. Leasing of Trailers by Common Carriers

A substantial portion of the evidence presented by the Bureau is directed to the well-known fact that certain railroads, either directly or through subsidiaries, trip-lease trailers to shippers for use in Plan III service and to the lesser-known fact that a few railroads trip-lease trailers

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* Eastern Central Section 5a Application No. 48.

to motor carriers for use in Plan I service. While there is no allegation by the Bureau that any violation of the Act has resulted, it nevertheless complains of a certain lack of "formality" which, coupled with the supposition that the railroads *might* lease to one shipper and not to another, leads the Bureau to favor proposed Rule C.3. The Bureau also disparages trip-leasing in that it has not ended *all* empty mileage (V.S. No. 1, pps. 6-7).

The Bureau is apparently concerned neither with efficiency of railroad operations nor with the particular services demanded by the shipping public. In the first place, the formalities of executing a lease at a particular time and place should be streamlined wherever possible. The only truly important matter is the collection of the charges. [fol. 1340] Secondly, the reduction in empty mileage achieved by trip-leasing TOFC equipment was specifically recognized by the Commission itself in I.C.C. 32533, and the Bureau's complaint that it has not eliminated *all* empty mileage is singularly unimportant.

While certain shippers have procured their own Flexi-Van equipment, most of the Flexi-Van Plan III traffic moves in vans leased from the New York Central Transport Company. The shipper first executes a "master lease", a copy of which is attached hereto as my Exhibit No. (RLM-R1) —. Having executed this lease, the shipper is entitled to procure vans from Transport at any given location, at which time the shipper executes the document reproduced and attached hereto as my Exhibit No. (RLM-R2) —. The time at which the van is returned to the Flexi-Van site at destination and the condition thereof are noted at the conclusion of the service. This provides the basis for billing charges.

All shippers are assessed the same charges per-trip and for detention, depending upon the type of equipment. For example, the charge for a standard dry van is $20 per trip between points on line, plus $10 per day for detention at origin and destination. The per-trip charge reflects the

second morning service generally offered on Flexi-Van traffic. Where the lease extends to points on another railroad beyond the lines of the Central, another $10 is added to the trip-lease charge for each additional schedule day. [fol. 1341] If the schedule time is four days, the per-trip charge would be $40 per van, plus the usual detention charges.

Since the van, whether leased or owned, is provided by the shipper, no claims are honored by the railroad for defects in the equipment. The shipper is also responsible for any damage occurring beyond the Flexi-Van sites at origin and destination.

It is my understanding that similar arrangements are in effect on all other railroads, and I know of no instances of discrimination among shippers, either as to price or availability of equipment.

The Bureau refers to trip-leasing by shippers as a device which enables shippers to avoid the burden and expense of ownership of equipment. This, it seems to me, should be a commendation rather than a criticism. The use of leased equipment has expanded enormously in private industry, and I see no reason why there should not be a similar trend in transportation. Specialized types of equipment have, of course, been leased to shippers by railroad subsidiaries such as FGE, PFE and MDT for many years, and the shippers utilizing these services also avoid the "burden" of owning their own equipment.

The Bureau also supports Rule C.3 in that it would prevent the railroad from leasing trailers *from* a shipper, terming the latter as "an obvious means of granting a concession." This apparently has reference to the fact that [fol. 1342] the New York Central Transport Company leases trailers from Tynan Company, and that at any given time, some of those trailers are moved empty. Here again the Bureau has simply ignored the economics of the matter.

In general operations, the New York Central Transport Company supplies the New York Central Railroad with the

vans for Flexi-Van service. Obviously, these vans entail a substantial capital investment. By making use of available Tynan vans, however, additional transportation facilities are created in a mutually convenient arrangement, without any necessity for additional capital investment by either the railroad or Transport. Of course, certain of these vans, as well as railroad vans, become surplus during any given period at any given point on line. It is extremely rare, of course, to find a perfect balance of inbound and outbound equipment at any terminal. However, the verified statement of Mr. French shows that, under normal conditions over a representative period, good use is being made of the Tynan vans without any additional expense on the part of the railroad. The net result, of course, is no different than that which would obtain in any instance where vans are trip-leased and the shipper's responsibility terminated at destination.

Both the Bureau and the motor carriers are well aware that the Tynan traffic now being handled by the railroads in Plan III service formerly moved over the highway in private carriage. It still moves over the highway in WTL [fol. 1343] Territory, and the vans are received from and returned to Tynan at Chicago. Testimony to that effect was given by Mr. W. H. Thickett, Vice President of Transport, in Docket 33133, but that particular portion of Mr. Thickett's testimony was not reproduced by the ATA. For convenience, it has been reproduced in Eastern Railroad Counsel's Exhibit No. 1, p. 189. The entire transaction simply demonstrates that, given a reasonable degree of flexibility, railroads and shippers can and will coordinate through the use of ordinary business methods to reduce private transportation.

It should be noted that Proposed Rule C.3 would eliminate all leasing, not just trip-leasing. On the other hand, the Bureau would permit railroads to continue to lease trailers to motor common carriers for Plan I service. I am unable to distinguish anything in the Bureau's presentation which leads it to conclude that the motor carriers

are entitled to more favorable conditions than the shipping public.

Both the Bureau and the ATA ask for an even more restrictive Rule C.1 than that proposed by the Commission. Under the suggested modification, the railroads would not only have to provide all equipment, but would be limited to publishing *either* all-inclusive rates or terminal-to-terminal rates, but not both. Why this should be the standard for railroads only, neither proponent bothers to state. The motor carriers themselves publish all-inclusive rates, as well as rates applying only on shipper-furnished equip- [fol. 1344] ment. As an example, I have reproduced and attached hereto, as my Exhibit (RLM-R3) —, excerpts from Supplements 18 and 24 to Ryder Tank Line Tariff No. 1B, MF I.C.C. No. 12, which show specific rates published on Anhydrous Hydrogen Chloride and Synthetic Resins in shipper-owned equipment. The language appearing in Note 3 to Item 830 thereof:

> "charges apply only when shipper furnishes the bulk container equipment and only on shipments loaded by shipper and unloaded by consignee."

is highly similar to the language found in the railroad Plan III tariffs.

The water carriers have similar rates in effect as shown by Mississippi Valley Barge Line Freight Tariff 25-I, I.C.C. 110. Certain items in that tariff, such as Nos. 5580 and 7470, show rates under columns "A" and "C". These terms are defined as follows in Item 10 of Freight Tariff No. 110 as follows:

> "(b) All rates in this Tariff shown under columns headed by letters 'A' and 'C' indicate application of such rates as follows:
>
> "Column 'A' Rates—apply on shipments moving in barges furnished by Carrier, including full common carrier liability. (See Item 35)

"Column 'C' Rates—apply on shipments moving in barges furnished by Customer, including only limited liability. (See Items 35, 510, 515 and 520)"

It should also be noted that the motor carrier and barge line rates above referred to also provide for the empty return of that equipment. Thus, the effect of the railroad trip-lease is simply accomplished by a different method of [fol. 1345] tariff publication. Obviously, the trailer or barge equipment referred to in these tariffs could be either owned or leased by the shipper.

* * * * * * *

[fol. 1346]

E. Piggyback Operations of Leasing Companies

The Bureau here notes that several private organizations, apparently non-railroad affiliated, are engaged in leasing trailers and cars to shippers for use in Plan III and Plan IV service (V.S. No. 1, pps. 16-20). The Bureau acknowledges, moreover, that proposed Rule C.3 would not apply to these outside companies, but states that the situation would be cured by proposed Rule C.1 which provides that all equipment in TOFC service must be provided by the railroad to begin with.

In my initial statement, I detailed my objections to Proposed Rules C.1 and C.3 (V.S. No. 2-A, pps. 10-11, 16-24). These objections had as their primary base the indisputable conclusion that these particular rules were intended to eliminate Plans III and IV. The Bureau here expressly admits that such would be the effect (V.S. No. 1, p. 19) and it would serve no purpose to repeat those matters here. Another matter has arisen, however, in which the New York Central has a particularly vital interest.

A number of parties, both railroads and shippers, while objecting to Proposed Rules C.1 and C.3, suggest an alternative rule requiring that all trip-leasing charges be published in tariff form with the Commission. This alternative would not be acceptable to the New York Central because

of ownership problems and the particular hardware in use. [fol. 1347] The New York Central owns the Flexi-Van cars, and Transport, its wholly-owned subsidiary, owns the vans. This is a markedly different situation from that obtaining on other roads where a substantial portion of the equipment is either rented from private sources or secured on a rental basis from some type of pool. The disparity is heightened by the specialized type of equipment necessary for Flexi-Van operation.

The outside companies to which the Bureau has referred would, in any event, lease primarily standard highway equipment and cars. When a shipper leases standard equipment from an outside source, however, the only sure result is that the traffic will move over some railroad other than the New York Central.

The disadvantage under which the New York Central would be placed, vis-a-vis outside leasing companies, if Transport's leasing charges were required to be published in tariffs, is obvious. The outside companies could lease standard equipment to any shipper at whatever charge they thought economical under the circumstances. Efforts to meet that competition would require tariff publication on 30 days' notice, subject to protests, suspensions, investigations, etc. Thus, by requiring publication, the Commission, insofar as the New York Central is concerned, would actually be setting up a competitive situation on a small scale similar to that faced by the regulated carriers today [fol. 1348] in their competition for exempt, non-regulated traffic, a situation which has progressed so far that legislation has been introduced in the Congress to remove regulation of certain traffic from the Commission's authority.

The instances of leasing by outside parties detailed by the Bureau are by no means complete. Several have entered an appearance in this proceeding. As an additional example, I have here had reproduced, as my Exhibit No. (RLM-R4) ——, the testimony given in March, 1962, in I. & S. 7730 by the witness for a large motor carrier. This carrier has two leasing subsidiaries, Rentar Car Lines And Leasing Company and North American Emery Corpora-

tion. Rentar is a company engaged in the leasing of trucks, tractors and trailer equipment to private shippers, to motor carriers, and to railroads. North American Emery leases flat cars and refrigerated trailers to railroads and to private shippers. Thus, the New York Central, once having published leasing charges, would not only be at the mercy of outside non-carrier affiliated companies, but would be forced to contend with non-regulated leasing affiliates of the motor carriers themselves.

The verified statements of the shipping public, as well as those of the railroads, make it exceedingly clear that the continuation of trip leasing is essential to the continued success of Plans III and IV. These are the purchasers of the service, and their testimony cannot be disregarded. A substitute requirement that the charges for trip leasing by [fol. 1349] railroads or their subsidiaries be published, however, will place the New York Central at a substantial and wholly unnecessary disadvantage.

I have already referred to the master lease which is attached hereto as my Exhibit No. (RLM-R1) —— as the standard form. The New York Central has no objection to disclosing these terms and conditions to the Commission, and would be perfectly willing to observe any requirement that copies of the leases should be filed with the Commission. This would seem to satisfy even the Bureau, for the Commission would have the means at hand to determine whether there was, in fact, any discrimination by a railroad between shippers. Accordingly, while the shipping public seems wholly satisfied with matters as they are, I suggest, as an alternative to publication, a requirement that copies of contracts and/or a list of charges for all accessorial services be simply filed with the Commission for information purposes.

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[fol. 1350]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY VERIFIED STATEMENT OF WESLEY F. FRENCH

My name is Wesley F. French. I am Director of Costs for the New York Central System with offices at 466 Lexington Avenue, New York 17, N.Y.

* * * * * * *

[fol. 1351] In my studies prepared and presented in I.C.C. 33133, I used an empty return ratio for Flexi-Van service of 10.4 percent. This represented the actual experience in Flexi-Van service on the New York Central for the entire year 1961. * * *

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[fol. 1352] I know of no other type of railroad equipment which has provided such a high degree of utilization, and this highly efficient performance is, in my opinion, primarily due to the flexibility and convenience which this equipment offers to the shipping public. * * *

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[fol. 1353]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY VERIFIED STATEMENT OF PAUL W. JOHNSTON, JR.

My name is Paul W. Johnston, Jr. I am Freight Traffic Manager of Erie-Lackanna Railroad Company. Piggyback sales and service are under my jurisdiction. I submitted Verified Statement No. 8 in this proceeding on December 10, 1962.

* * * * * * *

[fol. 1354] Plan I

The elimination of Plan I, as suggested in a few statements (V.S. Nos. 15, 16 and 31), would mean that the only coordinated rail-motor joint service that could be accomplished would be by use of Plan V. To restrict coordinated joint motor-rail service to Plan V service only would very seriously affect the development of motor-rail coordination. It must be remembered that in Plan I movements the shipments move under a motor carrier bill of lading and the rail carrier has no knowledge as to who the shipper is or what commodity is being carried.[1] Thus, a motor carrier can join in coordinated service with a rail carrier without disclosing the shipper or consignee, origin or destination of the motor carrier traffic. While this aspect of Plan I is important, of equal importance is the fact that under the substitution principle the flow of motor carrier traffic can be so directed as to integrate the best of highway and rail transportation from a purely operating standpoint.

[fol. 1355] It is not my purpose to argue that Plan I is the only form of intermodal transportation which benefits both the carriers and the public, but rather to point out that there are distinctive differences between Plan I and Plan V, and that to deny either is to severely limit the flexibility of intermodal service. Plan I is a voluntary coordination of services between the motor carriers and the railroads on traffic which moves on motor carrier bills of lading, and on which the shipper may require that all highway service be given. It is the duty of the carriers party to these arrangements to establish just and reasonable practices in connection therewith, and just, reasonable and equitable divisions thereof as between carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. I have been unable to locate in any of the verified statements of either shippers or carriers parties to this proceeding, any facts which in-

[1] Certain articles, such as articles of extraordinary value, livestock, explosives and mail are excluded, and liability is limited on numerous restricted articles.

dicate the existence of any inequitable divisions or practices between the participating parties in Plan I service. To make the distinction between Plan I and Plan V in another way, Plan V is a joint arrangement between motor carrier and railroad in which there is a joint movement specifically requested by the shipper, whereas Plan I is a joint arrangement between motor carrier and railroad in which the shipper retains an option to require all highway service. Both arrangements are published, the rates are filed with the commission, and in both the shipper has the tariff right to choose, the only difference being that one is a positive election and the other is negative. The question of division of charges between carriers is not at issue in Plan V and neither should it be at issue in Plan I.

The elimination of Plan I would be a serious blow to the Erie-Lackawanna because, as I stated in my Verified Statement No. 8, approximately one-third of our entire TOFC revenue is derived from our Plan I operations. This is an important segment of our traffic and one we cannot [fol. 1356] afford to lose. Moreover, this traffic is becoming increasingly important, as is evident from the fact that the total number of trailers handled in all our piggyback service has increased from over 74,000 in 1961, to over 90,000 in 1962.

The fact that the Erie-Lackawanna Railroad has Plan I arrangements with thirty-five motor carriers shows how much coordinated motor-rail service can be accomplished when the motor carrier is not required to reveal its traffic sources. Furthermore, the Erie-Lackawanna has not refused to enter into a Plan I arrangement with any motor carrier who had the required authority to operate between the points involved, and who was willing to agree to the same terms and on the same basis as the Plan I arrangements we have with all other motor carriers. The only factor that is different is the divisional factor, which, of course, varies according to distance. The divisional factor is the same, of course, for all motor carriers using Plan I between the same points.

Objection is made in Verified Statement No. 31 to Plan I on the ground that shippers are entitled to know just how their shipments will move, and that they will move in accordance with the shippers' statutory right to route their shipments. This objection has no merit whatsoever once the facts are understood. The fact is that no Plan I arrangement deprives the shipper of his right to route. Specific provision is made in tariffs on file with the Interstate Commerce Commission whereby the motor carrier cannot move a shipment in Plan I if the shipper directs that the shipment is to move by the all-motor route.[2] The fact that Plan I has developed to the point where it constitutes one-third of the Erie-Lackawanna's total TOFC traffic indicates [fol. 1357] clearly that the shipping public has no objection to this type of coordinated service. Significantly, the shippers have made no objection to Plan I service.

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[fol. 1358]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Counsel's Exhibit No. 1 to Reply Statement of the Eastern Railroads (Excerpts)

* * * * * * *

[fol. 1359]

EXTRACT OF TESTIMONY OF R. W. TALBOT, GENERAL MANAGER —FREIGHT RATES, PENNSYLVANIA RAILROAD COMPANY, IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR—BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

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[2] For example, Item 10, Paragraph (A) of Eastern Central Motor Carriers Association Tariff 34-X, MF-ICC A-221, provides as follows:

"Unless the shipper directs that the rail carrier service shall not be performed the motor carriers parties hereto may, at their option, substitute rail service between the points and via the

[fol. 1360] * * * My Exhibit No. 2 is a tabulation of data taken from a Commission study entitled "Inter-City Ton-Miles, 1939-1954", published by the Bureau of Transport Economics and Statistics as its Statement No. 568. This data has been augmented by similar data for the years 1955 through 1960 taken from the Commission's Annual Reports Nos. 71 to 75.

This exhibit shows for the period 1939 to 1960, inclusive, the total intercity ton-miles handled by each of the various kinds of transportation. It clearly demonstrates the continuing and rapid decline of the rail carrier participation in the total intercity commerce of the nation during the postwar period and the sharp increase in the total share handled by highway transportation. For example, the railroads' position steadily declined from 66.6% in 1946 to a low of 43.5% in 1960. On the other hand, motor vehicle transportation steadily increased its participation from 9.1% in 1946 to an all-time high of 22.5% in 1960. During this period, the intercity ton-miles handled by highway increased approximately 275 percent. Expressed another way, the motor vehicle ton-miles represented only 13.6% of the rail ton-miles in 1946, whereas this ratio was increased to 51.7% in 1960.

[fol. 1361] This exhibit merely substantiates what is already well-known to those having a knowledge of general transportation conditions. However, this exhibit, by itself, does not put its finger on the basic railroad problem. This problem is the drastic diversion of the higher-rated heavier density traffic from rail to highway service. This diversion has been almost complete on the shorter hauls, has reached drastic proportions on the hauls of intermediate distances and is now extending to transcontinental movements which reach across the country. This diverted traffic formerly constituted the life-blood of the railroad industry, as it, in

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rail carriers shown herein, for their actually available service via highways for which such motor carriers have lawful operating rights as common carriers via motor vehicle."

large measure, produced the net revenues which enabled the railroads to handle many articles of commerce, primarily raw materials, at marginal and submarginal earnings. This is the core of the present weak financial position of most of the Eastern Railroads.

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[fol. 1362] Q. Why cannot box car service be modernized so as to fully meet highway competition?

A. A complete answer to this question would require an exhaustive discussion of the subject. However, highway transportation possesses flexibility to a degree which can never be matched by conventional rail service and this more flexible service, quite frankly, has many attractions to the shipping public. Additionally, there are many aspects of highway service which reduce the overall cost of transportation to the user, wholly apart from any difference which may exist in the actual motor carrier and rail charges. Another factor of particular importance in the present era of inventory control is that highway service lends itself more readily to the expedited movement of freight in smaller quantities. Fundamentally, box car service, even under favorable circumstances, can only be made fully competitive with highway service in instances where the receivers are in position to purchase in relatively large quantities. In some such instances, the railroads are in position to provide a rate incentive which is in sufficient amount to overcome the additional cost of using rail service. However, the flexibility of highway transportation frequently makes it impossible to compete regardless of incentive rates.

• • • • • • •

[fol. 1363] Q. Will you please describe the development of piggyback service on the Pennsylvania Railroad since 1954?

A. As previously stated, the Plan II type of piggyback [fol. 1364] service was originally established July 12, 1954, between a number of local points on the Pennsylvania Rail-

road—this represented the initial postwar piggyback venture on the Pennsylvania Railroad. We have learned that this type of piggyback service is generally not profitable on the shorter hauls and that the terminal trucking expense must be closely controlled in order not to get out of hand. We have likewise learned that loaded movements must be reasonably balanced in order to avoid excessive movement of empty trailers. We have also learned that this type of service is not fully competitive with motor carrier service, as it lacks the same degree of flexibility in a number of respects. Its traffic potential appears to be largely limited to industries located within reasonable local trucking distance of the terminal ramps.

In line with its desire to explore fully the potential of the piggyback field, the Pennsylvania Railroad established the Plan I type of service in March, 1955. The Plan I service seemed to offer the most ready means of quickly building up a volume of piggyback traffic and thus provide more intensive utilization of the terminal facilities and special flat car equipment which had been made available for the handling of highway trailers. Greater volume also was required to warrant the continuation of new train schedules which had been established for the movement of trailers.

[fol. 1365] Q. What considerations led to the establishment of the Plan III service in 1958?

A. As previously explained, Plan III is a related type of piggyback service which provides for the line-haul transportation of shippers' trailers between ramps located at designated rail termini. Various considerations led to the establishment of this service and they may be summarized substantially as follows:

1. A desire to experiment with all promising methods of coordinating rail and highway transportation—the railroad industry has been severely criticized for years for their seeming unwillingness to adopt new methods.

2. A desire to round out their experience in the piggyback field which had been gained through the earlier introduction of Plan I and Plan II services.

3. The realization that neither Plan I nor Plan II had been successful in halting the continuing erosion of the more desirable traffic to highway service.

4. The realization that the Plan II service would not be a wholly effective means of meeting motor truck competition, due to its lack of the same degree of flexibility in a number of respects.

5. The insistent demand by the shipping public that the railroads directly provide for the line-haul transportation of shippers' trailers at charges comparable to those as- [fol. 1366] sessed for the similar transportation of motor carrier trailers under Plan I.

6. The definite realization that neither Plan I nor Plan II service provided a medium of stemming the rapidly growing diversion of the more desirable types of traffic to private transportation, that is, highway movement in motor vehicles directly operated by private shippers.

Q. Which of the foregoing considerations had the greatest influence in the decision to establish the Plan III service by the Pennsylvania Railroad?

A. The last enumerated consideration, that is, the necessity of curbing the growth of private highway transportation. It can be stated almost without dissent that all segments of the for-hire transportation industry regard the growth of private transportation as probably the single most important threat to their stability and long range solvency. In its last Annual Report, the Commission called the loss of traffic to private and unregulated carriers "the principal problem for all public transportation." The growth of private transportation has a particularly vicious impact upon the railroads in that it deprives them of the most desirable traffic movements. Where established, it means the loss of substantial regular movements of finished

products as well as movements of raw materials which are handled as return loads in the reverse direction. The rail-
[fol. 1367] roads consider it imperative to their long run survival that a service be established which will not only halt this trend but restore at least some of this traffic to rail service.

Mr. Duke: The next exhibit is a one-page exhibit entitled "Comparison of Ton-Miles via Private, ICC Authorized, and other for-hire carriers, on Main Rural Roads," etcetera.

I would like to have that marked for identification as Exhibit 3, Mr. Examiner.

Exam. Ries: It will be so marked.

(Respondent's Exhibit No. 3, Witness Talbot, was marked for identification.)

By Mr. Duke:

Q. Do you have any data which indicates the growth and extent of private highway transportation?

A. Yes. My Exhibit No. 3 which was also submitted as part of my testimony in I.C.C. Docket 32533 is a reproduction of Table 3 of Study by the Commission's Bureau of Transport Economics and Statistics entitled "Truck Traffic On Main Rural Roads, 1955." This provides a comparison for selected years of the ton-miles of motor truck traffic on main rural roads, separately, for—

1. Private carriers.

2. I.C.C. authorized carriers.

3. Other for-hire carriers, such as exempt commodity haulers.

It shows the tremendous growth which has taken place
[fol. 1368] in both the "private" and "for-hire" categories during the period 1936 to 1955, the total ton-miles in both categories having more than quintupled.

A comparison of the last two survey years, 1955 with 1950, shows the most recent trend. During this five-year

interval, private carriage increased more than 19 billion ton-miles or 37% as compared with an increase of about 14 billion ton-miles or 20% in the total for-hire carriage. While similar data is not available for the period since 1955, we are convinced that this growth of private transportation is continuing and probably accelerating.

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[fol. 1369] By Mr. Duke:

Q. Bringing this situation up-to-date, does the level of the Plan I charges continue less than the comparable Plan III charges involved in this proceeding?

A. Yes. My Exhibit No. 4 shows a comparison of Plan I charges for representative local movements on the Pennsylvania Railroad and the present Plan III charges for the same movements. This exhibit shows the comparable rail line-haul charges on shipments consisting of two trailers for total lading weights of 50,000, 60,000 and 70,000 pounds, and the same charges expressed in cents per 100 [fol. 1370] lbs. The Plan I charges are in every instance materially lower than the corresponding Plan III charges.

Q. What has been the trend in the Plan I traffic handled by the Pennsylvania Railroad since 1958?

A. As previously explained in I.C.C. Docket 32533, the Plan I volume handled by the Pennsylvania Railroad, since its inception, has been characterized by sharp peaks and valleys which has made it difficult to properly accommodate the traffic from the standpoint of service and equipment. Nevertheless, the volume of Plan I traffic handled by the Pennsylvania has shown substantial growth since 1958, as shown by the total number of trailers handled in each succeeding year—

1958—32,363
1959—42,736
1960—36,836
1961—54,669

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COMPARISON OF TON-MILES VIA PRIVATE, I. C. C. AUTHORIZED, AND OTHER FOR-HIRE CARRIERS, ON MAIN RURAL ROADS IN 1936, 1944, 1949, 1950, and 1955

LINE No.	Item	Total Ton-Miles	Ton-Miles By Private Carrier 1/	Ton-Miles By For-Hire Carriers 1/		
				Total	I. C. C. Authorized Carriers	Other For-Hire Carriers
	Col. (A)	(B)	(C)	(D)	(E)	(F)
	Amounts (Billions):					
1	1936	28.00	16.09	11.91	N.A.	N.A.
2	1944	44.84	19.95	24.89	N.A.	N.A.
3	1949	89.66	43.50	46.16	N.A.	N.A.
4	1950	121.09	52.51	68.58	N.A.	N.A.
5	1955	154.05	71.75	82.30	60.30	22.00
	Percent Of Total:					
6	1936	100.0	57.5	42.5	--	--
7	1944	100.0	44.5	55.5	--	--
8	1949	100.0	48.5	51.5	--	--
9	1950	100.0	43.4	56.6	--	--
10	1955	100.0	46.6	53.4	39.1	14.3
	Percent of 1936:					
11	1936	100.0	100.0	100.0	--	--
12	1944	160.1	124.0	209.0	--	--
13	1949	320.2	270.4	387.6	--	--
14	1950	432.5	326.4	575.8	--	--
15	1955	550.1	445.9	691.0	--	--
	Percent Of Increase Over Previous Survey Year:					
16	1944 Over 1936	60.1	24.0	109.0	--	--
17	1949 Over 1944	100.0	118.0	85.5	--	--
18	1950 Over 1949	35.1	20.8	48.4	--	--
19	1955 Over 1950	27.2	36.5	20.1	--	--

1/ Percentages computed at time of survey have been applied to the revised estimates of total ton-miles on main rural roads for 1944 and 1949 to secure figures shown.

N.A. - Not Available.

Source: "Truck Traffic on Main Rural Roads, 1955", Statement No. 5710, (Table 3), issued by Bureau of Transport Economics and Statistics, Interstate Commerce Commission.

[fol. 1371]

EXHIBIT No. 3 TO TESTIMONY OF R. W. TALBOT

[fol. 1372]

EXTRACT OF TESTIMONY OF DELMER H. ADAMS, PRODUCTION CONTROL AND TRAFFIC MANAGER OF R. P. SCHERER CORPORATION, IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR—BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

[fol. 1373] (Mr. Adams) The shipping operations of this company have been enhanced through the use of the Plan III piggy-back, which it finds most convenient and satisfactory. In no way has it been used for the purpose of taking freight that otherwise would move in rail box cars. R. P. Scherer Corporation is therefore vitally concerned and interested in the continuing in effect of the Plan III TOFC rates.

This company would far prefer to use this TOFC plan than to engage in private carriage. The cancellation of the plan, however, would most certainly compel a return to private carriage as a substitute. Accordingly, it urges this Commission to find these rates just and reasonable and otherwise lawful.

[fol. 1374]

EXTRACT OF TESTIMONY OF IRBY L. O'BRIEN, GENERAL TRAFFIC MANAGER OF MONSANTO CHEMICAL COMPANY, IN DOCKET NO. 33133. ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR—BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

[fol. 1375] (Mr. O'Brien) If the present Plan III arrangements and rates are continued and additional arrangements established where necessary, we do not intend to progress private operation. We do not want to go into the transportation business. Our primary business is the manufacture and sale of chemicals. We prefer to continue investing our capital in that primary business.

If the present Plan III arrangement is not continued and we are forced into a private motor carrier operation, both

the railroads and the motor carriers will lose tonnages they are now handling.

[fol. 1376]

EXTRACT OF TESTIMONY OF THEODORE W. ALLEN, CONSULTANT-TRAFFIC FOR GENERAL ELECTRIC COMPANY, IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR —BETWEEN THE EAST AND CHICAGO & EAST ST, LOUIS

[fol. 1377] (Mr. Allen) In the event that the existing Plan III rates were to be cancelled, we would most certainly renew our efforts to provide the necessary transportation in our own equipment. Similar action would follow any substantial change in the rates, any lag in the service, or any attached conditions which would limit the flexibility of service now being enjoyed.

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[fol. 1378]

EXTRACT OF TESTIMONY OF CAUGHEY B. CULPEPPER, SECRETARY AND GENERAL MANAGER OF ATLANTA FREIGHT BUREAU, IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR—BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

[fol. 1379] The Witness: —and have found that a substantial number of our members have already begun to use piggy-back service and have actually ceased to operate their own private motor vehicles in the hauling of raw materials into their plants and the distribution of their finished products.

For instance, five of our members, located on one of the railroads serving Atlanta, have materially reduced their private carriage operation and are today moving their shipments into or out of their plants (and, in some cases, in both directions) under rates published by this rail carrier for Trailer-on-Flat-Car operation.

There are, of course, other railroads serving Atlanta, on which others of our members are located; and in almost

all instances we have found that there are members which have already begun the use of the Plan III piggy-back operations with a resultant diminishing of the utilization by these members of their own private trucks in the movement of freight.

[fol. 1380]

EXTRACT OF TESTIMONY OF ROY W. HECKEL, JR., RATE ANALYST FOR THE AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR—BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

[fol. 1381] (Mr. Heckel) We will continue to utilize Plan III where it is possible for us to comply with the 60 percent mixture requirement. Elimination of Plan III will in certainty cause us to expand our private carriage operation to cover those movements now moving in Plan III. It is our position that Plan III rates and service represent a forward step in rate making and should be given the Commission's approval.

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[fol. 1382]

EXTRACT OF TESTIMONY OF ROBERT RICKER, TRAFFIC MANAGER OF RATES AND RESEARCH, FOR STANLEY WORKS, INC., IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR—BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

[fol. 1383] Q. Would you state how your Plan III trailers are handled at origin and destination between loading and unloading points and the rail ramp?

A. We normally use motor common carrier for the local hauling in Connecticut, and we use a local cartage agent for the distribution and trailer hosteling at Chicago and Atlanta. That is of course all an extra charge beyond the line haul railroad charges.

[fol. 1384] By Mr. Hunt:

Q. If Plan III becomes unavailable to Stanley, would you return to private carriage for your transportation of goods that now move in Plan III?

A. If Plan III became unavailable I am sure more traffic would move in our private trucks.

* * * * * * *

[fol. 1385] By Mr. Todd:

Q. On the destination of Chicago, Illinois, what cartage agent do you use there?

* * * * * * *

[fol. 1386] The Witness: Well, we have used several different cartage agents, including J. F. Martin, and we presently use Chicago Terminal Clearance Company, Mr. James Emerick, President. They do cartage distribution work for probably 50 different concerns and operate a fleet of vehicles, not only in distribution work in Chicago, but also handle our outgoing products from our Melrose Park, Illinois warehouse.

* * * * * * *

[fol. 1387] By Mr. Todd:

Q. What is your local cartage agent in Atlanta?

A. Southern Transfer Company. As far as I know, they are not related to any railroad. We found out who they were by making inquiries of several reputable companies in the Atlanta area.

* * * * * * *

[fol. 1388]

EXTRACT OF TESTIMONY OF MYRON G. KUHLMAN, BARRINGTON TRAFFIC MANAGER OF JEWEL TEA CO., INC., IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR —BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

* * * * * * *

[fol. 1389] The shipping operations of this Company have been enhanced by the availability of TOFC Plan III rates. Should the Plan III rates to either of these points be canceled, the Jewel Tea Co., Inc., undoubtedly would resort to the use of private carriage as a substitute for the traffic now moving under the Plan III rates.

* * * * * * *

[fol. 1390]

EXTRACT OF TESTIMONY OF GURNEY S. HORSMAN, ASSISTANT TO THE DISTRIBUTION MANAGER OF W. T. GRANT COMPANY, IN DOCKET NO. 33133, ET AL., ALL FREIGHT IN TRAILER ON FLAT CAR—BETWEEN THE EAST AND CHICAGO & EAST ST. LOUIS

[fol. 1391] By Mr. Duke:

Q. If Plan III rates were not available to W. T. Grant Company, how would the traffic now moving in Plan III and that which you propose for Plan III move?

A. I am sure we would put it back into private carriage.

* * * * * * *

[fol. 1392] Q. Who is your truck man at New York City?

A. Stone's Express.

Q. Is that a certified carrier or a local cartage carrier who does not have authority from this Commission?

A. He is a local cartage company.

* * * * * * *

Q. At Buffalo, New York, do you use a local cartage carrier?

A. Yes.

Q. Who is that?

A. Bison City Cartage Company.

* * * * * * * *

[fol. 1393]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM VERIFIED REPLY STATEMENT OF J. W. PLANT, MANAGER, TRAILER TRAIN SERVICE, ATLANTIC COAST LINE RAILROAD COMPANY

I am the same J. W. Plant who previously testified in this proceeding in the form of Verified Statement No. 10-A on behalf of the Atlantic Coast Line Railroad Company, a respondent herein.

* * * * * * *

[fol. 1394] On page 14 of Verified Statement No. 21, Witness Kipp says, "Plan III diverts traffic from rail boxcar service or rail Plan II." On Coast Line this is definitely not true. It has instead generated new traffic. Our Company handled its first trailers in Plan III service during February 1960, and its first trailers in Plan II service during September 1960. Shipments moving over Coast Line in both Plan II and Plan III services for the year 1962 showed a marked increase over those handled by our road during 1961. However, boxcar traffic handled by Coast Line in 1962 also showed an increase over that in 1961. Our Plan I business has remained almost static during the years 1960, 1961 and 1962 despite extensive solicitation by our Traffic people.

* * * * * * *

[fol. 1395]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte 230

EXCERPTS FROM VERIFIED REPLY STATEMENT OF DARACE M. PEDIGO, MANAGER—PIGGYBACK RATES, LOUISVILLE AND NASHVILLE RAILROAD COMPANY

* * * * * * *

[fol. 1396] It is necessary to maintain both Plan II and Plan III rates and services between the same points for the following reasons:

(a) Many shippers need the complete door-to-door service provided under Plan II, and are willing to pay the relatively higher level of Plan II charges in order to obtain that complete service.

(b) Plan II rates are attractive to many shippers and receivers since they apply on specific commodities and on quantities less than the full two-trailerload unit usually considered as a Plan III shipment.

[fol. 1397] (c) Plan II rates generally apply on single trailer-loads, permitting the shipping of smaller quantities more regularly than when Plan III is used, thus reducing inventories in keeping with the general requirements of the present-day economies.

(d) Plan II rates and services have a particular appeal to certain shippers who do not care to be burdened with the extra arrangements that must be made to complete Plan III transactions.

(e) Numerous important shippers prefer to use Plan III rates and services because of the economies they can effect and because of the greater flexibility of this type service. They are generally able to perform, or have performed, terminal services more economically and by performing their own terminal services they can better control the loading and unloading to suit their convenience

and can also stop the trailers for loading and unloading without extra charges for that service.

(f) Plan III rates and services have been our most effective means of meeting and retarding the competition offered by private carriage, and we therefore feel that it is imperative that such rates and services be maintained for use by those shippers who prefer Plan III over Plan II because of the aforementioned greater economies and flexibility. There is no logical reason for denying such shippers the advantages of Plan III rates and services merely because Plan II rates and services may be available between the same points.

(g) Many shippers use both Plan III and Plan II rates and services when they find that one of the two plans offers them a decided advantage or economy over the other [fol. 1398] plan in connection with particular shipments.

* * * * * * *

[fol. 1399] * * * Physically, servicewise, Plan III services and the rail carriers' portion of the service under Plan I are virtually identical. In one instance the shipper and in the other the motor carrier brings the loaded trailers to the railroads' loading ramp from whence it is moved by rail over the road to the point of unloading from whence either the shipper or the motor carrier picks up the trailers at the unloading ramp. In almost every instance the charge made to the motor carrier for such service is less than is charged a shipper. In other words, the motor carriers are saying that the Plan III rates, which are higher than amounts charged motor carriers for a like service, are too low; a lesser charge to the motor carriers, according to Witness Kipp's statement, is perfectly satisfactory, but a higher charge to shippers for the same service is destructive to motor carrier rate structures.

* * * * * * *

[fol. 1400]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM COUNSEL'S EXHIBIT NO. 1 TO REPLY ARGUMENT OF RAILROADS OPERATING IN SOUTHERN FREIGHT ASSOCIATION TERRITORY

Year-End Statement of
Clinton L. Sanders, President
American Trucking Associations

Complete reports for 1962 are expected to show that it was one of the three best years for the trucking industry since World War II. Net earnings for the year, like 1955 and 1959, reflect a strong rebound from periods of adverse business conditions during which motor carriers had to tighten their belts to survive.

Current business conditions and forecasts of the general economy point to continued progress for the trucking industry during 1963.

Reports now available from trucking companies show that traffic has maintained a high level throughout the year and that earnings have recovered substantially from the poor results of 1961. The volume of freight handled during the first half registered impressive gains as compared with the corresponding period of 1961—a recession period. The year-to-year comparison narrowed as the year progressed since the latter half of 1961 reflected a general economic recovery.

Revenues of the class I and II motor freight carriers were about 12 percent ahead of the previous year's first half while intercity tons transported were up about 10 percent. Third quarter results are not yet fully summarized but a gain of about 6 percent is indicated. The ATA weekly tonnage survey and other scattered reports from the carriers suggest that the fourth quarter will be either abreast of, or marginally behind, a year ago.

The trucking industry continued to narrow the gap between for-hire motor carrier and railroad freight revenues. Total 1962 gross for the approximately 16,000 for-hire motor freight carriers regulated by the Interstate Commerce Commission is expected to reach $7.9 billion. This should [fol. 1401] bring the total value of service rendered by these motor carriers within about $100 million of total U. S. rail freight revenue. Additional billions of dollars worth of service are provided by thousands of private, intrastate, and other trucking operations not reporting to the ICC. Consequently, the Nation's shippers pay more for motor carrier service provided or self-operated than for any other form of transportation.

All private and for-hire motor carriers generated an estimated 317 billion ton-miles of intercity service in 1962, roughly tripled since World War II. This traffic divides in a ratio of about ⅓ regulated and ⅔ private and exempt; that is, intercity carriers authorized by the ICC, accounted for about 111 billion ton-miles while the remaining 206 billion were moved by all other types of carriers operating over the highway.

Truck registrations in 1962 rose to approximately 12 million vehicles, not including Government-owned units. These trucks used an estimated 16 billion gallons of fuel, required a $4.1 billion outlay for new equipment and replacement parts and accessories, and provided employment for some 7½ million Americans.

* * * * * * *

[fol. 1402]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

EXCERPTS FROM REPLY STATEMENT OF J. E. BILBO, GENERAL TRAFFIC AND TRANSPORTATION MANAGER OF THE COCA-COLA COMPANY, ATLANTA 1, GEORGIA

Comes now The Coca-Cola Company in its reply to verified statements in the proceedings. Our reply is specifically directed to Verified Statement No. 21-B—the consolidated statement of the American Trucking Association, Inc., et al.—and Verified Statement No. 1—that of the Bureau of Inquiry & Compliance.

For convenience we have shown in parentheses the central concepts of the respective statements.

Rule C-3

(Allegation that identical service is performed under Plan II and Plan III)

[Page 12—Line 22 thru Page 13—Line 9—Verified Statement No. 21-B]

The statement is made:

"It cannot be challenged that when a railroad offers a Plan III service and in conjunction therewith furnishes the two trailers on a trip-lease basis, and furnishes pickup and delivery service, both at unpublished privately negotiated charges, the net result in terms of [fol. 1403] transportation is that the railroad gives the shipper exactly the same service that it would give in Plan II. But the total amount of money collected by the railroad bears no relationship whatever to the amount it would charge if Plan II rates were applied."

The last sentence in the above quotation is so broad in its scope that a reply cannot be made. However, it does provoke the question—Are the Plan II rates (admittedly

patterned after the rates of the motor carriers) sacrosanct? If not, shouldn't the public get the benefit of the lowest transportation cost?

The comparison, however, is incomplete as it does not portray other combinations available under Plan III which do not result in the same service. It must be kept in mind that at origin on Plan III a shipper has several options for the transportation of a trailer or container to the railroad ramp. He can use private carriage, common carrier, contract carrier or exempt carrier. At destination, the same options are available to transport a trailer or container from the railroad ramp to the consignee. Under Plan III the shipper also has the option of doing the loading or having it done for him depending on whether he can do it more efficiently or economically than the carrier. As containerization and material handling techniques improve it is expected that more shippers will do their own loading and/or unloading. It is obvious that the elements of loading, unloading, pickup, and delivery are extremely important considerations to a shipper contemplating or engaging in private carriage.

[fol. 1404] There are other important differences between Plan II and Plan III. Under Plan II the shipper must use a trailer furnished by the railroad; under Plan III he has a selection. He can use his own trailer, lease one from a railroad or a railroad subsidiary, or lease from an independent leasing company. Also, under Plan II the rail carrier assumes a greater degree of claim liability than is required under Plan III.

Regardless of how it may be colored there is no merit to the argument that Plan II and Plan III are identical services.

* * * * * * *

[fol. 1405]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

LIST OF REPLY VERIFIED STATEMENTS SUBMITTED IN EX PARTE NO. 230

R.V.S. No.	Submitted By	On Behalf Of
1	Harvey Gobetz John H. Fallon Asa J. Merrill	Bureau of Inquiry and Compliance
2	David Flint	The Singer Manufacturing Co.
3	Gene T. West	Consolidated Freightway Corp. of Del., Missouri Consolidated Freightways Corporation
4	Lawrence A. Reedquist	John Morrell & Co.
5	Harold A. Soules	Rath Packing Company
6	George P. Shuler	Oscar Mayer & Co.
	Argument of Warren H. Wagner	John Morrell & Co., Rath Packing Co., Geo. A. Hormel & Co., Oscar Mayer & Co.
7	Clement T. Mayo R. M. Hartsock John E. Faulk	Department of Defense, Defense Traffic Management Service
	Introductory Argument, Amos M. Mathews Robert F. Munsell Thormund A. Miller	Class I Railroad of The Western District
8	T. H. Maguire	Western Railroad Traffic Assn., Executive Committee
9	Ray Brooke	Chicago Great Western Railway Co. Class I Western Railroads

R.V.S. No.	Submitted By	On Behalf Of
10	Werner B. Fisher	Chicago, Milwaukee, St. Paul and Pacific Railroad Co.
11	Yale James	Burlington Truck Lines
12	R. S. Sandgren	Northern Pacific Ry. Co.
13	Grant S. Allen	Western Pacific Railroad Co.

[fol. 1406]

14	A. J. Stilling	Union Pacific Railroad Co.
	Argument, Rules A-1, A-2, A-3, by W. G. Treanor, R. J. Lehman, L. A. Harris	Western Railroads
	Argument, Rule B-1 By R. F. Munsell	Western Railroads
15	Charles D. McGehee	Chicago and North Western Ry. Co.
16	J. H. Lyons	Southern Pacific Co.
	Argument, Rule B-2 by C. H. Dickman, W. G. Treanor, T. A. Miller, R. J. Lehman	Western Railroads
	Argument, Rule B-3 by W. P. Higgins	Western Railroads
	Argument, Rules B-4 & B-5 by T. A. Miller, W. G. Treanor, J. A. Gillen	Western Railroads
	Argument, Rule B-6 by A. M. Mathews, T. A. Miller, R. F. Munsell	Western Railroads
	Argument, Rule B-7, B-8, B-9, by A. M. Mathews, T. A. Miller, R. F. Munsell	Western Railroads

R.V.S. No.	Submitted By	On Behalf Of
17	E. W. Bergstrom	Great Northern Ry. Co.
	Argument, Rules B-10 & C-4, by R. W. Cronon	Western Railroads
18	J. A. Christiansen	Chicago, R.I. & Pac. R. Co.
	Argument, Rules B-11 & C-5, by G. M. Mariner	Western Railroads
19	T. M. Caiazza	The Atchison, T.&S.F. Ry. Co.
20	D. A. Baumgartner	The Atchison, T.&S.F. Ry. Co.
21	Edward F. Grasser	Western Railroads
22	W. H. Butterfield	Northern Pacific Ry. Co.
23	W. G. Duchek	Wabash Railroad Co.
[fol. 1407]		
24	W. H. Carr	St. Louis Southwestern Ry. Co.
25	J. W. Tipton	Frisco Transportation Co.
	Argument, Rules C-1, & C-2(f) by J. A. Gillen, L. A. Harris, R. J. Lehman, J. E. McCullough	Western Railroads
	Argument, Rule c-2(a) by H. B. LaTourette	Western Railroads
	Argument, Rules C-2(b), C-2(c), C-2(d), A. M. Mathews, T. A. Miller, R. F. Munsell	Western Railroads
	Argument, Rule C-2(e) R. F. Munsell	Western Railroads
26	F. R. McVoy	Chicago & Eastern Illinois R. Co.
	Argument, Rule C-3, W. P. Higgins, T. A. Miller, A. M. Mathews	Western Railroads

R.V.S. No.	Submitted By	On Behalf Of
27	Robert Bennett	Western Rail Carriers
	Argument, Rule C-7, W. G. Treanor	Western Railroads
28	T. P. Wadsworth	Western Railroads
29	J. M. Crowell	Western Weighing & Inspection Bur.
30	T. P. Wadsworth	Western Railroads
	Argument, Rule D-3, C. H. Peterson	Western Railroads
	Argument, Rule D-4, A. M. Mathews, T. A. Miller, R. F. Munsell	Western Railroads
31	Robert Bennett	Class I Western Railroads
	Argument, TOFC Services, T. A. Miller, A. M. Mathews, R. F. Munsell	Western Railroads
	Argument, Additional Rule 1, R. F. Munsell	Western Railroads
	Argument, Additional Rule 2, L. A. Harris	Western Railroads
	Argument, Additional Rule 3, J. A. Feeney, W. A. Gregory, C. C. Niebank, Jr., J. A. Wilcox	Western Railroads
[fol. 1408]		
32	H. F. Lacey	National Industrial Traffic League
33	Joseph L. Bula	National Industrial Traffic League
	Argument, J. F. Donelan J. M. Cleary	National Industrial Traffic League

R.V.S. No.	Submitted By	On Behalf Of
34	Richard J. Riddick	Freight Forwarders Institute, et al.
35	Richard R. Sigmon Harry Jordan Peter P. Beardsley	American Trucking Assns., et al.
36	Randolph B. Johnston	Chesapeake and Ohio Ry. Co.
37	Arthur E. Baylis	New York Central Railroad Co.
38	R. W. Talbot	Pennsylvania Railroad Company
39	H. O. Brown	Pennsylvania Railroad Company
40	Roy L. Milbourne	New York Central Railroad Company
41	Wesley F. French	New York Central System
42	Paul W. Johnston, Jr.	Erie-Lackawanna Railroad Co.
	Reply Argument on Behalf of the Eastern Railroads	R. G. Bleakney, Jr. B. T. Buck J. T. Clark J. A. Daily K. A. Dobbins R. H. Duesenberg P. R. Duke U. B. Ellis R. J. Gunning E. E. Hunt C. C. Rettberg, Jr. R. J. Williams
	Separate Argument of N. Y. Central R. Co.	John A. Daily
	Errata Sheet for the N. Y. Central R. Co.	John A. Daily
	Counsel's Exhibit No. 1 with Reply Statement of the Eastern Railroads	

R.V.S. No.	Submitted By	On Behalf Of
43	J. W. Plant	Atlantic Coast Line Railroad Co.
44	Thomas E. Conway	Illinois Central Railroad Co.
[fol. 1409]		
45	Hugh T. Harrell	Seaboard Air Line Railroad Co.
46	Darace M. Pedigo	Louisville and Nashville R. Co.
	Reply Argument of Railroads Operating SFA Territory	J. W. Adams, Jr. J. H. Doeringer J. W. Hoeland R. A. Hollander E. R. Leigh A. B. Russ, Jr. J. F. Smith, Jr.
	Motion to Strike Matters in Certain Verified Statements, Railroads Operating in Southern Freight Assn. Terr.	
	Motion to Strike, Bureau of Inquiry and Compliance, Railroads Operating in Southern Freight Assn. Terr.	
47	W. D. McLean James A. Bistline Walter J. Myskowski	Southern Railway System
48	C. H. Williams	U.S. Dept. of Agriculture
49	Philip F. Welsh	Assn. of American Railroads
50	R. B. Gotfredson Howell Ellis	Transamerican Freight Lines, Inc.
51	Harold G. Hernly	Midwest Haulers, Inc.
52	Jack Cooper	Contract Carrier Conference of the American Trucking Association
53	George S. Dixon	National Automobile Transporters Association

R.V.S. No.	Submitted By	On Behalf Of
54	Samuel W. Earnshaw	The Charter Oak Shippers Cooperative Assn., Inc. Progressive Shippers Cooperative Assn., Inc. Detroit Shippers Co-operative Assn. Southeastern Michigan Shippers Co-operative Assn.
55	John B. Hedges	Manufacturers Assn. of Conn., Inc.
56	Eugene J. Mielke	Minneapolis Traffic Assn.
[fol. 1410]		
57	Clarke Munn, Jr.	Swift & Company
58	J. E. Bilbo	The Coca-Cola Company
59	Robert Ricker	The Stanley Works
60	M. F. Crass, Jr.	Manufacturing Chemists' Assn., Inc.
61	Harold C. Foreman	An Individual

[fol. 1411]

BEFORE THE INTERSTATE COMMERCE COMMISSION

(See opposite) ☞

Served *August 23, 1963*

EX PARTE NO. 230

SUBSTITUTED SERVICE - CHARGES AND PRACTICES
OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS
(Piggyback Service)

Decided

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1. Rules designed to govern trailer-on-flatcar (TOFC) service in interstate or foreign commerce and the practices in connection therewith applicable to railroads subject to Part I; motor common carriers subject to Part II; water common carriers subject to Part III; and freight forwarders subject to Part IV of the Interstate Commerce Act, prescribed.

2. Multi-level rail car service found not to be TOFC service; petitions requesting separation of issues pertaining to the transportation of motor vehicles, granted.

3. Plan I TOFC service found lawful under section 216(c) of the act.

4. Requests for separation of issues involving TOFC practices and cross-examination, denied.

5. Proceeding discontinued.

Harry C. Ames, S. S. Eisen, James L. Givan, George H. Leonard, F. N. Melius, Jr., Giles Morrow, Theo. R. Schneider, Leonard Stelzer, D. Robert Thomas, and Martin Whitten for various freight forwarders and freight forwarder associations.

Peter F. Beardsley, Albert F. Beasley, James L. Beatty, Walter N. Bieneman, W. H. Borghesani, Jr., Ferdinand Born, Robert E. Born, R. Edwin Brady, LeGrand A. Carlston, Homer S. Carpenter, Eldon R. Clawson, James I. Collier, W. Wilson Corroum, Ray M. Cream, Paul M. Daniell, Francis P. Desmond, George S. Dixon, Robert C. Dryden, J. F. Edell, Howell Ellis, Marion M. Emery, W. B. Ewers, John S. Fessenden, F. H. Floyd, F. G. Freund, Robert Gawley, Harry L. Grubbs, Marvin Handler, James E. Haydon, Richard A. Heilprin, Harold G. Hernly, Thomas J. Houser, Earl Hummer, Harry J. Jordan, S. Harrison Kahn, Joseph E. Keller, James K. Knudson, Houston Lynch, Jr., Carney D. Matheson, Herman Matthei, Francis W. McInerny, George D. Michalson, M. Bruice Morgan, Glen F. Morgan, Arlus C. Morris, Lloyd Ownbey, Jr., Guy H. Postell, Bryce Rea, Jr., G. M. Rebman, Roland Rice, Floyd M. Roach, Reagan Sayers, Richard R. Sigmon, Louis E. Smith, R. P. Sohan, Hugh M. Steinberger, Glenn W. Stephens, C. Austin Sutherland, Clarence D. Todd, Edward G. Villalon, William M. Watt,

Harvey A. Welty, Gene F. West, James J. Williams, James E. Wilson, James W. Wrape, and Chester A. Zyblut for various motor carriers and motor carrier associations.

John W. Adams, Jr., Margaret P. Allen, Curtis H. Berg, Harry N. Babcock, John J. Burchell, James A. Bistline, R. G. Bleakney, Jr., Benson T. Buck, Charles W. Burkett, Jr., J. T. Clark, J. L. Connor, Richard E. Costello, Robert W. Cronon, John A. Daily, Robert S. Davis, William E. Davis, C. H. Dickman, Kemper A. Dobbins, John H. Doeringer, Robert H. Duesenberg, Paul R. Duke, J. H. Durkin, Urchie B. Ellis, J. D. Feeney, James A. Gillen, E. D. Grinnell, Jr., Rene J. Gunning, Carl P. Greeley, John W. Hanifin, L. W. Hobbs, Bryce Hamilton, Louis A. Harris, William P. Higgins, James W. Hoeland, Richard A. Hollander, Eugene E. Hunt, J. H. Jester, Edmund J. Kenney, Jess Larson, Harry B. LaTourette, Roland J. Lehman, E. R. Leigh, George M. Mariner, C. E. Martin, Amos M. Mathews, John E. McCullough, W. D. McLean, Thourmund A. Miller, William M. Moloney, P. G. Mullen, Robert F. Munsell, Walter J. Myskowski, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Earnest Porter, Gregory S. Prince, C. C. Rettberg, Jr., Wade M. Richards, Albert B. Russ, John F. Smith, John MacDonald Smith, Robert H. Stahlheber, William A. Thie, Robert A. Thompson, L. E. Torinus, Walter G. Treanor, Ray M. Van Hook, Archie T. Walters, Philip F. Welsh, Edward K. Wheeler, Robert J. Williams, D. N. Zirkle, and Erle J. Zoll, Jr., for various railroads and railroad associations.

Paul J. Coughlin, John Mason, Andrew A. Normandeau, and Hugh H. Shull, Jr., for water carriers.

Theo. F. Behler, Harry Bradt, John M. Cleary, Ronald N. Cobert, Paul Coyle, John F. Donelan, Lester J. Door, Samuel W. Earnshaw, Donald W. Fisher, Walter R. Frizzell, Benjamin G. Habberton, Dan F. Hart, John B. Hedges, Leonard A. Jaskiewicz, Jess Larson, John C. Lincoln, Dickinson R. Loos, Sumner J. McCollester, Clarence M. Mulholland, Clarke Munn, Jr., A. E. Norrbom, James E. O'Boyle, F. S. Partridge, Warren Price, Jr., Frederick M. Porter, Philip H. Porter, Aloysius F. Power, Theo. R. Schneider, William R. Settgas, Louis R. Simpson, Carles W. Singer, Harold E. Spencer, James E. Steffarud, Warren H. Wagner, Charles A. Washer, M. W. Wells, John C. White, and Signey Zagri for shippers or other interested parties.

John M. Agrey for Public Service Commission of North Dakota.

Harold C. Heublein for Public Service Commission of Wisconsin.

Charles W. Bucy, Carl R. Bullock, Joseph E. Quin, George A. Robertson, Clarence H. Williams for Department of Agriculture.

John E. Faulk, R. M. Hartsock, and Clement T. Mayo for Department of Defense.

William R. Pierce for General Service Administration.

John H. Fallon, Harvey Gobetz, and Asa J. Merrill for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

RECOMMENDED BY HEARING EXAMINERS HAROLD P. BOSS AND RICHARD S. RIES

This is a rule-making proceeding instituted on the Commission's own motion under the authority of Parts I, II, III, and IV of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act, into the practices of, and the manner and methods of the performance and use of coordinated and substituted motor-rail service, and all similar and related types of service, including, but not limited to, so-called "piggyback" or trailer-on-flatcar "TOFC" service, now provided by or participated in, or to be provided by or participated in or used by shippers and carriers not subject to economic regulation, and by motor common and contract carriers, rail carriers, water carriers, express companies and freight forwarders subject to the Act, for the transportation or shipment of property, in interstate or foreign commerce. The proceeding was instituted for the purpose of ascertaining and determining, in the light of the national transportation policy, and the provisions of the Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided and utilized by or for rail, motor, and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers.

Notice of the institution of the proceeding was given to the Public Utility Commissions or Boards, or similar regulatory bodies of each State having jurisdiction over the transportation here involved and to all other interested persons by publication in the Federal Register. The matter was assigned to Commissioners Clyde E. Herring and William H. Tucker for administrative handling and to Hearing Examiners Harold P. Boss and Richard S. Ries for a report and recommended order.

The order instituting the proceeding made all railroads, motor carriers, water carriers, express companies, and freight forwarders of property operating in interstate or foreign commerce, and subject to the Act, respondents, and invited all such respondents as well as any other interested party including shippers or carriers of any mode not subject to the Act, to file representations setting forth the extent of their participation in coordinated or substituted services and the practices connected therewith. The same order made the Commission's Bureau of Inquiry and Compliance a party to the proceeding. There were 73 representations filed in respons to said invitation.

A prehearing conference was held at which copies of proposed rules (attached as Appendix I) were distributed to the parties in attendance and also a general summary of replies to piggyback questionnaires mailed to selected railroads, motor carriers and freight forwarders and prepared by the Commission's Bureau of Transport Economics and Statistics.

Subsequent to the prehearing conference an order was entered directing special procedure, including the following matters: (1) method of becoming a party to the proceeding; (2) time for all parties to file a special pleading setting forth their position with respect to the proposed Rules; (3) dates on or before which verified statements and replies would be filed; and (4) date on or before which any party might request a separation of issues or an oral hearing for cross-examination. There were 145 special pleadings, 123 verified statements, and 61 reply verified statements filed by the parties.1/ Request have been filed for separation of issues and for cross-examination of certain persons filing verified statements and those requests will be ruled on herein. Also to be ruled on herein are motions to strike and replies theret

It was further ordered that all of the initial 73 representations and the general summary statement would be a part of the record.

TRANSPORTATION - U.S.A.

It would be difficult to choose a subject that has been the topic of more books and articles in this country than Transportation in the United States. This is only natural since the word "transportation" has many sides. It has a controversial side because anyone on Main Street U.S.A. has an idea on how to run a railroad. It is dynamic because the hauling of property is constantly subjected to new developments in the struggle for a competitive position at the market place. It is confounding and complex and more so now than ever before. Competition between the various modes of transportation have forced the carriers into a keen sense of reality which means that the transportation they offer must be the best for the least cost that the shipper can obtain depending upon his individual circumstances.

Transportation has held its effect upon the lives of every person in this nation either directly or indirectly and that is the reason why transportation has been referred to as the life blood of this country. Improved transportation has stimulated both large scale production and geographical division of labor. The many activities that accompany trade and make up the process of reaching the market place include such things as storing, packaging, advertising, merchandising, financing, insuring and other related transportation services all of which tend to make themselves felt in our industrious economy.

Before the development of railroads in 1830, overland transportation was both slow and costly. Water transportation was performed at less cost and, therefore, it was only natural that in the early days of this young nation most of the commerce was carried by water and the important cities found a natural location at sea and river ports. The steam

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1/By order entered February 28, 1963, the Department of Defense was permitted to intervene as a party and to file a reply verified statement.

locomotive which was introduced on the American scene in 1829, was revolutionary in its effect on rail transportation. The development of railroads brought an end to the era of canal building and the constant technological improvements which have occurred over the years in railroading have caused the railroads to become the backbone of our transportation system. There was a time when the railroads achieved monopolistic proportions. This became of great concern to the nation and to the Congress, so much so that in 1887 the Interstate Commerce Act was enacted. This Commission was established as the first federal regulatory agency to regulate, in the public interest, the railroad industry.

Highway transportation in its early stages was of little importance, being restricted to local hauls. The development of motor trucks for over-the-road use began with World War I. With the advent of automobiles and improvement in the highway system intercity trucking began to develop rapidly. So much so that by 1935 the Congress enacted Part II of the Act for application in the transportation of property in interstate or foreign commerce by motor carrier.

The rise of modern barge transportation on inland water ways began in the 1920's with the use of the diesel engine to propel tow boats. By the Transportation Act of 1940 the new provisions relating to water transportation were added as Part III of the Act.

In 1942 Part IV of the Act became effective and applied to freight forwarders. Among other things, every freight forwarder was required to file its tariffs of rates and charges, rules and regulations with the Commission.

In Movement of Highway Trailers by Railroad, 293 ICC 93, 94-95, (New Haven case) the Commission reviewed some instances of coordinated and substituted services when it stated as follows:

"The movement of freight loaded in the vehicles of one transportation medium which in turn are carried aboard those of another form of transportation has been practiced for more than a century. From 1843 to 1857, sectionalized canal boats were transported on flatcars between Philadelphia and Columbia, Pa., and between Hollidaysburg and Johnstown, Pa., as parts of a Philadelphia-Pittsburgh rail-water service. In January 1885, and for several years thereafter, The Long Island Rail Road Company operated so-called "Farmer's Trains" between Long Island points and the East River, carrying four loaded produce wagons per flatcar, with the teams riding along on the same train in box cars built expressly for that purpose. Freight-laden highway trailers have been transported on flatcars since 1926. The transportation of loaded freight cars on oceangoing vessels, as conducted by Sea-train Lines, Inc., has occurred since 1929. Highway trailers are transported by vessels on the Hudson and Ohio Rivers, the Gulf Intracoastal Waterway, and on Puget Sound."

While TOFC service is not new, the record shows that this service experienced a lull until about 1954. The reason appears to be that the railroads were satisfied to take the percentage of traffic offered to them during those years. Appendix II shows ton-mile distribution for the years 1947 through 1961. In 1947, the ton-miles of all railroads in the United States amounted to 664,523 million or 65.24 percent of the ton-miles of all intercity freight transportation performed. By 1960, the railroads' portion had declined to 579,130 million or a percentage of 43.66. During the same period, all other modes experienced a substantial increase in their ton-miles. The most dramatic increase is shown for highway transportation. In 1947, for-hire motor trucks operating under Commission authority and private and other motor trucks not subject to economic regulation performed 10.02 percent of the total ton-miles completed in the United States. By 1961, that percentage had increased to 22.83 percent. Of those percentage figures private carriage is shown to represent 6.32 percent in 1947 and 14.84 percent in 1961. In other words 14.84 percent of all intercity traffic was performed by other than regulated carriage in 1961. This is valuable traffic in which the railroads, motor carriers and water carriers would like to participate.

Appendix III is a comparison of ton-miles and freight, express and mail revenues of railroads with Class I, II and III motor carriers for the years 1939 through 1959. It will be noted that for the year 1959 the motor carriers total revenues had increased to 80.27 percent of the railroad revenues while performing only 17.40 percent as many ton-miles as the railroads.

The Nations estimated freight bill increased $3.5 billion during the period 1948 through 1961 culminating in a total of $44.1 billion in 1961. Two-thirds of this amount went for trucking service. Railroad service, including express and charges for loading and unloading freight cars, accounted for only 21 percent of the total freight bill.

The record shows a breakdown of the ton revenue freight and the gross freight revenue of the various commodity groups. By far the Group V-Manufactures and Miscellaneous traffic, because of its relatively high rate and constant volume characteristics, is the traffic most attractive to the motor carriers. Group V increased 6,478,000 tons or 8.7 percent in 1956 compared with 1960. In 1960, Manufactures and Miscellaneous traffic constituted 80,762,000 tons of the grand total of 86,741,000 tons of revenue truckload traffic carried in intercity service. Revenue from Group V traffic increased 25.5 percent in 1960 over 1956. Moreover, the revenue received by these carriers for the transportation of Manufactures and Miscellaneous traffic in 1960 was $916,987,000 as compared with the grand total revenue for all intercity truckload traffic of $986,442,000.

In addition to the foregoing statistics which the railroads offer to show a prevailing trend in American business, particularly in the last decade, to favor highway carriage,

they cite massive highway construction producing a network of modern, high speed facilities for motor transit, guaranteeing the means for dependable all weather road service. Thus in decentralizing production facilities, private industry can afford to construct its plants and warehouses at offtrack locations with no rail connection.

While pipelines are another source of competition to the railroads, it is shown that the total domestic oil receipts for 1960 were 793 million barrels which were transported to refineries in the following proportions: 594 million for pipelines; 194 million by ship; and only 4.5 million by both tank cars and tank trucks. Other factors that show their effect upon the earnings picture is the growth of natural gas pipelines, the tendency to transmit electricity over long distances from power plants at mine mouth, and pending measures to assist in the construction of coal slurry pipelines. All of these factors have operated to severly reduce rail transportation of bituminous coal which in 1961, for example, represented 40 percent of The New York Central Railroad Company's total revenue freight tonnage and 19 percent of their total freight revenue.

The New York Central shows the known private carriage operating in the area it serves. Ten of 14 points are shown to have 10 or more private carriers headquartered therein. Detroit has 77; Chicago 67; Indianapolis 27; and Columbus, Ohio, 21.

The present practice of strict inventory controls in private industry dictates the use of a fast, flexible method of moving traffic in relatively small volume on precise door-to-door scheduling. Under such conditions, the conventional railroad service of volume movement with its unavoidable delays in switching through congested terminals becomes increasingly less attractive.

It was shown hereinbefore that 14.84 percent of all inter-city traffic was performed by other than regulated carriage in 1961. Significant too, is the extent to which it is shown on this record by many shipper statements how TOFC service has prevented private carrier operation from beginning, or, if one had begun how it was prevented from expanding. The common carrier must be able to show the prospective private carrier that nothing is to be gained from his entry in the transportation business. The rail respondents point to the pattern of price and service which have grown up in connection with TOFC service and contend that they have been valuable tools in preventing both the start and growth of private carrier operations.

A witness for the American Trucking Associations, Inc. (ATA) has referred to the transportation methods used by some shippers as shown in their testimony in Docket No. 33133, et al., All Freight In Trailer-On-Flat Car - Between The East and Chicago and E. St. Louis., which has been made a part of this record, and concludes it is crystal clear that Plan III has recovered precious little traffic from private carriage but has

substantially reallocated traffic between and among various carriers. The Southern Freight Association Territory railroads, (SFA railroads) have filed a motion requesting, among other things, to strike the conclusion of the ATA witness to which a reply was filed.

We have carefully considered the shippers statements in this proceeding and we are convinced that TOFC service and especially Plan III accompanied with permissible trip leasing of trailers is overwhelmingly favored in comparison to private carriage. In view of this conclusion we are of the opinion that the motion to strike the testimony of the ATA witness is unnecessary. We also reach the same conclusion with respect to the other alleged grounds of the motion to strike. We conclude that the motion of the SFA railroads should be overruled.

The sample guidelines announced by the Commission in 1954 for TOFC service provided the measure of permanence which encouraged the expansion of this type of service. It was not until 1958 that the railroads began taking major strides in TOFC service which have brought them to the present state. Substantial investments have already been made in TOFC equipment. The New York Central has invested a total of almost $30 million not including investment in flexi-van terminals. The Seaboard Air Line Railroad Company (Seaboard) has invested $1,147,000 in 55 ramps; The Chesapeake and Ohio Railway Company (C&O) shows $2,800,000 invested in TOFC equipment and ramps; The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) shows $2.1 million invested in facilities at Chicago, Los Angeles, and Oakland; The Baltimore and Ohio Railroad Company (B&O) shows $2.6 million invested in trailers and freight cars, $670,000 in ramps, and $186,559 in cranes; the Pacific Fruit Express Company has $6,579,600 invested in TOFC equipment and in addition its leased equipment represents an investment of $2.8 million with orders placed for 200 additional 40-foot refrigerated trailers at a cost of $2,470,000 making a total investment of approximately $12 million. Seatrain Lines, Inc., owns and operates six Seatrain type vessels which will transport loaded and empty railroad cars. In addition, Seamobile service was inaugurated in 1958 which is a container service on a chassis loaded on Seatrain's equipment. Seatrain owns 529 Seamobile containers and 218 chassis. It has constructed and operates mobile and fixed shore cranes for handling the containers. All of this equipment represents an investment in excess of $3 million.

This record does not show how extensively commercial shippers have invested in TOFC equipment but the investment of freight forwarders is set forth. As of January 1, 1963, the freight forwarders, represented in this proceeding, have an investment amounting to $10.5 million in trailers, tractor freight cars and bogies. They also have annual obligations in long-term leases on freight cars and trailers amounting to $1.6 million.

The Car Service Division of the Association of American Railroads show the growth of TOFC service for Class I railroads reporting their revenue loads. In 1955, the total number of freight cars loaded was 168,150 for a weekly average of 3,234. The total number loaded in 1961 was 591,246 for a weekly average of 11,370. As of November 24, 1962 a total of 641,381 had been loaded for a weekly average to that date of 13,646. In 1960 the number of reporting railroads was 54. By 1961, that number had increased to 58 and at the present time 61 Class I railroads are reporting TOFC loadings.

The Pennsylvania Railroad Company (PRR) sets forth some facts regarding the growth of TOFC service on its railroad. In 1955 it transported in Plan I service 17,000 trailers.[2/] In 1961, 54,500 and it was estimated that in 1962 the number would approach 80,000. Plan II service began in mid-1954 on the PRR and for the balance of that year 15,000 trailers were handled. In 1961 that figure had grown to 35,000 and the estimate for 1962 was 55,000 trailers. The first full year of Plan III operations on the PRR was 1959 when 10,500 trailers were handled. By 1961 that total had grown to 43,000 and the estimated number for 1962 was 65,000. Traffic handled in Plan IV and other miscellaneous types of operations such as traffic moving under Section 22 quotations and in substitution for boxcar service was estimated to reach 5,000 trailers in 1962. The revenue from these TOFC operations has grown from $5.7 million in 1955 representing .8 of 1 percent of the total freight revenue of the PRR to over $24 million in 1961 representing 4 percent of total freight revenue. The 1962 revenue from this TOFC service was estimated to exceed $34 million and to comprise some 5 to 5.5 percent of total freight revenue.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) leased a rail car and two flexi-van trailers to a group of shippers in Seattle in 1959 for use in Plan IV service. From 1959 until September 1962, when this group acquired their own equipment for Plan IV service between Seattle and Chicago, the Milwaukee realized over $400,000 in gross freight revenue from these Plan IV shipments. The Milwaukee leases rail cars to freight forwarders suitable for Plan IV service on a round trip basis only and over the past 2 years has received $30,000 from this leased equipment.

The Wabash Railroad Company is presently engaged in all 5 Plans of TOFC service. Plan II was inaugurated in July 1954, Plan IV in June 1958, Plan III in July 1958 and Plans I and V in May 1960. The development of TOFC traffic on the Wabash ranged from 0 to 57,233 trailer loads in 1962 with gross revenues exceeding $7 million. This is most significant when it is realized that over 50 percent of the Wabash TOFC traffic is interline traffic.

2/ The various Plan TOFC services are fully described under caption "TOFC IN OPERATION".

The Seaboard began TOFC service in October 1959 and in that year it handled 3 cars returning revenue to the carrier in the amount of $837. The next year, it handled 2,328 cars for $591,675 and in 1961 it handled 8,076 for which the revenue amounted to $2,187,650. Projecting the figures for the full year of 1962 it is estimated that the carrier will handle 17,884 for a revenue of $4,386,166.

The Louisville and Nashville Railroad Company (L&N) separates trailer loads and the revenues derived therefrom for its TOFC traffic under Plans I, II and III. Under Plan I in 1960 the L&N handled 46 trailer loads for a revenue of $3,468. In 1961 the carrier handled 1,771 trailer loads for a revenue of $150,388. The traffic under this plan declined as did the revenue in 1962. There were only 1,590 trailer loads for a revenue of $135,007 for 1962. In 1955 the first TOFC service inaugurated on the L&N was Plan II service and 193 trailers were handled for a revenue of $33,790. By 1962 the trailers handled had increased to 6,712 for a gross revenue of $1,295,013. Plan III was inaugurated in 1960 and in that year the L&N handled 181 trailer loads at a revenue of $24,271. By 1962 the carrier handled 8,618 trailer loads for a return of $995,854.

The Boston and Maine Railroad (B&M) shows the growth of TOFC service for Plans I, II, and II for the years 1956 through 1962 (estimated). That growth is shown to be as follows:

Year	Plan I	Plan II	Plan III	Total
1956	-	325	-	-325
1957	1,885	1,370	-	3,255
1958	1,165	2,490	312	3,967
1959	2,250	3,905	3,227	9,382
1960	2,689	5,340	8,686	16,715
1961	2,516	5,263	9,928	17,753
1962 (Dec. est'd.)	5,872	6,142	12,344	24,358

The B&M owns or leases in excess of 500 trailers which are devoted to their TOFC operations and participates in trailer leasing plans with the R E A Leasing Corporation (REAL Co.) and XTRA, Inc. While the B&M participates in Plan IV there has been very little traffic under that Plan. The railroad has yet to enter into Plan V service with motor carriers to any significant extent.

The New York, New Haven and Hartford Railroad Company (New Haven) has on long term lease from the General American Transportation Company 85 clejan type flat-cars representing an investment of over $1 million and negotiations are underway for an additional 50 flatcars of a most recent costing $740,000. The volume of TOFC traffic has been increasing on the New Haven and for the 12 month period ending September 1962 there were a total of 31,623 trailers moved in Plan I service returning a revenue of $1.5 million; 6,106 trailers in Plan II resulting in revenues amounting to $737,013; and 12,506 Plan III trailers returning a revenue of $885,104 for a grand total of 50,000 trailers at a revenue of $3.1 million.

The B&O does not offer Plan I service but it does participate in the other Plans. Here again the TOFC service has been on the increase. For example, in 1956 the B&O had Plan II tonnage amounting to 146 million pounds for a revenue of $943,764. The first 10 months of 1962 the tonnage had increased to 503 million pounds returning a revenue of $3.7 million. Plan III operations for 1959 show the B&O handled 122 million pounds at a revenue of $664,000. For the first 10 months of 1962 that tonnage had increased to 745 million pounds and the revenue was $3.5 million. Plan IV was inaugurated in 1959 and in 1960, the first full year of operation, 117 million pounds were handled for a revenue of $587,000. For the years 1961 and 1962 both the tonnage and revenue have been on the decrease under this Plan.

The C&O participates in Plans I, II and III. Its Plan I operation has grown until it now participates with nearly 100 motor common carriers. In 1959, when TOFC was inaugurated on this railroad, 13,000 revenue trailers were handled. By 1962 the carrier shows three times that many trailers were handled. The C&O is a member of the Trailer Train Company and its flatcar fleet is supplemented from time to time with TTX cars from that company. The railroad owns no highway trailers but it has 600 trailers under lease for use in TOFC service.

The Erie-Lackawanna Railroad Company (Erie) has shown an increase in its freight traffic since the inception of Plan II service in 1954. Since that time it has expanded its participation to all five of the basic TOFC plans. This carrier shows that revenues for 1962 amounted to $15 million divided among Plans I, II, III and IV. Plan V is not a significant revenue producing service at this time.

The New York, Chicago and St. Louis Railroad Company (Nickel Plate) has rates in effect in all five of the basic TOFC plans, however, it has had no experience to date with Plan IV. The growth of TOFC service on the Nickel Plate is illustrated when it is shown that 11 trailers were handled in August of 1954 and in October 1962 the number of trailers handled exceeded 5,000. The Nickel Plate has invested over $2 million in trailers of which it owns 437 and it leases 184. It owns 386 flatcars at a cost of $1.8 million. The Nickel Plate is a member of the Trailer Train Company and while the railroad is not assigned any particular flatcars the Trailer Train Company provides it with such flatcars as the traffic requires. In addition this carrier has invested $379,000 in ramp facilities.

Consolidated Freightways, a motor common carrier, has Plan I arrangements with 23 railroads. It has substituted service tariff provisions established between 340 pairs of points. Through 10 months of 1962, Consolidated handled 7,878 loaded trailers (255 million pounds) in Plan I service which compares with 5,394 loaded trailers handled in the entire year of 1961. In those first 10 months of 1962,

Consolidated paid a total amount of $1,841,086 to the railroads for the movement of its trailers, loaded and/or empty. Such sum was almost double the amount paid to the railroads in 1961 which amounted to $1,034,987.

The American Freight Forwarding Corporation shows that its annual revenues increased from $500,000 a year to gross revenues of $7.5 million for 1962 due to the use of TOFC service.

Enough examples have been set forth with respect to the railroads, motor carriers, and freight-forwarders to warrant the conclusion that the transportation industry now has under its control one of the most dynamic formulas for transportation of freight this country has ever seen. The record is replete with shippers evidence of satisfaction and approval of TOFC service. The bounds of this service and its total effect on transportation is as wide and long as the imagination of the men who are providing this service to the nation. For many years there has been a clamor from various quarters that our regulatory processes should work toward the end that the rights of all should be equally protected. It appears that within the framework of this formula each mode of transportation will be free to exploit to the fullest the inherent advantages that it possesses. The end is not in sight and given the proper guide lines, which, when reduced to its lowest denominator means proper regulation, the intuition and the imagination of the transportation industry of this country, which is still in the hands of private individuals and not an arm of Government, transportation in the United States shows every sign of flourishing and prospering and giving better service to the public in the years to come more than ever before.

TOFC IN OPERATION

Generally speaking there are five principal TOFC plans being used to move freight at the present time. In addition, some rail carriers have published tariffs providing for a modified service in connection with certain of these plans. All railroads do not participate in every type of TOFC service nor is everything standardized with respect to all plans. It therefore seems appropriate that we show how the various modes of transportation are operating their TOFC programs insofar as this record discloses such information. Appendix IV sets forth that information.

The appendix to the Notice and Order instituting this proceeding defines the various TOFC Plans I through V as they are presently understood by the transportation industry and the shipping public. The said Plans are defined as follows:

PLAN I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

PLAN II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

PLAN III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

PLAN IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

PLAN V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

In order to make it absolutely clear as to the present methods used in this coordinated or substituted transportation it seems appropriate that typical TOFC movements under the five basic

plans be shown. The following paragraphs are therefore designed to show a typical TOFC movement between Chicago and New York.

Plan I - Under this plan the rail carrier participates in the published motor common carrier rates and charges under a substituted service arrangement. The motor carriers solicit the traffic for movement in their own trailers, which, in the absence of the shipper forbidding the use of substituted rail service, is tendered to the railroad for line-haul transportation. The trailer is brought to the railroad ramp by the motor carrier where it is loaded on the flatcar by motor carrier personnel supervised by rail personnel. The shipment moves on motor carrier bill of lading and at motor carrier rates. The trailer is sealed and the railroad has no knowledge of the traffic being transported, except for the total weight of lading in each trailer. The railroads' compensation in such a move is based upon a division of the motor carrier charges arrived at through negotiations between the two carriers. In the past, the rail carriers' portion of the charges was submitted to the Commission under the Fourth Section requirements of Part I of the act. However, more recently motor carrier associations have obtained from the Commission so-called "blanket Fourth Section relief", which has eliminated the necessity of filing a new Fourth Section application for every change in the divisional agreements. This division of charges is published as a division sheet but is not customarily made available to the shipping public nor is it filed with the Commission. At destination the trailers are unloaded from the flatcars by motor carrier personnel and delivered over-the-road to destination by the motor carrier. So long as the motor common carrier meets the financial responsibility and route authority requirements the railroads are generally willing to share Plan I arrangements with any such motor carrier.

Plan II - Under this Plan the railroads hold themselves out to provide a complete door-to-door service under a single bill of lading. Neither the shipper nor the consignee intervene in any way in the overall transportation activities or do anything beyond tendering the shipment to the railroad at origin or at the shippers loading dock. The railroad assumes full responsibility in the following respects: providing the shipper with a trailer; moving the trailer to, and placing it at the shippers origin door for pickup; loading the freight into the trailer; moving the loaded trailer from the shippers origin dock to the rail TOFC ramp which involves the furnishing of a tractor and driver; supplying the rail flatcar; loading and securing the trailer on a railroad flatcar; providing the line-haul transportation from origin ramp to destination ramp; unloading the trailer from the flatcar at destination; moving the loaded trailer from the destination ramp to consignees store door by furnishing a tractor and driver; unloading the freight from the trailer; and finally removing the empty trailer from the consignees store door.

The published rate which includes all of the above mentioned services to be performed by the railroad generally applies (a) to a specific commodity or a group or specific

commodities; (b) in straight or mixed car loads without mixture limitations; (c) in a single trailer; and (d) subject to a rate per 100 pounds and a minimum rate tailored to the specific commodity involved.

Plan III - Under this Plan the railroad furnishes only a transportation service between its TOFC ramps. The only additional service the railroad performs in accordance with its tariff is the loading and securing the trailers on the flatcars at the origin ramp and the unloading of the trailers from the flatcars at the destination ramp. This service is offered to private shippers and freight forwarders. The shipper using Plan III must assume the full responsibility for the following: supplying its own trailer either by ownership or through a lease arrangement; moving or arranging to move the trailer to the shippers origin dock for loading the freight into the trailer; moving the loaded trailer from the shippers origin direct to the railroad TOFC ramp which requires the shipper to arrange for the furnishing of a tractor and driver; arranging for the issuance of an appropriate bill of lading from the railroad origin ramp to the railroad destination ramp; receiving the loaded trailer at the destination ramp; furnishing or arranging for the furnishing of the physical facilities for removing the trailer from the destination TOFC ramp to the consignees store door; unloading the freight from the trailer; and finally returning the trailer, where leased, to the lessor normally the railroad TOFC ramp.

Under Plan III the published rate generally applies (a) of freight, all kinds; (b) in mixed car loads; (c) subject to specific mixing rules and regulations; (d) into trailer lots; and (e) further subject to a maximum load of 70,000 pounds at the flat charge per car load and irrespective of the mixture or freight involved.

Trip leasing of trailers has become common place with many shippers and freight forwarders from the railroads or their subsidiary leasing companies. At the present time the tariffs offering Plan III service do not include, in most instances, the leasing charges, free time allowed for loading or unloading; detention charges or protective service charges. These latter charges in some cases appear in the lease forms which are supplied to the shipper at the time of leasing the trailer. In some cases the charges for leased trailers may be on a negotiated basis. Objections are raised to the fact that these charges are not published in tariffs in order that all shippers using the services on that particular railroad can be assured of paying the same charges as a competitor using the same service.

Plan IV - This Plan is exactly comparable to Plan III except that the shipper has the additional responsibility of furnishing the railroad flatcar including the loading and unloading of the trailers onto and off the flatcar.

Plan V - This Plan involves through motor-rail, motor-rail-motor or water-rail services at joint rates applicable only over the through route or routes.

TRANSPORTATION OF AUTOMOBILE TRAFFIC

In National Auto. Transporters Assn. - Declaratory Order, 91 M.C.C. 395, (NATA case), the Commission had before it issues with respect to the interpretation of Administrative Ruling No. 75 issued by the Bureau of Motor Carriers in 1938, and of grants of motor carrier operating authority which follow that ruling, particularly insofar as the meaing of the terms "initial" and "secondary" movements as used in such authorities are concerned, and the extent, if any, to which such carriers may substitute and utilize rail service in connection with such transportation. Therein, the Commission found:

> that the use of TOFC plan I by common and contract carrier holders of irregular route initial authority, under the circumstances discussed in this report, is merely a substitution of rail for motor service, does not involve any interchange requiring point-to-point operating authority, and in no way violates the present interpretation of Administration Ruling No. 75; that a motor carrier holding irregular route initial authority between points A and D needs no additional authority to serve rail intermediate points B or C in performing a motor-rail-motor through service from A to D; and that the terms of Administrative Ruling No. 75 propounded by the Commission's Bureau of Motor Carriers and the meaning of the terms 'initial movements' and 'secondary movements' as employed in grants of motor carrier operating authorities require no further interpretation.
>
> that operation by Auto Transports, Inc., *** as a contract carrier by motor vehicle, in the transportation in interstate or foreign commerce of motor vehicles *** under arrangements whereby and at the specific direction of General Motors Corporation, as shipper, it availed itself of trailer-on-flatcar service provided by the Union Pacific Railroad Company and the Chicago, Burlington & Quincy Railroad Company *** to Denver, Colo., and other points it is authorized to serve under its initial authority in the manner described in the report is unlawful.

The Commission also noted that it has instituted the instant investigation; that a prehearing conference had been held; and that proposed rules "embracing a new approach to the piggyback problem" and special rules of procedure for the handling of this case had been issued. At page 417, the Commission stated:

> It is contemplated therefore that the matters dealt with in the instant proceeding may be the subject of further inquiry and representations in Ex Parte No. 230. In the circumstances, and in the interests of orderly procedure, the findings made herein should not be considered as precluding different findings in the general investigation which are warranted by the record made therein. /Emphasis supplied/

A number of persons interested primarily in the transportation of motor vehicles have filed verified statements in which they, in effect, argue in support of, or in opposition to, the above-described findings of the Commission in the NATA case. The question is raised whether the proposed rules involve multi-level rail car, hereafter called MLRC, service.

Ford Motor Company (Ford) suggests that the definitions included in the proposed rules (see Rule A-1) be amended by adding the following sentence:

> Trailer on flatcar (TOFC) service shall not be deemed to include rail multi-level service.

It argues that since some question was raised at the prehearing conference as to whether the proposed rules cover MLRC service, it would appear wise to clarify this point and firmly establish that MLRC service is not covered.

The National Automobile Transporters Association (Transporters Assn.) for its individual members (except Motor Convoy, Inc., National Trucking Company, and Auto Convoy Co.) specifically seeks reaffirmation of the findings in the NATA case. It refers to page 412 where the Commission said:

> *** that the transportation of new automobiles in an initial movement from a manufacturing point to a rail point for the purpose of a further movement by rail in TOFC or MLRC service under the circumstances described herein, does not destroy the 'initial' nature of such movement.

As hereinafter seen, the Transporters Assn. and others have filed requests to separate the issues involving the transportation of motor vehicles from the general issues raised in the instant proceeding. In view of the conclusions hereinafter reached granting such requests, it is not deemed necessary to set forth herein the arguments raised by the parties concerning the transportation of motor vehicles, except to the extent hereinafter shown.

General Motors Corporation (General Motors), Auto Transports, Inc., Howard Sober, Inc., and United Transports, Inc., also support the findings in the NATA case. Auto Transports is a contract carrier by motor vehicle of automobiles serving only General Motors. Under the terms of its contract, at the direction of that shipper, it now utilizes the railroad's ramp-to-ramp MLRC service "under Plan III"assertedly as a substitute for part of its authorized service. For a time beginning in May 1960, when TOFC service was made available for the transportation of automobiles, General Motors made arrangements with Auto Transports to utilize TOFC service for portions of some movements.

The Convoy Company, Motor Convoy, Inc., and Auto Convoy Co., disagree with some of the findings in the NATA case and contend that certain of the findings made therein are no longer correct. They argue that, in view of the

NATA decision, the proposed rules embrace MLRC service, but some suggest amendments to such rules to cover primarily MLRC service. Auto Convoy argues that there is a vast distinction between the use of multi-level rail cars and a true TOFC service. It contends that if the proposed rules pertaining to TOFC service are to be made equally applicable to the use of multi-level rail cars, "by the same token" they should be made applicable to the use of box-car service. It is of the opinion that there are no automobiles today moving from the manufacturer in TOFC service, though a substantial portion of the traffic is moving in MLRC service.

The C & O, Atlantic Coast Line Railroad Company (Coast Line), Illinois Central Railroad Company (IC), L & N, Seaboard, Southern Railway Company, (Southern), and SFA Railroads contend that the instant proceeding does not encompass MLRC service. One or more of these parties argues that it would be as improper to include MLRC service in this proceeding, as it would be to include all other railroad services; and that rack-car (MLRC) service is merely an improved all-rail service. It is also argued that MLRC service is not substituted intermodal service although it may be joint or interline service. They admit that some years ago some automobile traffic moved in TOFC service, but assert that this type of movement lasted only a short time. For example, the IC no longer has any arrangements with motor carriers for the transportation of automobiles in TOFC service. The Coast Line argues that if the movement of automobiles in bi-level or tri-level cars does not constitute TOFC service, then the automobile hauling industry should have no further interest in the instant proceeding.

By petition dated March 15, 1963, the Transporters Assn. requests the elimination from this proceeding of all issues peculiarly related to the transportation of motor vehicle traffic. It points out that its participation in the instant proceeding has been motivated primarily by the desire to protect and preserve the relief obtained through the findings of the Commission in the NATA case, and seeks to avoid any reversal or modification of those conclusions. Transporters Assn. is of the view that separation of the issues pertaining to the transportation of motor vehicle traffic from consideration of the other issues raised in the instant proceeding would be of benefit to the Commission, would be of benefit to the motor vehicle transporters, and would be of corresponding benefit to those motor carriers not so engaged. It argues that the members of its association do not have any particular interest in the numerous issues involved in the instant proceeding. Accordingly, it requests separation of the issues as provided in the afore-mentioned order of the Commission entered October 12, 1962.

The request of the Transporters Assn. is supported by General Motors and Auto Transports in their joint petition dated March 2[illegible], 1963. They contend that the proposed rules do not contemplate the character of motor carrier service performed by motor carriers of motor vehicles.

By petition dated March 29, 1963, Ford joins in the request of the above-described parties for separation of issues. It is noted that most of Ford's shipments of vehicles by rail move in MLRC service and that "few, if any, vehicles are shipped on the haulaway trailers in TOFC rail service." It argues that the transportation of automobiles is a specialized type of service and presumably is of little or no interest to the general commodity carriers and the freight forwarders; and that the requirements and characteristic of MLRC service "bear no similarity to those of conventional TOFC service." Ford contends therefore that such regulations as the Commission may promulgate in connection with general TOFC service "would, in all probability, be inappropriate for MLRC service."

The C & O by petition dated April 1, 1963, also requests the elimination from this proceeding of any preference to operations or practices concerning (1) the transportation of property in or on multi-level rail cars, or (2) the use of, or manner of preformance or charges involving, MLRC service. It repeats the arguments set forth above that MLRC service is not, in fact, within the scope of the proposed rules, nor within the contemplation of the order instituting the investigation.

A study of the proposed rules and of the verified statements and replies filed by the parties with respect to such rules, convinces the examiners that the proposed rules do not include MLRC service, that they deal only with TOFC service, and that the rules should not be amended, as suggested by some of the parties, to cover MLRC service. The latter service involves primarily the transportation of automobiles in a new type of rail car, designed specifically for the carriage of automobiles. On the other hand, TOFC service involves the transportation of loaded or empty trailers (or containers) on a rail flatcar. Unquestionably, TOFC service and MLRC service are not one and the same, are not so considered in the transportation industry, and neither service includes the other. Automobiles have moved in TOFC service, and much of the discussion in the NATA case deals with such service. So far as this record shows, however, automobiles now move only in MLRC service.

In view of our conclusions that the proposed rules do not include MLRC service and that, so far as this record shows, automobiles now move only in such service, it could be argued that the described requests for separation of issues are unnecessary. We recognize, however, the possibility that some automobiles may still move in TOFC service, and that if they are moving in such service, the findings hereinafter made respecting Plan I TOFC service in particular, although not specifically so intended, may affect the interpretation made by the Commission in the NATA case as to the meaning of the terms "initial movements" and "secondary movements" as employed in grants of motor carrier operating authority to transport motor vehicles. In the circumstances, we find that separation of the issues pertaining to the transportation of motor

vehicle traffic from consideration of the other issues raised in the instant proceeding would be of benefit to the carriers transporting motor vehicles, and to those motor carriers not so engaged. Accordingly, the examiners conclude that the request for separation of issues pertaining to the transportation of motor vehicles should be granted and that there should be eliminated from this proceeding any further references to operations or practices concerning (1) the transportation of property in or on multi-level rail cars, or (2) the use of, or the manner of performance or charges involving, MLRC service. In view of this conclusion, we deem it unnecessary to discuss further any of the comments or suggestions made by Ford, General Motors, Transporters Assn., or the above-named motor carriers pertaining to one or more of the proposed rules.

By petition dated March 15, 1963, the SFA Railroads move to strike certain portions of the verified statements filed on behalf of Convoy Company, Motor Convoy, and Auto Convoy Company, as well as certain portions of other verified statements hereinafter discussed. In its reply, Motor Convoy requests that the motion be rejected as not proper under the special rules of procedure under which this proceeding is being handled, or that the motion be denied. In view of the conclusion concerning the separation of issues, we are of the view that the motion to strike portions of the verified statements of the three named motor carriers should be overruled.

LEGALITY OF PLAN I SERVICE

The Freight Forwarders Institute (FF Institute)[3], Southern, Clipper Carloading Company, and Helm's Express, Inc. (Helms) attack the legality of Plan I arrangements. The FF Institute argues that such arrangements are unlawful, per se, on the grounds briefly, (a) that motor carriers may not be authorized to utilize rail transportation in substitution for their highway service, and (b) that Plan I arrangements do not conform to the statutory requirements for through routes and joint rates. In general, the arguments advanced by the above parties are the same as those raised by the FF Institute and others in the NATA case, and were found therein to be without merit. In the NATA case, however, the Commission called attention to the instant proceeding and said that the findings made there were not to be "considered as precluding different findings in the general investigation /Ex Parte No. 230/ which are warranted by the record made therein." The Commission's order instituting this proceeding, stated as one of the issues to be determined:

> What is the nature of the operating rights that must be held by motor carriers in order to participate in TOFC Plan I substituted service, including the question whether motor carriers may participate in such service where the motor carrier's route is circuitous with respect to the portion of the rail route used.

A summary of the contentions made by the parties attacking the legality of Plan I is as follows: (1) that the movement of motor carriers' trailers on rail flatcars is rail service subject to Part I of the act; (2) that Plan I TOFC arrangements result in numerous violations of Part I of the act; (3) that motor carrier utilization of rail service, on any basis other than joint rates, constitute abandonment of motor service and unlawful invasion of the forwarding industry; (4) that, when using Plan I TOFC service, motor carriers assume all the characteristics of a freight forwarder and thus engage in unfair and destructive competition with the forwarding industry; (5) that the term "substituted service" is a "stranger" to the Interstate Commerce Act and that the only substitution anywhere permitted under Part II is the authority to substitute one highway route for another, as provided in

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3/Its members are Acme Fast Freight, Inc., American Freight Forwarding Corp., Barge Service Corporation, Century Carloading, Inc., International Forwarding Company, Lifschultz Fast Freight, Lone Star Package Car Company, Merchant Shippers Association, National Carloading Corporation, Ohio Fast Freight Corporation, Pacific & Atlantic Shippers, Republic Carloading & Distributing Co., Sheldon Forwarding Company, Springmeier Shipping Co., Inc., Universal Carloading & Distributing Co., Western Carloading, and Westland Forwarding Company.

section 208(b);[4] (6) that the alternate route authority provided under section 208(b) of the act is not applicable to Plan I; (7) that the Commission, in trying to encourage the use of Plan I substituted service, has ignored the desirability of preserving competition and the stated objectives of the national transportation policy; (8) that under Plan I, the railroad is merely a tool of the long-haul motor carrier, which retains the traffic and accomplishes the transportation by the use of TOFC service for all or a part of the line haul at a lower cost to it; (9) that no one really knows for certain how Plan I functions as there is less known about Plan I than any other facet of transportation; (10) that before the Commission properly may prescribe rules concerning Plan I arrangements, it should have a full scale investigation of the charges, rules, regulations, and practices involving such service; (11) that Plan I service should be disapproved and in lieu thereof Plan III service and coordinated truck-rail service should be permitted to shippers and motor common carriers alike under regulations prescribed by the Commission in the instant proceeding; and (12) that the only joint intermodal TOFC service which should be authorized is the so-called Plan V service requiring the publication of joint through rates in tariffs filed with the Commission between railroads and other modes of transportation utilizing TOFC service on a voluntary basis by the participants.

Citing the NATA case in support thereof, the FF Institute also contends that Plan I arrangements do not meet the statutory requirement for joint rates. Although the terms "joint rates" and "divisions" are not defined in the act, it believes that the Commission gave a good definition of a "joint rate" in Freight Forwarders, Motor Common Carriers, Agreements, 272 I.C.C. 413, 446, as follows:

> In common-carrier regulation the term 'joint rates' has acquired the definite meaning that two or more carriers forming a through route have agreed, expressly or impliedly, to participate in transportation over different segments of the through route to form a complete service, and that they have agreed upon and join in a combined or total charge, known as a 'joint rate,' instead of requiring the payment by the shipper of each carrier's individual rate. *** Carriers participating in joint rates, as they are understood in this country, must be common carriers.***

4/ Section 208(b) of the act provides: "A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

[fol. 1433]

In arguing that Plan I arrangements do not fit the foregoing statutory and decisional definitions of a joint rate and through route, the FF Institute asserts that the freight never moves from a point on the line of a motor carrier to a point on the line of a railroad, as required by section 217 of the act, and that it always moves between points on the line of the motor carrier. They further assert that under Plan I there is no joint responsibility, that the sole responsibility is that of the motor carrier, and that there is no "division" of a rate involved.

The FF Institute also contends that as the unpublished charge which the railroads make for transporting trailers under Plan I have no standing as "divisions", the railroads transport freight without having filed their published tariffs as required by section 6 of the act; that as the charges received from motor carriers under Plan I differ from, and are in "perhaps all instances lower than," charges exacted from "other shippers" for a like service under substantially similar circumstances and conditions, they result in unjust discrimination in violation of section 2 of the act; that as Plan III service is exactly comparable to Plan I from a physical standpoint and that as the Plan I charges to the motor carriers are materially lower than the Plan III rates, the railroads create unreasonable preferences and advantages as "between shippers", in violation of section 3 of the act. It calls attention to the fact that it has been the practice of the Commission to grant blanket Fourth Section relief apparently as a matter of course and without an "investigation" in the sense that such term is used in the act, and contends that the Plan I arrangements give rise to many section 4 violations.[5]

Replies have been filed by the Class I Railroads of the Western District (Western Railroads), the Manufacturing Chemists Association (Chemists Assn), PRR, Erie and the ATA.[6]

5/ On April 24, 1963, the New York Central Railroad Company filed a petition requesting the Commission to enter a declaratory order, pursuant to section 5(d) of the Administrative Procedure Act, for the purpose of determining whether there is need for relief from the long-and-short haul provisions of section 4(1) of the Interstate Commerce Act. This petition has been docketed as No. 34254.

6/ The verified statement of ATA was also filed on behalf of the National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference, Common Carrier Conference - Irregular Route, National Tank Truck Carriers, Inc., Central and Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, The Eastern Central Motor Carriers Association, Inc., Eastern Tank Truck Carriers, Inc.,

(Footnote continued on following page.)

We agree[7] in general with the views expressed and accordingly do not deem it necessary to specifically set them forth herein.

The Commission in a number of proceedings over the years has recognized the legality of Plan I and other types of various TOFC services and encouraged their development and extension. In view of the rapid development and changes in the use of TOFC service and of the issues raised herein concerning present TOFC practices in general, it may well be, however, that past approaches to TOFC service do not adequately provide for the future growth of TOFC transportation as will serve the public in the light of the National Transportation Policy. A brief review of the findings of the Commission in cases involving TOFC service in general and of Plan I service in particular follows.

With the possible exception of certain conclusions in the NATA case, hereafter discussed, the decisions of the Commission since the effective date of what is now Part II of the act have (1) approved the use of TOFC service or coordinated service between motor common carriers and rail carriers, and (2) found such service to be lawful under the act provided certain conditions were met. Some of the service discussed and approved consists of what is now known as Plan I TOFC service. Possibly the first case where the Commission approved coordination of operations between rail and regulated motor common carriers was decided in November 1936. Early in that year the Chicago Great Western Railroad Company (Great Western), began a TOFC service between Chicago, Ill., and St. Paul, Minn., primarily for the purpose of attracting the trailers of the carriers by motor vehicle. In Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245, (Traffic in East and Midwest Case), the Commission approved the joint-rate tariff which was published to cover the provision of such

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(Footnote 6 continued from preceding page.)
Indiana Motor Rate & Tariff Bureau, Middle Atlantic Conference, Middlewest Motor Freight Bureau, The New England Motor Rate Bureau, Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, Inc., Rocky Mountain Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, Southwestern Motor Freight Bureau, Inc., Cooper-Jarrett, Inc., Eastern Express, Inc., Eastern Motor Dispatch, Inc., and Kramer Bros. Freight Lines, Inc.

7/ It is noted that the Western Railroads, in their reply statement, argue that the legality of Plan I service is not an issue in this proceeding as no rule has been proposed that would abolish such service. True no such rule has been proposed, but in view of the contentions advanced by the parties and of the fact that certain of the proposed rules could apply only to Plan I service, the examiners conclude that the legality of Plan I is an issue herein and should be determined.

service by the Great Western and the motor carriers "cooperating" with it. In this connection, it is of interest to note that the Commission in that case stated beginning at page 272:

> Section 216(c) does not define the particular type of through routes therein authorized to be established, the only requirement being that they shall be reasonable.* * *
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> As many considerations bear upon the feasibility and practicability of such arrangements, we cannot conclude that the proposed through routes are unlawful because similar routes are not provided from and to all points on the line of the participating rail carrier. Nor can we accept the contention that because the haul which a motor common carrier might receive on some traffic would be short, or terminal in character, that it may not participate in such a joint rail-motor route. On this point we see no reason for departing from the following conclusion reached in Trucking L.C.L. in Lieu of Rail Service, 185 I.C.C. 71, 73: /Emphasis supplied/
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> 'And while terminal carriers may publish switching charges, and act as the agents of connecting road-haul carriers when the latter assume and pay those charges, there is nothing in the act which prohibits the terminal carriers from participation in their own right in joint through rates, as they have elected to do here.'

And at page 274, the Commission further said:

> One of the protestants argues with great insistence that it is unlawful for a motor carrier having authority to operate over particular routes to 'substitute transportation of its motor vehicles on flat cars over a totally different route for its highway operations.' This argument assumes that under the proposed arrangement the status of respondent motor carrier with respect to the rail portion of the transportation would be that of a shipper. Nothing in the evidence warrants that assumption. The motor carrier's status is that of a connecting carrier under a joint-rate arrangement which, as previously indicated, is specifically authorized by law. The novel way in which the traffic is handled does not affect the status of the participating carriers in that arrangement. It does not appear that any portion of the transportation which the motor carrier would perform under the arrangement would be over routes other than those over which it may lawfully operate.

In 1938, the Commission entered upon an investigation into the lawfulness of the tariff rules published pursuant to certain special permissions, and into the lawfulness of the practices of common carriers by rail and water subject to Part I of the act and of common and contract carriers by motor vehicle subject to Part II, in connection with the substitution of motor vehicle service for rail or water service and of rail or water service for motor-vehicle service. That was Substituted Freight Service, 232 I.C.C. 683, (Substituted Service case). There the Commission concluded, beginning at page 687:

> There can be no doubt that the interstate transportation service here under consideration is common-carrier service and that either the rail carrier must have authority to engage in common carriage by motor vehicle in its own right, or the motor carriers joining in such service must be authorized to act as such carriers in their individual capacities. /Footnote omitted/. In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act.

The Commission noted that the only specific instance of substitution of rail service for motor carrier service was in connection with Consolidated Freight Lines, Incorporated, which on transcontinental traffic substituted for its service between Minneapolis, Minn., and Terry, Mont., service of the Chicago, Milwaukee, St. Paul and Pacific Railway Company on account of load restrictions within the State of North Dakota. With respect thereto, the Commission stated at page 690:

> *** It appears that between these points it acts as a forwarder or shipper and assembles the traffic tendered by the individual shippers into carload lots, paying the railroad the carload rate between Minneapolis and Terry and assessing the individual shipper or consignee its less-than-truckload rate between primary origin and destination. But for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it

appears that it actually has common-carrier rights between Minneapolis and Terry. [Footnote omitted] Generally speaking, it appears that the special permissions governing the substitution of rail service for motor-carrier service and of motor-carrier service for water service were published merely because similar special permission was accorded the rail carriers. If Consolidated or other motor and water carriers desire to continue this service, they should bring the service into conformity with the tariff provisions of the act in accordance with the views expressed herein.

The suggestions made herein contemplate that the substituted service shall consist of joint rail-motor or joint motor-water service, that is, a combination of line-haul movements by both motor and rail or water. Thus, they are not intended to cover instances where the service is entirely by motor carrier and no actual rail service is performed or instances where the port-to-port service is entirely by motor vehicle and no actual water service is performed. Where all-motor service is rendered from origin to destination or from port to port, all-motor tariffs published in accordance with part II should be filed to cover. ***

In the Substituted Service case, the Commission found:

1. The interstate transportation here under consideration is common carriage and cannot lawfully be performed by motor vehicle in whole or in part unless the rail or water carrier or participating motor carriers are authorized to act as common carriers by motor vehicle in accordance with the provisions of sections 206-208 and our regulations thereunder;

2. The substitution of one form of transportation for another at the carrier's option, where the shipper otherwise directs, would constitute a breach of the contract of carriage in contravention of section 20(11) of part I and section 219 of part II; and

3. The furnishing of the so-called substituted service without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs is in contravention of sections 216-217 and our regulations thereunder, including rule 31 of section 2 of Tariff Circular 20.

By petition filed late in 1953, the New Haven sub- d to the Commission for its consideration 20 questions rning the legal relations, limitations, and

obligations incident to the transportation of highway trailers on rail flatcars, and requested a declaratory order under section 5(a) of the Administrative Procedure Act. In the New Haven case, the Commission reviewed at some length TOFC services in general in answering questions pertaining to the use of TOFC service. Therein, the Commission referred to its decision in the Traffic in East and Midwest case and confirmed the findings made therein that in those instances where the motor common carrier's trailers are moving in the railroad's TOFC service that the motor carrier's status is that of a connecting carrier. Further, the Commission, after noting that it was "necessary to consider the arguments of certain interests concerning the matter of substituted freight service," in effect answered many of the contentions now advanced by the parties in their attack on Plan I, when it said (at page 106):

> The New York Central contends that a substituted freight service arrangement does not result in the existence of joint rates. [Footnote omitted] Under substituted-rail-for-motor service, say the eastern railroads, 'the motor carrier would still be the carrier, so far as the public is concerned. The railroad would simply be a tool * * * in relationship with the motor carrier * * *. The Commission has referred to it as a joint service, but so far as the public is concerned, certainly it is still a motor carrier service even though you have a physical combination.'
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> * * * we are of the opinion that trailer-on-flatcar transportation is in fact transportation by railroad. And this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.
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> A joint rate is one that applies to transportation extending over the lines of two or more carriers, and which is made by arrangement or agreement between such carriers and is evidenced by concurrent or power of attorney. 49 CFR 141.0(b)(3). In Substituted Freight Service, supra, we said that 'where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated.' We recognized that substituted freight service presented certain problems in the publication of tariffs, and indicated that interested carriers might confer with representatives of our Bureau of Traffic to work out a simplified form of tariff publication. Certain carriers suggested that the substituted service might be covered by a tariff rule and directory containing a list of participating rail and motor carriers and showing between what points the substituted service is performed. We stated that if publication takes the form of a directory, it should be published with appropriate concurrences of the rail and motor carriers listed therein.

Since the above cited cases, the Commission or a division thereof, (1) in Substituted Rail Service by Red Ball Transfer Co., 303 I.C.C. 421, hereafter called the Red Ball case, has approved the substitution of rail service for the over-the-road service of a motor common carrier, stating at page 424, that it was "unable to find anything unlawful in the proposed substituted rail service"; (2) in Substituted Service - Consolidated Freightways, Inc., 305 I.C.C. 301, has approved the substitution of rail service for motor service between certain points, but found not lawful the proposed substitution to and from other named points as the motor carrier respondent (see page 304) "may not establish rates for substituted rail service between points which it is not authorized to serve as a motor carrier" (findings upheld in Consolidated Freightways, Inc. v. United States, 176 F. Supp. 559); and (3) in Gordon's Transports, Inc. v. Strickland Transp. Co. 318 I.C.C. 395, hereafter called the Strickland case, did not approve the proposed substitution of TOFC service by that motor carrier and stated, at page 401, that "substituted service, in our opinion, should bear some reasonable relationship to the authorized motor carrier service for which it is substituted." The findings in the Strickland case were recently confirmed by the United States District Court for the Northern District of Texas in Strickland Transportation Company, Inc., v. United States (civil action 3-63-77)). The Court stated that it was "in agreement with the findings of the Commission and its conclusion that the present and proposed uses by Strickland of TOFC service between the considered points is unlawful." The FF Institute and others were permitted to intervene and the Court also stated that the "broad issues which these intervenors seek to raise, that is the lawful status of the use by motor carriers of 'substituted service' is before the Commission in" the instant proceeding.

As heretofore seen, the FF Institute, to some extent at least, relies upon the decision of the Commission in the NATA case to support its contentions that Plan I arrangements do not meet the statutory requirement for joint rates. In that case, the Commission stated beginning at page 409:

> Under present methods of motor-rail operations, a true substituted service is achieved in TOFC plan I transportation of automobiles since the motor carrier retains full responsibility under its own tariff for the shipment and takes advantage only of voluntary rail participation. In the case of the contract carrier, as discussed infra, rail participation is a recognition of the contract arrangement between the contract carrier and its shipper. In all respects the responsibility for the transportation service rendered to shipper rests upon the motor common or contract carrier and the motor carrier must hold appropriate motor operating authority to perform

such service. Although the railroad essentially performs the same physical service in the transportation of automobiles for its portion of the haul under plans I, III, and V, the forms of carriage materially differ.

In Movement of Highway Trailers by Rail, 293 I.C.C. 93, it was stated that where a railroad and motor carrier have a joint rate arrangement for substituted rail-for-motor service they are in the relation of connecting carriers. However, under TOFC Plan I service, whereby a motor common carrier utilizes substituted rail-for-motor service for the transportation of initial movements of automobiles, there is no delivery to a connecting carrier and no interchange, in the sense of a motor-to-motor interchange, with a rail carrier; rather, what is contemplated is the substitution of rail service for a portion of the service the motor carrier is already authorized to perform under its own existing initial authority. Unlike a TOFC plan V movement where there is a joint rate and joint responsibility, and where the rail carrier's service may extend beyond the authorized initial service area of the motor carrier, TOFC plan I is a true substituted rail-for-motor service.* * *

In concluding that the above also was applicable to contract carriers, the Commission said, at page 413:

The foregoing conclusions concerning common carrier participation in substituted service under TOFC plan I is applicable to contract carriers. In legal effect, the use by motor carriers of substituted rail service is a true substitution and that movement, for all legal purposes, remains the operation of the motor carrier. Therefore, it follows, that contract carriers are not prohibited from using substituted rail service merely because they cannot participate in joint-line service with motor or rail common carriers. The entire operation, at least in the present state of the law and under Commission regulations, remains that of a motor carrier. Since the filing by the rail carriers of substituted service directories is not required under the law or the Commission's regulations, the rail carriers may accept, under plan I contracts, trailers tendered by either motor common or contract carriers. /Emphasis supplied/

In view of (1) the findings in the cases heretofore discussed, and (2) the contentions raised by the parties in their attack upon the legality of Plan I operations based in part at least upon the findings in the NATA case, we are confronted first with the problem of determining which findings are correct and should be followed herein -- those in the NATA case, or those to the contrary in the

Traffic in East and Midwest case, the Substituted Service case, and the New Haven case. As seen, the conclusions in the NATA case, contrary to those in the other three cases cited, are that Plan I operations are a "true substituted rail-for-motor service," that there is "no interchange" with a "rail carrier", that "the entire operation, at least in the present state of the law and under Commission regulations, remains that of a motor carrier", and that since "the filing by the rail carriers of substituted service directories is not required under the law or the Commission's regulations, the rail carriers may accept, under Plan I contracts, trailers tendered by either motor common or contract carriers."

In connection with the above findings of the Commission in the NATA case (see page 413), it is true that a substituted service directory is not specifically required by the act or the Commission's regulations. It is, however, a method of publication by which the carriers comply with the requirements of the law and the Commission's tariff rules governing the publication and filing of tariffs. Because this method does not comply in all respects with the tariff circular rules, the Commission granted special permission to both the rail and the motor carriers waiving the tariff rules necessary to permit the carriers to comply with the tariff filing requirements of the law in this manner. Further, it is undoubtedly correct that the rail carriers would not file a substituted service directory in the above-mentioned circumstances. In Plan I service the motor carrier is the one that is substituting rail service for its over-the-highway service, and the motor carrier generally files the directory. The rail carrier is simply transporting by rail, traffic offered to it by a motor carrier.

It is true, as argued by the FF Institute and others, that the term "substituted service" is not found within the Interstate Commerce Act. On the other hand, neither are a number of other terms now in general use in transportation parlance. In any event, the furnishing of so-called "substituted service" was first discussed in the Substituted Service case. Since that time a large number of railroads have been authorized under section 207 of the act to substitute service by motor carrier for service by rail from and to numerous points on the lines of the railroad subject to certain conditions. The authority so granted has always been as a common carrier by motor vehicle.

No one questions the finding of the Commission in the New Haven case that "trailer-on-flatcar transportation is in fact transportation by railroad", and that "this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers." It naturally follows therefore that for a motor carrier to use Plan I service of a rail carrier, it may do so only as a shipper or as a connecting carrier under the

provisions of the act. Plan I service is not available to shippers. And there is no indication of record that regulated[8] motor carriers are utilizing Plan I service without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs as required by the act and the Commission's regulations thereunder. The question then becomes does section 216(c), which undoubtedly embraces Plan V operations, also embrace Plan I operations, and if not, what section of the act, if any, permits a motor carrier to use Plan I operations as a so-called substitute for any part of its authorized operations by motor vehicle? Section 216(c) provides:

> Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Other than for the above provisions of section 216(c), we are aware of no other provision of the act which would permit motor carriers to use Plan I service. Nor has anyone suggested that any other provision of the act is applicable to such service.

Before further discussion of the issues raised respecting the use of Plan I service, we desire to call attention to certain aspects of Plan V service. Unquestionably, in those instances where motor and rail carriers participate in Plan V service, a motor carrier may, under section 216(c), interchange traffic with a rail carrier at a point short of the full length of the motor carrier's authorized operations. Instead of using a substituted service directory the motor carrier could add the participation of the rail carrier to its rate tariffs and provide routing between it and the rail carrier at exactly the same points where traffic would

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8/ With respect to the transportation of so-called exempt commodities, see the discussion under proposed Rule B-2.

be interchanged under the directory.[9] It should also be realized that if the motor carrier employed this method, which undoubtedly it would have the right to do, it could accomplish the same thing as substitution by simply routing the shipment in accordance with routing in the tariff, without calling it substitution. In other words, the motor carrier would have the choice under its tariff of either routing the shipment by highway to destination - on its own line if it serves the destination or interchange it with another motor carrier - or routing it to the connection with the rail carrier, and the rail carrier beyond. This, of course, would be the case where the shipper has not routed the shipment. Although a shipper does not have the right under Part II to route its traffic, the Commission has held that when it does, there is an obligation on the carrier to observe it. In effect, this is what the shipper does when it exercises its right under the substitution rule and directs that the shipment is to move entirely by highway.

Unquestionably shipments handled in Plan I service move only on the billing of the motor carrier and under rates as provided in the motor carrier's tariff. And when a rail carrier handles a shipment moving from and to points where the rail carrier substitutes the service of a motor carrier for a portion of its service, the shipment moves only on the billing of the rail carrier and under the rates of the rail carrier. Under Plan I, the motor carrier may be said to take advantage of the voluntary participation of the rail carrier in the movement of the traffic. It is true that so far as the public is concerned, Plan I service is that of the motor carrier, and similarly the described substitution of motor for rail service is that of the rail carrier. This does not mean, however, that the public does not know that the motor carrier may use the service of a rail carrier for a portion of the haul under Plan I service, for the tariffs not only set forth the service, the routes over which it is is performed, and the parties performing it, but also provides in substance that the shipper has the right to direct that the carrier may not substitute TOFC service for the over-the-road transportation service of the motor carrier. In this connection, tariffs providing rates for Plan V service do not give the shipper such right.

As stated by the Commission in the Traffic in East and Midwest case, section 216(c) does not define the

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9/ A motor substituted service directory provides reference to the concurrence of the rail carrier, the points between which the substitution may be made - which in effect is routing - and incorporates that information into the rate tariff by making the latter tariff be governed by the directory.

particular type of through routes and joint rates therein authorized to be established, the only requirement being that they shall be reasonable. It is also true that Plan I service in some respects may be said to be somewhat different from what some persons consider normal "through routes and joint rates." As further stated in the Traffic in East and Midwest case (see page 274), in discussing what is now known as Plan I service, the "novel way in which the traffic is handled does not affect the status of the participating carriers in that arrangement", and the "motor carrier's status is that of a connecting carrier under a joint-rate arrangement which *** is specifically authorized by law." Moreover, while a shipment in Plan I service moves from a point on the line of a motor carrier to another point on the line of the same motor carrier, it should not be overlooked that the shipment also moves over the line of a rail carrier under an arrangement or agreement between such carriers. And the transportation is partly by motor and partly by rail as contemplated in section 216(c).

Under all the circumstances, we conclude that the arguments advanced by those parties attacking the legality of Plan I operations are without merit. In this connection it may be observed that we also are of the view that such operations, which in effect permit the coordination of service between motor and rail carriers, provide an additional means of meeting the needs of shippers as well as the carriers; that the public is protected against any misuse of the practice by reason of the shipper's retention of the right to specify that it desires over-the-road transportation by the motor carrier it selects to transport its shipments; and that clearly the continuation of Plan I service is in the public interest and in harmony with National Transportation Policy.

The above conclusions make it unnecessary, in our opinion, to consider the other arguments advanced by those opposing Plan I service except to add that as motor common carriers are not using Plan I service as shippers, there can be no violations of sections 2 and 3 of the act, as alleged. See Eastern Central M. Carriers Assn. v. Baltimore & O. R. Co., 314 I.C.C. 5, 50 (Eastern Central case). Issues with respect to the question of whether or not the tariffs may provide for Plan I service for the entire line-haul movement are hereafter discussed under proposed Rule B-7.

One other matter remains for consideration in connection with the use of Plan I service. As seen, in the NATA case the Commission found that "rail carriers may accept, under Plan I contracts, trailers tendered by either motor common or contract carriers." We have concluded that motor common carriers may use Plan I service of the railroads. The Contract Carrier Conference (Contract Conference) of ATA, argues that to allow common

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carriers to participate in "intermodal service" and to deprive motor contract carriers of such right, not only denies "equality of opportunity", but places greater reliance on the "restraints of regulation" and less reliance on the "forces of competition."

The Commission's notice concerning the proposed rules stated that the rules do not contemplate the use of TOFC service by motor contract carriers. In its statement of position with respect to the proposed rules, the Contract Conference suggests changes in the proposed rules which generally speaking would permit contract carriers to use TOFC service. Dyer O'Hare Hauling Co., and the Meadows Transfer Co., are contract carriers by motor vehicle serving principally the Great Atlantic and Pacific Tea Company. The B & L Motor Freight, Inc., is a contract carrier and serves only the Owens-Corning Fiberglas Corporation. Neither one of these contract carriers has used TOFC service in the past. Each believes that it should be authorized to use TOFC service in the future whenever the shipper it serves desires that it be done.

We have heretofore concluded that a motor common carrier may use Plan I service and that in so doing its status is that of a connecting carrier under a joint-rate arrangement which is authorized under section 216(c) of the act. Carriers "participating in joint rates, as they are understood in this country, must be common carriers." See Freight Forwarders, Motor Common Carriers, Agreements, supra, at page 446. Furthermore, since the substitution of rail for motor service results in a joint service partly by motor and partly by rail, the single-factor through rate applied to such transportation becomes a joint rate. Under section 216(c) only common carriers are authorized to establish through routes and joint rates. The law therefore does not permit contract carriers to participate in through route and joint-rate arrangements with common carriers by rail. In the circumstances, we also conclude that contract carriers by motor vehicle may not use Plan I service, and that the findings to the contrary in the NATA case should be reversed.

A contract carrier by motor vehicle of course may use Plan III service as an agent of the shipper it serves under certain conditions. As stated in T. T. Brooks Trucking Co., Inc., Conversion Application, 81 M.C.C. 561, 573, a contract carrier may be employed as a shipper's agent "separately from the contract of carriage", but the other carrier involved must collect its regularly published charges for the service furnished, and the bill of lading issued by the other carrier must show the shipper and not the contract carrier agent as the consignor. Further, the trailers used in such Plan III service must be owned or leased by the shipper. It may be that motor contract carriers should be permitted also to use Plan III

service within the scope of the carrier's permit where specifically so directed by the shipper under its contract with the shipper. However, this record does not show that any motor contract carriers now use[10] or propose to use TOFC service. In the circumstances, we do not believe it necessary to give further consideration to the views of the Contract Conference or to those of the above mentioned contract carriers.

By petition filed April 2, 1963, the FF Institute requests that the following issues and operational areas be separated from the other issues and areas involved in the instant proceeding:

(a) The lawfulness of the participation by common or contract motor carriers in TOFC Plan I;

(b) The lawfulness of the utilization by common or contract carriers of TOFC Plan III or IV rail rates and service;

(c) The lawfulness and reasonableness of the charges and practices of carriers participating in TOFC Plan I substituted service; and

(d) The prescription of rules and regulations and practices for the conduct of TOFC Plan I, if such service is not found to be unlawful, per se.

It also requests (1) that oral hearing be held for the purpose of cross examination of (a) named witnesses who have submitted evidence concerning the above issues and (b) all persons who have filed statements on behalf of the Bureau; (2) that oral argument be held at the conclusion of the cross examination; and (3) that the Bureau be directed to participate in such oral hearing and to develop and present evidence bearing on such issues.

Many of the arguments presented by the FF Institute have been discussed above and some of the other contentions raised by it are hereinafter discussed under certain of the proposed rules. In view of the conclusions reached herein with respect to the use of Plan I service by motor common carriers, we are of the opinion that the FF Institute has not established that good cause exists for the requested action and conclude therefore that the petition should be denied.

10/ As heretofore stated, some contract carriers have been used for the transportation of automobiles in TOFC service, but this practice has apparently ceased. Further, the requests, to separate issues concerning the transportation of automobile traffic from the other issues herein have hereinbefore been granted.

GENERAL NEED FOR TOFC RULES

The Western Railroads, the Eastern Railroads, Southern, The Association of American Railroads (AAR), the Railway Labor Executives Association (RLEA), and two shippers, in their reply verified statements, question whether there is any need for the proposed rules. Some contend that not only is there no need for the proposed rules, but that there also is no need for any of the variants of such rules suggested by the Bureau or any other party.

The position of some of the above-named parties seems to have changed somewhat since the filing of their verified statements. In any event, it is noted, for example, that the Western Railroads in their verified statement raise no objection to a number of the proposed rules, do not object to the principle of certain of the proposed rules and in fact suggest changes in the wording of such rules. This is likewise true with respect to some of the other railroads.

In arguing that none of the proposed rules should be adopted, one or more of the above-named parties contend briefly that the shippers are virtually unanimous in opposition to any rules that would prohibit (a) present Plans III and IV, or (b) the leasing of equipment to shippers by railroads; and that in most intances they have expressed opposition to the remaining rules. It is argued that the shippers understand the present TOFC rules and the plan-number designations, and believe that the proposed rules would produce confusion where none now exists; and that the evidence adduced by the shippers shows that TOFC service should continue to be operated and developed under the managerial and policy guidance of the affected rail carriers, within the framework prescribed by the Commission in the New Haven case. They assert that the shippers, the railroads, the Secretary of Agriculture, the FF Institute, and other interests have introduced specific evidence supporting, what the Western Railroads say is, the rejection by shippers that TOFC service be poured into a rigid mold of prescribed rules. Accordingly, they argue that TOFC service should be free to develop in a case-by-case determination which leaves TOFC service free to progress through technological advancement and economic change. They contend that

ıe only specific support for the rules comes from the ›ng-haul motor carriers and the Bureau; that they have not ·oduced sufficient evidence to sustain their positions; and ıat, as the parties have had their day and full opportunity › submit evidence and express their views, the Commission ıould find, based on this record, that no rules should be ·escribed.

The Southern argues that any rules or requirements for ıich any need has been demonstrated may be imposed in ›nnection with the findings to be made in Docket No. 33133,[11/] 11 Freight in Trailer on Flatcar--Between the East and ıicago and East St. Louis.

The arguments set forth above that no rules should be ·escribed and that TOFC service should be free to develop ı a case-by-case determination or that any necessary rules ıy be imposed in connection with the findings in the above-ɛntioned case are without merit. The Commission, in its ·der instituting this proceeding stated:

> * * * That in recent years there has been a marked expansion of and changes in the use of coordinated and substituted service, particularly in so-called motor-rail piggyback operations; and that it is desirable that certain aspects of coordinated and substituted service be further considered by the Commission looking to the resolution and control of the legal and operational problems arising in connection therewith through the promulgation of appropriate rules, regulations, statements of policy, and precedent.

It is a matter of common knowledge that within the past ɜar or two, many questions have been raised concerning OFC services and practices and no doubt this influenced : least to some extent, the issuance of the above order. › believe that it would be very unlikely to have as many ıarties presenting their views in a case-by-case determina-ıon of the many issues involved in connection with TOFC ɜrvices and practices, except in a rule making proceeding ıch as the instant one. In this connection it should be

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1/ This case has been heard, but no report has yet been ɜsued. The greater portion of the evidence in Docket No. 3133 has been made a part of this record.

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noted that the Commission's order named all railroads, motor carriers, water carriers, express companies, and freight forwarders of property operating in interstate or foreign commerce subject to the Interstate Commerce Act, as respondents. These carriers as well as shippers, various government departments, and others have presented their views concerning not only the proposed TOFC rules, but also their views with respect to the regulation of TOFC service in general. In other words, this proceeding has presented an opportunity to the transportation industry as well as to shippers and others to assist the Commission (1) in solving the multiple and complex problems involved, and (2) in promulgating policy guide lines which will serve to encourage the future development of TOFC service. The views of all parties have been given careful consideration in reaching the conclusions hereinafter expressed. As pointed out by the Commission in the NATA case, at page 412:

> Turning now to consideration of motor common carrier participation in TOFC Plan III service, the original proposal in the division report was to make the Plan III rail open tariffs available to all motor common carriers as well as to shippers and freight forwarders. As therein stated, the physical rail transportation service provided by the railroads under Plans I, III, and V, is identical. But a motor carrier's utilization of an open tariff as a shipper has been considered as repugnant to the act.
>
> In view of the rapid development and change in the use of TOFC service, it is no longer clear that past approaches to these problems will adequately provide for the orderly growth of intermodal transportation, competitions, or service to the public. However, the facts at hand at this time do not warrant making any modification of the relationship between the services offered under Plan I and Plan III, and final disposition of these issues cannot logically be made here, however desirable prompt and final determination of these issues would be. In the circumstances, such consideration should be deferred pending resolution of the general investigation instituted in Ex Parte No. 230 referred to previously.

There remains, of course, the question of whether or not one or more of the proposed rules, or the changes suggested in such rules by the parties, should be adopted. As pointed out at the prehearing conference as well as to all parties participating in this proceeding, the proposed

rules in general represent a so-called new approach in that they contemplate abolishment of the attempt to describe varying TOFC services in terms of the "plan-number" terminology now in general use. It was specifically stated therein that the proposed rules are not intended, however, to curtail the TOFC services represented by the various numbered plans now in general use. Instead, it was said therein that the proposed rules represent an attempt to simplify the classification of piggyback services and nomenclature so as to eliminate what was said to be certain disadvantages of the "plan-number" arrangement. As hereinafter seen, a number of the parties believe that there would be more disadvantages if the present "plan-number" system were changed as proposed; and some argue that the adoption of some of the proposed rules would have the effect of eliminating some of the present TOFC services. The proposed rules do not involve rates as such but deal only with practices; nor do they deal with the movement of highway trailers or containers by water carriers subject to Part III of the act in so-called fishy-back service. The notice also stated that the proposed rules do not contemplate the use of TOFC service by motor contract carriers. The issues raised by such carriers concerning their use of TOFC service has heretofore been discussed.

A number of the more recent Commission reports have specifically stated that the findings made therein are without prejudice to whatever findings or modifications may result from the findings in the instant proceeding. A list of the reports in which such findings have been made, so far as we have been able to determine, are shown in Appendix V. The changes, if any, which should be made in the reports set forth in that appendix as a result of the findings made herein, we believe should be left to the parties for their consideration and action in the light of the findings made herein.

As heretofore stated, almost 200 verified statements and reply verified statements have been filed in this proceeding. In some instances, the verified statements or replies represent the views of more than one person, and this fact will be indicated wherever it is believed necessary or desirable. It should be noted that not all those who filed a verified statement or reply thereto commented on each of the proposed rules. Some have indicated "no comments" with respect to one or more of the proposed rules, but it is not deemed necessary to so state in the following discussion of such rules. In other words, only the comments of those persons supporting or opposing a proposed rule need be set forth. Each of the proposed rules, together with a brief statement as to the purpose or apparent intent of such rule, will be discussed separately with certain exceptions hereinafter mentioned.

The Western Railroads also contend that there has been no adequate notice of the authority relied upon for the

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publication of the individual rules. We consider this contention to be without merit. The order and "Notice of Proposed Rule Making" issued by the Commission instituting this proceeding recited in part as follows:

> It is ordered, That a proceeding be, and it is hereby, instituted under the authority of Parts I, II, III, and IV of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act, and the practices of, and the manner and methods of the performance and use of coordinated and substituted motor-rail service, as hereinafter more particularly described, and all similar and related types of service, including, but not limited to, so-called 'piggyback' service under Plans I to V, ***

We believe the argument advanced by the Western Railroads is answered by the above quotation. Briefly, the whole of Parts I, II, III, and IV of the act were deemed necessary for authority due to the widespread nature of the proceeding.

RULE A-1

> "Trailer-on-flatcar (TOFC) service" means the transportation in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable portion thereof) on a rail car.

The main objection to this Rule is that it would limit the movement of empty trailers of TOFC service to "return transportation", It is argued that such a restriction is unrealistic and impractical. It is further argued that to tie the movement of empty trailers to a return movement would be unnecessarily burdensome and would require increased paper work in keeping proper records. The railroads and freight forwarders are very much opposed to this restriction and according to the reply statements filed by the ATA and the Bureau, they concede that the Rule should be restated. We have considered the suggested restatement and we find that the proposed Rule would impose an unnecessary restriction in the definition of TOFC service. We are convinced, on the basis of this record before us, that to eliminate flexiability in the field of piggyback transportation is to freeze TOFC service.

The ATA has suggested a preamble to any rules or regulations that may be adopted. We find this suggestion unnecessary.

We conclude that the following restatement of this Rule should be adopted:

"Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car.

RULES A-2 and A-3

Rule A-2- "Joint intermodal TOFC service" means any transportation of property (the motor and/or water transportation of which is subject to economic regulation under the International Commerce Act) jointly provided by a railroad or railroads subject to Part I of the act and a motor common carrier or carriers subject to Part II of the act, and which includes, for the whole /See Rule B-7/ or any part of the line-haul movement, the performance of TOFC service as defined in (1) above; except that the term "joint intermodal TOFC service" does not include the transportation of property moving under contract rates as set forth in section 409 of the act.

Rule A-3- "All-rail TOFC service" means any transportation, other than transportation embraced in (2) above, provided by a railroad or railroads subject to Part I of the act, which transportation includes the performance of TOFC service as defined in (1) above.

Under these Rules TOFC service would be broken down into two types of service, "joint intermodal" which would include Plans I and V and "all-rail" which would include Plans II, III and IV. The railroads are unanimously opposed to the proposed attempt to not only blanket the present TOFC service into two definitions but they are also concerned about the future and any additional TOFC plans or programs that may eventually be developed. It is contended by some motor carriers and the Bureau that TOFC service is not adequately described in the tariffs, that the shippers are confused by the railroad TOFC tariffs, that the TOFC Plan numbers and descriptions now in use are confusing, and that the definitions proposed are made to eliminate confusion and discrimination in the performance of TOFC service.

In reply to these contentions it is argued that the different services offered under each Plan makes it unwise to attempt generalization. This record is devoid of proof that is convincing of actual confusion among shippers using TOFC service. Indeed the opposite conclusion is clearly demanded after considering the many statements filed by shippers in this proceeding requesting the Commission to permit TOFC service to remain in its present form. While the tariffs do not refer to the Plans by number, they clearly describe the service within the terms of the plan covered by the tariff. The Bureau in its reply statement confesses that it too thinks in terms of Plans I and V instead of "joint intermodal TOFC service".

The Bureau as well as other parties have suggested that in the event that proposed Rules A-2 and A-3 are to be replaced by definitions of Plans I through V the new definitions should, as proposed Rule A-2 now does, include the parenthetical clause "(motor and/or water transportation of which is subject to economic regulation under the Interstate Commerce Act)." This request is rejected and will be discussed hereinafter in connection with proposed Rule B-2 and C-7.

Transamerican Freight Lines, Inc., (Transamerican) would divide proposed Rule A-2 into three parts. In the first part it would retain the Rule as written except it would eliminate the word "joint." The second part would deal with joint intermodal TOFC service where the service rendered involves a through joint connecting line service performed under a through joint railroad-truck rate. The third suggested part would concern substituted intermodal TOFC service described as a service performed under the through rate of the motor carrier from point of origin to point of destination where the motor carrier elects to use substituted rail service for a part or all of the line-haul. Transamerican is engaged in this latter type service and it wants to be absolutely sure the definitions include such service. We believe the definitions recommended herein will cover the service now participated in by Transamerican.

The Bureau cites instances where TOFC shipments are converted from one Plan to another Plan. A typical example is cited where shipments of fresh meat and packinghouse products which arrive at Chicago from the West under Plan II are converted to Plan III shipments for the movement East, without unloading and reloading, by simply leasing to the shipper the trailers containing his merchandise which completed the first stage of the transportation as the property of the carrier. According to the Bureau, an examination of waybills have disclosed that Universal Car Loading was tendering at New York, to the New York Central, loaded trailers for a Plan III-IV movement to Los Angeles. The waybills covering the shipments that moved set forth the charges for Plan III movement to Chicago and charges for the Plan IV movement beyond, with a total revenue of the two Plans being collected. The examination shows that the trailers were not grounded at Chicago upon completion of the Plan III portion of the movement and to eliminate the grounding of the trailers and to allow the same flatcar to be used from New York to Los Angeles the railroad paid an allowance to Custom Equipment Rental, Inc., a wholly-owned subsidiary of U. S. Freight Company for the use of the New York to Chicago in Plan III service. According, the Bureau argues that the general public has been misled into believing there were only five basic TOFC Plans in operation. There appears to be no proceeding before the Commission suggesting the possibility of combining separately published Plan II rates with Plan III rates or to combine Plan III and Plan IV rates

so as to establish and provide joint through routes and rates. Nevertheless this practice has become quite widespread. The Bureau then argues that the trip-leasing of railroar trailers by shippers or shippers' flatcars by carriers greatly reduces any difference that exists between the various TOFC Plans. It is argued that when Plans are combined the only difference remaining is in the rates assessed for various portions of the through movement. The Bureau concludes that the adoption of proposed Rule A-3 together with the proposed rules under Section B governing joint intermodal TOFC service would put an end to the practice of converting TOFC shipments in transit from one Plan to another.

The railroads are opposed to the position taken by the Bureau. The railroads as well as many shippers argue that there is no restriction either legal or fictional against a shipper using different Plans offered by different carriers to accomplish through transportation from origin to destination so long as they comply with the published tariffs. For many years shippers have utilized combination rates in through movements to take advantage of lower rates and special services that were made available. It cannot be questioned that if the railroad delivering a loaded trailer at railroad expense were to unload the trailer onto the shipper's representatives platform and then reload the commodity into another trailer and deliver it to the rail ramp for movement beyond in a Plan III service there would be no reason for complaint. Under the present practice of converting from Plan II to Plan III as outlined in the Bureau's illustration the railroads are providing a through movement that is not only time-saving but a less costly operation to both the carriers and the shippers. There is no prohibition in the act against such a conversion of Plans taking place so long as the complete service is set forth in the tariffs. To the extent that the tariffs are deficient, the Commission must require corrective measures. The technical problem for the leasing of the trailer for the shippers use in Plan III at the time conversion takes place from Plan II to Plan III is such a problem. It is imperative that the carriers and shippers alike understand that in the future the tariff must spell out the leasing arrangements and the lease between the shipper and the owner of the trailer or flatcar, as the case may be, must be executed by the shipper or his duly authorized agent. It must be understood that the Commission will no longer countenance some driver of a dray-van or cartage company, for example, to sign a lease on behalf of the shipper where no special authority exists.

We find that among the shippers who have filed statements and the entire transportation industry, rail, motor and water, the numbered Plans used for TOFC service are synonymous with a particular service. As pointed out by the rail carriers it is necessary for a shipper to consult the tariff in order to be certain of the service offered between any two points, however, this is the normal precaution that all shippers are well aware. It is true that within the

industry the mention of a TOFC Plan number has come to mean a very definite service. This is not to say that additional Plans cannot be devised. We have considered our recommended rules with an eye to the future. For example, Plan II½ or modified Plan II has been mentioned in this record. In the future there may be other Plans devised, especially in all-rail TOFC service. It is our conclusion that since Plans I and V are joint intermodal Plans they should be defined separately. Plans II, III and IV, on the other hand, represent all-rail service and they should be described as such. In this way it is possible to add any number of all-rail Plans whereas if each Plan was defined separately the rail carriers would be circumscribed and unable to inaugurate new Plans in the future without first coming to the Commission for a change in definitions. This does not mean that Plan numbers II, III or IV will cease to be used by the shipping public and the transportation industry in referring to a particular service nor do we suggest that such a result occur.

We find that proposed Rule A-2 should be rejected and that Rule A-3 should be restated. We further find that the definitions should read as follows:

> "Plan I TOFC service" is service performed by a railroad in substitution for motor common carrier service to, from, and between named points over the motor carrier's route, at the option of the motor carrier, unless otherwise directed by the shipper, the traffic moving from initial origin to final destination at all-motor rates and on motor carrier bills of lading under an arrangement or an agreement between the two modes of transportation.
>
> "Plan V TOFC service" is that performed under published joint rail-motor rates over through routes with certificated motor common carriers.
>
> "Joint intermodal TOFC service" includes Plan I and Plan V TOFC services as defined above.
>
> "All-rail TOFC service" means any transportation, other than transportation embraced in Plans I and V above, provided by a railroad or railroads subject to Part I of the Act, which transportation includes the performance of TOFC service.

RULES GOVERNING JOINT INTERMODAL TOFC SERVICE

RULE B-1

> "Tariffs embracing joint intermodal TOFC rates or charges shall set forth the service covered by the published rates or charges, the routes over which such service will be performed, and the names of the carriers participating therein."

This rule would require tariff publication of joint intermodal TOFC rates and charges for the services offered, the rates involved, and the participating carriers. Some carriers have expressed apprehension that under such a Rule the Commission might attempt to require publication of division between rail and motor carriers in Plan I service. If such a theory is intended, they are opposed to the Rule first, on the grounds that the Commission is without authority under the act to make such a requirement, and secondly, it would serve no useful purpose. The PRR and C&O object to the Rule and suggest that the following language be added:

> Where TOFC service is performed as substituted service, the shipper must be given the option of preventing such substitution. The names of the rail carriers performing substituted service, and the routes over which such service will be performed, may be shown by reference to other tariffs or substituted service directories filed with the Commission. (Citing 232 I.C.C. 683, 689 and 293 I.C.C. 93, 106-107).

The Erie believes the Rule should be clarified to indicate that it does not apply to joint rate arrangements under Plan I.

The L&N and the other SFA Railroads urge that a new definition for "Substituted Service" should be adopted and that the title of Section B should include the words "AND SUBSTITUTED SERVICE". In addition they would combine proposed Rules B-1 and B-2 to read as follows:

> "Tariffs embracing joint intermodal TOFC rates or charges may be published by rail, motor or water common carriers or their agents, and shall set forth the service covered by the published rates or charges, the rates over which such service will be performed, and the names of the carriers participating therein."

In combining these Rules, the portion that would limit the tariff publication to commodities subject to economic regulation throughout their entire movement has been omitted because it is contended that such a limitation would place an inequitable limitation upon rail transportation. These rail carriers argue that railroads should be permitted to establish joint intermodal TOFC rates on exempt commodities where it can be done profitably. A large number of the rail carriers in their reply statements take the position that this Rule as well as Rule B-2 merely pertains to publication of tariffs containing joint rates between various modes of Commossion's Tariff Circular No. 20 and supplements thereto. transportation and that such Rules are already contained in the Commission's Tariff Circular No. 20 and supplements thereto.

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It is contended, therefore, that this Rule is a useless duplication and should be rejected.

The Western Railroads comply with the existing Commission regulations of Tariff Circular No. 20 and point out that the method of publishing part of the information in a tariff directory dealing with joint services has been acceptable to the Commission for many years. They contend that these directory publications are simple to understand, maintain, and create no confusion for the shipping public or the carrier.

Sea-Land Service, Inc., (Sea-Land) suggests that the following language should be included in the Rule:

> "Rates covering TOFC service, whether all-rail or joint intermodal, shall not be published as proportional rates."

Sea-Land contends that proportional rates under Plan III TOFC service frequently permit the publishing railroad to reach traffic originating at a point far outside the carriers customary service area. It asserts there is a possibility that the objective sought in its suggested Rule would be attained under proposed Rules B-1 and B-2.

In answer, the Southern contends that no valid reason exists forbidding the railroads to publish TOFC proportional rates the same way they do on boxcar traffic. The Southern has proportional rates in effect between Alexandria, Va., and numerous points in the south. It argues that such rates were allowed to become effective without suspension and investigation, and that any blanket prohibition of TOFC proportional rates would be unreasonable and would amount to an arbitary and capricious action by the Commission.

Consolidated suggests that both Rules B-1 and B-2 be deleted and that the following Rule be substituted in lieu thereof:

> Joint intermodal TOFC tariff provisions shall set forth the service to be provided, the routes over which such service will be performed, and the names and appropriate concurrences of all carriers participating therein; and, said tariffs may be published only by rail, motor or water common carriers, or other agents.

This suggested Rule would permit a motor common carrier to move "exempt" commodities in TOFC service. It is argued that the reference to rates and charges is not necessary because Section 216 of the act requires that it assess its

published tariff rate for all commodities other than those that are exempt.

The Department of Agriculture calls attention to the fact that irregular route motor carriers do not adhere to specific routes and that the place of origin may well be a private farm located off paved roads regularly used for intercity traffic. It suggests that the point of interchange with the rail carriers be published for motor carriers in lieu of specific routing. It would modify the Rule to read as follows:

> Tariffs embracing joint intermodal TOFC rates or charges shall set forth the service covered by the published rates or charges; the rates over which such service will be performed or the origin, destination, points of interchange between modes of transportation and rail routes; and the names of the carriers participating therein.

The Bureau makes no comment on this Rule and there are certain other suggestions made by various parties as to the caption of these Rules. For example, the word consolidated service should be added. Another suggestion is that substituted service be added, and yet another suggestion would delete the work "joint" as the caption is now proposed.

The requirements of publication under this Rule are in complete harmony with Commission policy throughout its history of administering the act. Full disclosure in published tariffs of the service offered, the rate to be charged, the route of movement and the participating carriers is not new to regulated carriers. Conceding that similar Rules are already contained in the Commission's Tariff Circular No. 20, and supplements thereto, we are nevertheless convinced that such a Rule should be promulgated in connection with intermodal TOFC service. We believe that the suggested addition to the Rule made by the Department of Agriculture is sound and should be adopted.

We find, on this record, that the following Rule is justified and reasonable and we recommend its adoption. The Rule should read:

> Tariffs embracing joint intermodal TOFC rates or charges, or Substituted Service Directories, if used shall set forth the service covered by the published rates or charges; the routes over which such service will be performed or the origin, destination, points of interchange between modes of transportation and rail routes; and the names of the carriers participating therein.

RULES B-2 and C-7

These two rules deal primarily with the TOFC transportation of commodities exempt from economic regulation under section 203(b)(6) of the act (exempt commodities) and therefore will be considered together. Rule B-2 would prohibit the transportation of any commodity in joint intermodal TOFC service, unless it is subject to economic regulation throughout the entire movement. It provides:

> Tariffs embracing joint intermodal TOFC rates or charges may be published only by rail, motor, or water common carriers, or their agents, on commodities subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

Proposed Rule C-7, on the other hand, would permit the transportation of exempt commodities under all-rail TOFC tariffs. It reads:

> The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible under all-rail TOFC tariffs.

A number of the parties have commented on one or both of the proposed rules. In view of the conclusions heretofore reached with respect to Plan I service and the fact that Plan V service also requires the carriers participating therein to comply with the provisions of sections 216 and 217 of the act and the Commission's regulations thereunder, we do not believe it necessary to discuss many of the arguments advanced by the parties with respect to these two rules.

Some of the parties would delete proposed Rule B-2 entirely, some would have the Commission "pass over" the rule and leave for consideration at some other time and place the questions which it raises, and some would amend the rule by striking the words "on commodities subject to economic regulation throughout their entire movement." Any such action, however, would merely leave unanswered the questions raised by the rule and therefore need not be given further consideration. Nor do the examiners consider the answer to those opposed to Rule B-2 to be, as some contend, that the rule simply recognizes a legislative fact of life, that if part of the rail-water or rail-motor movement is exempt from tariff publication requirements, a tariff cannot and would not be published purporting to cover the entire

movement. The mere fact that this may be all that the rule is intended to recognize is also without merit.

Undoubtedly, Rule B-2, if adopted, would curtail the transportation of exempt commodities moving in TOFC service. That the transportation of such commodities is important to the general public as well as to all types of carriers is a well known fact and is borne out in this record. We agree in general with the views expressed by the Department of Agriculture and by certain of the other parties to the effect that there must be some way to permit the handling of exempt commodities in TOFC service especially if regulated rail and motor common carriers are to compete effectively with unregulated (exempt) carriers for the transportation of such traffic. The basic question presented therefore is to what extent, if any, may exempt commodities be transported in TOFC service under the act?

An indication of some of the problems involved in the TOFC transportation of exempt commodities concerns the Southern Pacific Company (SP) and five motor carriers using Plan I service of the SP. The Bureau's evidence shows that under Plan I the motor carriers have agreed to use that service only for the movement of freight at rates set forth in the motor carrier's tariffs published, posted and filed with the Commission, and that each of the motor carriers has transported exempt commodities for shippers at charges which were less than the applicable rates provided for in its tariffs on file with the Commission.

The policy of the SP, with respect to Plan I service, is that contractual obligations must be strictly followed. It asserts that if trailers which would not qualify under the terms of its Plan I agreements have been tendered it for transportation under Plan I, it was without its knowledge. The SP points out that there are substantial movements of exempt commodities along the Pacific Coast, and that competing for the movement of these commodities are the railroads; the regulated motor carriers; a number of exempt commodity haulers; proprietary truckers seeking a backhaul after delivering their own company's products; and numerous "gypsy" owner operators from all parts of the country. On the Pacific Coast, the light direction of general commodity traffic is southbound, and because of this the regulated motor common carriers generally balance their equipment utilization, and improve their revenues, by hauling exempt commodities southbound from points in Washington and Oregon to California. The SP contends, therefore, that it has a problem in promoting greater use of Plan I service. Admittedly, the exempt traffic is important to the regulated motor carriers to balance their operations, but such traffic cannot, generally speaking, move at tariff rates if the motor carriers are to remain competitive. The SP has not yet

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revised its Plan I TOFC contracts to allow for TOFC substitution for exempt commodities moving under "unpublished rates". The SP is of the view that it is in the regulated motor carrier's interest, to the interest of the SP, and in the public interest that certificated motor common carriers who have been extended Plan I service be allowed to employ it for the transportation of exempt commodities as well as for the transportation of regulated commodities.

Some of the parties have cited cases wherein the Commission has approved the publication (1) of joint rates between rail and water carriers covering the transportation of commodities exempt under Part III of the act, and (2) of proportional rates published by a regulated water carrier for use in connection with initial movements by unregulated motor carriers. The cases cited, however, are of no assistance in solving the problem here presented as there are no motor carrier rates published and on file with the Commission covering the transportation of exempt commodities, or if such rates are published and on file with the Commission, they are not used to transport the traffic. Competition for the movement of exempt commodities is keen and apparently exempt commodities are transported by motor carriers under what may be termed "negotiated" rates. It should also be noted that there are a number of persons engaged solely in the transportation of exempt commodities by motor vehicle. Whether or not these persons now use or intend to use TOFC service is not clear of record. They do not need any authority from the Commission for the transportion of exempt commodities and undoubtedly they may not file tariffs providing rates on exempt commodities with the Commission even if they desired to do so.

As seen, we have concluded that Plan I service is a joint service provided by common carriers by motor and rail. Under the act and the Commission's regulations thereunder, "it is fundamental that the service be covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs." Proposed Rule B-1, which we have concluded should be adopted, in effect, carries out the foregoing. Part I of the act governing common carriers by railroad, with certain exceptions not here pertinent, contains no exempt commodity provisions, and all freight transported by rail must be assessed the applicable published rate. Accordingly, the transportation of exempt commodities in Plan I or Plan V service would not meet the above fundamental requirements for a joint service as there is no indication of record that there are any motor carrier rates published and on file with the Commission used in connection with the service performed, and certainly the rail rates do not cover the entire service offered. The examiners conclude, therefore, that exempt commodities may not be

transported in TOFC service under Plans I or V and that proposed Rule B-2, with some minor modifications for the purpose of clarification should be adopted. We find the rule should be modified as follows:

> Tariffs setting forth rates or charges for joint intermodal TOFC transportation may be published only by rail, motor, or water common carriers, or their agents, on commodities the transportation of which is subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

It is noted that the agreement between the SP and motor carriers utilizing its Plan I service contains provisions to the effect (1) that trailers shall not have contents which would require that protective service against heat or cold be furnished by the SP, and (2) that the trailers shall not contain, and the motor carriers agree that it will not tender for transportation trailers which contain, articles of extraordinary value, livestock, Class A and B explosives, or mail. It is assumed that other rail carriers have somewhat similar agreements with motor carriers covering their Plan I service. In view of the conclusion herein with respect to Rule B-2, the examiners suggest that all agreements between railroads and other carriers covering transportation in Plan I or V service be amended to provide also that trailers shall not contain, and that the motor carriers agree that it will not tender for transportation trailers which do contain, exempt commodities, and that such amendment be made as soon as practicable after Rule B-2 becomes effective. Certainly, it should be no more difficult to police the exclusion of this additional group of commodities than to police those now excluded by the agreement.

As stated, proposal Rule C-7 would permit the transportation of exempt commodities under <u>all-rail</u> TOFC tariffs. The Bureau believes that this rule would merely cause confusion and suggests that it be revised to <u>prohibit</u> the handling of exempt commodities under all-rail TOFC tariffs. The Southern is in accord with the Bureau's objections and contends that the motor carriers should not be permitted to take advantage of rates offered by their rail competitors to the shipping public. Some of the parties, however, oppose the suggestion of the Bureau for the reasons heretofore stated in connection with the discussion of Rule B-2. Some see no reason for the proposed rule on the ground that exempt commodities are articles of commerce and that it is unnecessary to provide by rule that railroads may transport them. Although this is correct, it overlooks the fact that there would continue to exist some question as to whether or not a railroad could

handle, in TOFC service, a motor or water carrier's trailer loaded with commodities the motor transportation of which is not subject to economic regulation under the act. In this connection, it should be noted that, with possibly one or two exceptions, the parties are in general agreement that some provision should be made for the transportation of exempt commodities in TOFC service.

In the Substituted Service case, the Commission stated that for a motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is "repugnant to the act." This view was upheld in the New Haven case and on the basis of the record herein we see no reason to challenge that ruling. In the latter case, the Commission also stated:

> * * * that if the railroad is on notice that trailers tendered it in this manner are being operated in common-carrier service subject to Part II of the act, it should not thus knowingly join with the motor common carrier in a violation of the law. /Emphasis supplied/

A motor carrier engaged in the transportation of exempt commodities is not subject to Part II of the act except with respect primarily to questions pertaining to safety of operations. In the circumstances and in view of the matters heretofore discussed with respect to the TOFC transportation of exempt commodities, we conclude that a railroad may transport in TOFC service trailers containing exempt commodities even though the trailers may be those of a common cafrier by motor vehicle; and that such service would not be "repugnant to the act."

In reaching the above conclusion, the examiners note that the Commission on a number of occasions has in effect given "special treatment" to motor carriers transporting exempt commodities. For example, the Commission did not require specific authority for the return movement of shipping devices by transporters of exempt commodities--see Settle Common Carrier Application, 46 M.C.C. 227--although prior to the decision in Interpretation, Operating Rights--Return Containers, 82 M.C.C. 677, it has held that authority for outbound transportation of a particular commodity did not constitute implied authority for the return of empty containers or other such incidental facilities used in the outbound transportation. Further, it appears well settled that contract carriers by motor vehicle may transport exempt commodities as a backhaul without violating the concept of assignment of vehicles to a shipper's exclusive use for a continuing period of time. See Mover Contract Carrier Application, 88 M.C.C. 767, 773, and Interstate Exp., Inc., Extension - Schillings, Mont., 86 M.C.C. 637. It is also noted that

in Substituted Service on Livestock, Chicago, B. & Q. R. Co., 304 I.C.C. 43, the Commission, division 3, had before it for determination the question of whether tariff provisions authorizing the substitution of motor-vehicles for rail line-haul service in the transportation of livestock as a part of the interstate shipment violated any provision of the act. In the cited case, the division stated beginning at page 45:

> * * * The tariff provisions here under consideration were designed for the transportation of livestock only, and to the extent that livestock is so transported by motor vehicle as an optional service for a portion of the total haul at through rail rates, it is not a service subject to Part II, except the provisions of the act relating to qualifications and maximum hours of service of employees and safety of operations or standards of equipment. /Footnote omitted/ The services rendered by the respondent under this plan, including the rates applicable, are subject to Part I of the act.
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> * * *
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> The instant proceeding concerns the transportation of livestock by motortruck for which no certificate is required; thus, the tariff provisions under investigation here do not conflict with the certificate provisions of Part II. Similarly, the substituted service here under scrutiny does not constitute a breach of the contract of carriage for the reason that the service is optional with the shippers. In the cited case, the substitution found to be in contravention of the act was at the option of the carrier.
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> With respect to the tariff provisions of Part II, it was found in the above proceeding that to satisfy those provisions of substituted freight-service directory should be published showing the points between which the service would be performed and the motor carrier performing the service. The respondent's position in this proceeding is that since the transportation of ordinary livestock is not subject to the tariff provisions of Part II, no particular form of publication is necessary to satisfy those provisions.
>
> We agree with the respondent's position. As stated, the cited proceeding dealt with substituted service on less-than-carload traffic which in common or contract motor service is subject to the Commission's jurisdication under Part II of the act, whereas here we are dealing with livestock, an exempt commodity under Part II. This service is limited to livestock moving between railroad

stations, and thus does not extend beyond the points now served by the railroad. It gives the shipper the right to have his traffic moved all-rail in the event he objects to substituted motor service, and in case of loss or damage the shipper need look only to the railroad. In these circumstances, we see no objection to the substituted service as provided in the respondent's tariff. [Emphasis supplied]

The examiners agree with the objection of ATA to the wording of proposed Rule C-7 to the effect that the Commission should make certain that the TOFC regulations do not enlarge the exemptions contained in Part II of the act. Accordingly, we conclude that the following rule should be adopted in lieu of proposed Rule C-7:

The handling by a railroad of a motor or water carrier's trailer, loaded with commodities the motor transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible only under all-rail TOFC tariffs.

RULE B-3

Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon consideration of an appropriate application filed by the motor carrier in which it seeks relief from the percentage provisions of this section. [Example: In connection with a shipment originating at A and destined to D, a motor common carrier holding authority to transport such shipment from A to D (a distance of 300 miles by its authorized highway routes), serving the intermediate points of B and C, participates in joint intermodal TOFC service in lieu of its authorized over-the-road service in the following manner: The shipment is transported from A to B by the motor carrier over its authorized highway route (a distance of 100 miles), at which point it is placed on a rail car for TOFC movement to C (a distance of 80 miles over the rail route used as compared to 100 miles over the motor carrier's authorized highway route), and at C the shipment is returned to the originating motor carrier for ultimate delivery at D (a distance of 100 miles over the motor carrier's authorized highway route). Although the rail line distance (80 miles) between B and C is less than 90 percent of the motor carrier's authorized highway route between the same points (100 miles), the above rule allows this operation inasmuch as the combined motor-rail-motor route between A and D (280 miles) is more than 90 percent of the motor carrier's authorized highway route (300 miles) between A and D.]

This rule is described by some as the allowable circuity of motor carrier service for which railroad service may be substituted, and some of the parties assert that this rule also may be described as one designed to protect the right-of-entry limitations of Part II of the act. In view of our findings with respect to Plan I service, we view the rule as one that in effect determines what is a "reasonable" through route under section 216(c) of the act.

The B & M, C & O, Erie, and the Nickel Plate support the proposed rule. As hereafter seen, a number of the parties, while not supporting the rule in its entirety, suggest certain amendments thereof. Some request that the rule be amended to reflect the fact that, as a practical matter, it is applicable only with respect to Plan I service. Before discussing the comments of the parties concerning the need, if any, for the

proposed rule, we deem it appropriate to comment first on the rule in the light of our conclusion that Plan I service comes within the purview of section 216(c). This is especially true in view of the fact that a study of the comments of the parties shows that few, if any, took such a conclusion into consideration in commenting upon the proposed rule. In any event it is doubtful, however, that our findings as to this rule would differ to any material extent.

As seen, section 216(c) provides that common carriers of property by motor vehicle may establish reasonable through routes and joint rates with, as here pertinent, common carriers by rail. The examiners view the proposed rule as one which, in effect, poses the question of whether or not some general rule may be established by the Commission for the purpose of determining what would be a "reasonable" through route under section 216(c), for the transportation of certain TOFC traffic. As we are of the opinion that the answer to the latter question is in the affirmative, it will be considered first.

Admittedly, there is no provision of the act conferring "specific" authority to determine generally by a rule what would be a "reasonable" through route under section 216(c). The act does, however, confer the duty upon the Commission "to administer", "to regulate", and "to make all necessary orders * * * and to prescribe rules and regulations." In our opinion this includes the power to determine, if need be, what is a "reasonable" through route under section 216(c) by a general rule.

The Commission has heretofore stated that the "regulation of motor carriers and the administration of Part II of the act is a herculean task." That the Commission has an even greater task in relation to joint intermodal TOFC service is evident. To conclude that the Commission is without power to establish a general rule defining what would be a "reasonable" through route under section 216(c), and that the Commission must, of necessity, wait until the carrier or some other person chooses to initiate some action and then investigate to determine whether the route is "reasonable", would be to ignore the practicalities of the situation and perhaps result in such a large number of cases calling for individual consideration as to create an impossible work load, complicate regulation, and unduly burden both the Commission and the industry. In the circumstances, we conclude that the Commission has ample authority upon a proper record, such as it has here, to make an appropriate findings, subject of course to a provision for individual consideration of unusual cases, as to what would be a "reasonable" through route under section 216(c). Authority to do that which is necessary is implied in the imposition of the duty imposed under section 216(c).

A number of the parties contend that Plan V service is not included within the scope of the proposed rule. We share that view. Moreover, we conclude that there is no indication of record showing any need to determine whether or not a through route, established under section 216(c) to handle

Plan V shipments, would be a "reasonable" one. The comments of the parties therefore need be discussed only to the extent of determining the need, if any, for the proposed rule in the light of the above conclusions.

The IC, L & N, Western Railroads, National Industrial Traffic League (NIT League), Yale Transport Corp., (Yale), Burlington Truck Lines, Inc.,[12] (BTL), Growers and Shippers League of Florida (Fla. Shippers League), Owens-Illinois Glass Company (Owens), RLEA, and the SFA Railroads argue that the proposed rule is objectionable and most of them suggest it be deleted. They assert (1) that the rule would tend to promote inefficient and uneconomical transportation by favoring a long rail route over a short one; (2) that the rule would in many instances require a constant check by a motor carrier of both its all motor-route mileage and the joint motor-rail mileage which would be involved between the same points to determine whether a shipment could be accepted; (3) that where a motor carrier has a wide area of operation, it would be possible for a railroad operating between the same junctions to be eliminated on some hauls and included in others; (4) that as a practical matter, it would be extremely difficult, if not impossible, for rail carriers to operate efficiently and legally under the rule; (5) that this rule could destroy competition between railroads in certain movements calling attention to the fact that there would be instances when the short rail route could not be used to handle the trailers of a motor common carrier in Plan I service, whereas the long-haul rail carrier would be in a position to do so; (6) that there is no basis for any universal arbitrary percentage standard; (7) that the proposed rule appears to be designed to artificially protect a segment of the transportation industry; (8) that the rule is undesirable and not in the public interest in that it would impose on the railroads participating in TOFC traffic a number of restrictive requirements not applicable to other forms of transportation; (9) that the rule is wholly unnecessary as of the present time; and (10) that the stringent circuity limitation in the rule does not have a sound basis, is not required by either law or because of existing practices of the carriers, and that if adopted, would tend to foster wasteful transportation.

Some also argue that the motor carriers using Plan I service should be permitted to use such service even though the rail route is different from the authorized motor-carrier route; that the only proper restriction is that the motor carrier be authorized to haul the commodity and to serve the origin and destination; and that Plan I service should not be curtailed in any respect.

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[12] A wholly owned subsidiary of the Chicago, Burlington & Quincy Railroad Company.

The Western Railroads initially took the position that the proposed rule, while perhaps not objectionable in principle, was unnecessary and introduced an unwarranted degree of complexity into joint rail-motor TOFC mileages. They assert that the statements of other parties responding to the proposed rule serve to confirm their conclusions. The Western Railroads now take the position that the rule is unnecessary, and so confusing as to lead to totally unexpected results. They call attention to the fact that the Bureau has already changed its attitude, as hereinafter seen, with respect to this rule as a result of the comments of other parties.

BTL has been using TOFC service between numerous points in Colorado, Illinois, Iowa, Missouri, Montana, Nebraska, and Wyoming for several years. No complaint has ever been filed with respect to its use of such service even though in some instances BTL effects a mileage saving in excess of 10 percent. It opposes any rule which would curtail service enjoyed by the public for many years and which would tend to stunt the growth of TOFC service. BTL takes the position that if the Commission concludes that a circuity rule is necessary and in the public interest, that such a rule should have application to future development only. A number of other parties are of a similar view. As we are of the opinion that the rule, which we hereafter find should be adopted, cannot possibly apply where the Plan I route has been established with specific approval or without any protests thereto, we do not consider it necessary to comment further on such matters.

The Department of Defense joins in the request that the issues presented should be decided on a case-by-case basis and that the competitive situations existing as between motor carriers and rail carriers are too important to be placed in a straight jacket. It believes that the 90 percent provision is too strict.

The Coast Line and the Seaboard take the position that the 90 percent restriction is extremely unreasonable. They call attention to the fact that under section 4 of the act the circuitous nature of the rail routes are initially left to managerial discretion subject only to Commission approval as to the reasonableness of the routes. The NIT League takes the position that, until there is more experience, there should be a "rule of reason" whereby the circuity issue is determined in any particular case where it is raised on the facts, circumstances, and conditions directly applicable to that case. The Western Railroads are in agreement with the statement of the NIT League.

Transamerican is in agreement with the rule except that it contends (1) that it should apply to "substituted intermodal TOFC service" as defined by it, and that the proposed 90 percent provision should be changed to 80 percent. In its

present TOFC operations, the mileage of its motor-carrier routes are substantially the same as the mileage of the rail routes used in TOFC service. Transamerican does not believe that if this rule were liberalized, as suggested, that it would be in conflict in any respect with the decision of the Commission in the Strickland case.

The Chemists Assn. also urges that the percentage provision be changed to 80 percent. It argues that, if one of the aims of the proposed rule is to reduce litigation before the Commission, it has "fallen far short of its mark." It believes that the number of applications filed to use rail routes involving less than 90 percent of the mileage of the motor-carrier routes would greatly out number the complaints filed in the past or which may be filed in the future concerning the lawfulness of Plan I service. The Chemists Assn. agrees that a rail route no shorter than 90 percent of a motor-carrier route would be lawful for Plan I service. It contends, however, that its suggested 80 percent test would be more realistic and that in only rare instances would a rail route between 80 and 90 percent of the motor-carrier route be found to be unreasonable.

Eazor Express, Inc., hereafter called Eazor, now uses Plan I service in connection with several railroads. It believes that the proposed 90 percent restriction would have a detrimental effect on many motor and rail carriers. Eazor believes that some restriction is necessary to avoid abuse and suggests that a percentage provision of 75 percent would be a much more reasonable figure. It considers that Plan I service is the only practical approach of benefit to the two modes of transportation, and that its expansion should not be unnecessarily hampered.

The PRR argues in principle with the proposed rule and points out it would give blanket approval to all Plan I arrangements where the circuity eliminated by the arrangement is no greater than 10 percent. Whether or not this is the correct percentage factor, the PRR asserts that it is not in a position to judge. With one exception hereafter discussed and with which certain other parties agree, the PRR has no objection to the proposed rule and believes that it will serve as a "favorable guideline toward greater rail-motor coordination."

The Local and Short Haul Carriers National Conference of ATA (Short Haul Conference) has no objection to the rule in its present form provided that it also establish the maximum permissible circuity. It suggests 110 percent as the maximum circuity, except as may be permitted by the Commission upon consideration of an appropriate application. The Short Haul Conference contends that the absence of a maximum limitation would tend to force business of motor carriers from a railroad routing which does not meet the proposed 90 percent rule to railroads having a route of greater circuity.

The PRR, joined by the Western Railroads, the Bureau and the Eastern Railroads, suggest that an application for relief from the percentage restriction be permitted to be filed by a rail carrier as well as by a motor carrier. In support thereof, it argues that such a provision would not alter the considerations upon which relief could be granted or denied, but would simply permit a railroad to take the initiative, where warranted, and to protect itself in cases where there might be no reason for the motor carrier itself to apply. We agree and in view thereof consider it unnecessary to impose any maximum circuity limitation.

The New England Industrial Traffic League, Inc., (New England League), suggests that the rule be amended by inserting the following language immediately after the "percentage provisions of this section":

> Motor carriers participating in joint intermodal TOFC service which is to be used in lieu of their authorized over-the-road line haul service for the entire line haul movement shall be required to file with the Commission Alternate Route Deviation Notices complying in every respect with the standard deviation rules, as revised, of the Commission (49 CFR 211.1(c)(8)) and give notice of such filings in the manner provided for in such rules (CFR 211.1(d)(4)).

It argues that the above amendment would serve to put all interested parties on notice as is presently done when deviations in route are sought over a new highway for operating convenience; and that it would also serve to prevent abuses and preserve proper competitive conditions among motor carriers.

ATA points out that when Congress enacted what is now Part II of the act it provided that motor-carrier service not already in existence could be established only after a finding by the Commission of a public need therefor. Accordingly, it contends that motor carriers should be prevented from changing the competitive character of their service by means of the device of substitution of TOFC transportation for their own over-the-road line-haul operations. ATA agrees generally with the purpose of the proposed rule. It too would amend[13/] the proposed rule in much the same manner as proposed by the New England League and the Short Haul Conference. In its reply verified statement, ATA asserts that several parties oppose the rule because, when applied to particular situations, it may work a hardship on them. Based on this record and for sometime to come, it believes that the circuity limitation can best be a policy decision. If the 90 percent provision

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13/ The amendment to permit a motor carrier to use Plan I service at a point it is not authorized to serve is hereafter considered in connection with Rule B-8.

fails to meet the needs of a particular person, ATA points out that that person may seek relief under the rule and upon a proper showing may be granted such relief.

Based upon the pleadings filed by other persons, the Bureau has changed its position somewhat since the time it filed its initial pleading herein. As seen, it agrees with the PRR that railroads also should be permitted to file for relief from the percentage provision. The Bureau also believes that to the extent it is found reasonable and necessary to prescribe that the intermodal route be no less than a certain percentage of the authorized highway route, it will also be necessary to prescribe the maximum degree of circuity to be permitted under the rule.

Midwest Haulers Inc., (Midwest), opposes the suggestion that the rule be liberalized by reducing the degree of circuity to 80 percent. It contends that the rule should not be liberalized in the absence of good cause.

The Western Railroads also oppose the proposed amendments or modifications of the rule. They argue, for example, that the proposed amendments of ATA constitute an effort to "shape coordinated TOFC service to suit the convenience of that segment of the motor carrier industry it represents."

Bekins Van Lines, Co., (Bekins) suggests that the proposed rule be clarified to provide that irregular-route carriers would have to determine their routes and mileages applicable thereto by way of any gateways which exist in the irregular-route carrier's certificate. It believes that without such clarifying language there would be uncertainty in the application of the rule.

As seen, some parties object to the proposed rule and suggest it be deleted. Their arguments have heretofore been summarized, and the examiners believe they are without merit. For example, why some rule or guide line, such as proposed, would (a) make it impossible for rail carriers to operate efficiently and legally, (b) tend to foster or permit wasteful transportation, or (c) impose on the railroads participating in TOFC traffic a number of restrictive requirements not applicable to other forms of transportation is not apparent, nor have the parties presented any facts to support such arguments. It is noted that not all of the rail carriers oppose the proposed rule. Although a number of the parties suggest some modification of the proposed rule, it is evident that there is little objection to the general tenor of the rule.

As stated by the Commission in the Traffic in East and Midwest case, "many considerations bear upon the feasibility and practicability" of what is a reasonable through route under section 216(c). That any Plan I service over a through route which does not "bear some reasonable relationship to the authorized motor carrier service for which it is substituted" would not be a "reasonable" through route seems so clear as to require little discussion. If this were not true, motor

common carriers would be able, without proof of public convenience and necessity, to change at will the competitive character of their service and indirectly invade the territory of other authorized carriers. Moreover, such a change may well affect adversely existing authorized carriers and thus constitute unfair and destructive competition in contravention of the national transportation policy.

Under the proposed rule, the Commission in effect would be advising all parties that Plan I arrangements whereby the joint route, including the substitution, does not involve less than a stated percentage of the mileage of the motor carrier's authorized highway route, would be a reasonable through route. This being true it is difficult to understand the arguments of some of the parties that, if the proposed rule were adopted, it would curtail the use of Plan I service. Perhaps the proposed 90 percent limitation is too strict as argued by some parties. It is noted that the Commission in Substituted Rail Service Between Jackson and New Orleans, I.C.C. , (I & S Docket No. M-15074 decided December 27, 1962) approved Plan I service where the route was 11 percent circuitous, and that there have been other proceedings where the route approved was circuitous to an even greater extent. Admittedly, many considerations bear upon what is a "reasonable" through route. Giving due consideration to how the traffic actually moves in Plan I service and the arguments advanced by the parties, the examiners find that 85 percent would be a more realistic figure to use in a general rule to describe what is a "reasonable" through route for the purposes of the proposed rule. We also agree (1) with Bekins that the rule should be clarified to cover irregular-route carriers, and (2) with the New England League to the extent that motor carriers using Plan I service should be required to file a notice with the Commission of their future use of such service. We do not consider the mere filing of a tariff or a substituted service directory showing the points between which Plan I service may be used to be of much help to the Commission in making certain that Plan I arrangements would not be contrary to the proposed Rule.

From some of the arguments advanced, it would appear that some parties seem to believe that in the event there were a number of individual shipments in the trailer, each originating at and destined to different points, it would be possible that some of the shipments could be moved in Plan I service without violating the circuity rule and that some could not be. Admittedly, there is such a possibility. We believe any such violation could be avoided by the motor carrier by simply providing that the shipments handled must originate at and be destined to or beyond named points.

In the circumstances, we conclude that the following Rule, in lieu of proposed Rule B-3, should be adopted:

> (A) Motor commor carriers shall not participate in Plan I TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 85 percent of the distance between such points computed (1) if a regular-route carrier, over its

its authorized regular route, of (2) if an irregular-route carrier, through any gateway point which it is required to use; except as may be permitted by the Commission upon consideration of an appropriate application filed by a motor common carrier or a railroad in which relief is sought from the percentage provisions of this rule.

(B) Motor common carriers participating in Plan I TOFC service which comes within the 85 percent circuity provision provided in part (A) of this rule, shall file with the Commission, on the same date that tariffs or substituted service directories are filed, information showing the name of the rail carrier to be used, the total mileage from origin to destination over its all motor route, the points between which TOFC service of the rail carrier is to be used, and the total mileage from origin to destination over the joint motor-rail-motor route to be used.

RULE B-4

The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

This Rule involves the relationship between rates and divisions. It would prohibit the assessment by the railroads of more than their local charges as a division of the through charge made for the joint intermodal TOFC service.

With a few exceptions hereafter discussed, the parties commenting on this rule object to it on various grounds and some suggest changes in it. The FF Institute would revise the rule to require the filing with the Commission of any divisions to be received by the railroads under joint TOFC service and to permit public inspection of such divisions. It believes that the Commission should have some control over divisions and asserts that its suggestion would provide that measure of control.

The Manufacturers Association of Connecticut would substitute the word "different" for the word "greater"; the New England League would add the words "or less" after the word "greater"; and Progressive Shippers Cooperative Association and The Charter Oak Shippers Cooperative Association, Inc., would substitute the word "lower" for the word "greater" in the proposed rule.

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The RLEA believes that the rule is wholly unnecessary as of the present time. It is not aware of any abuses to shippers or the public with respect to TOFC service and contends that no pattern of abuses in, or of, such service on a wide spread scale has been shown.

Seatrain asserts that the meaning of the words "terminal-to-terminal" as used in the proposed rule is not clear and can lead to confusion. It suggests that such words be eliminated.

The Department of Defense, National Dairy, Chemists Assn., Coca Cola Company, NIT League, New York Central, B & M, PRR, B & O, C & O, Erie, Nickel Plate, Coast Line, L & N, SFA Railroads, Southern, and the Western Railroads object to the proposed rule. They contend (1) that the Commission is without power to adopt such a rule, citing the New Haven case and sections 215(c) of the act; (2) that the proposed rule would be difficult, if not impossible, to apply calling attention to the fact that there is more than one terminal-to-terminal all-rail TOFC service; (3) that while the Commission, under section 215(f) of the act and on a full and complete record, may adjust particular divisions between rail and motor carriers, the act provides no authority whatsoever for the Commission to adjudicate the maximum amount of rail divisions by a blanket order such as proposed under the guise of rule making; (4) that, in any event, rates and divisions are not an issue in the instant proceeding; (5) that the maintenance of just, reasonable, and equitable divisions are now assured by the present law and therefore that the rule is unnecessary; (6) that there is no evidence of record tending to show that the present divisions for either Plan I or Plan V service are unreasonably high; (7) that there are no complaints pending with respect to the divisions of rail-motor joint rates for TOFC service; (8) that while the proposed rule refers to "compensation or charge" accruing to the railroad, such compensation has historically been held by the Commission to be a division, citing Ringsby Truck Lines, Inc. v. Atchison, T. & S. F. Ry. Co., 263 I.C.C. 139; Great Northern Ry. Co.--Control--Superior & D Transfer, 85 M.C.C. 401; and Truck Trailers on Flatcars, Utah, Idaho, Oreg., and Wash., 297 I.C.C. 395, and 298 I.C.C. 533; and (9) that the Commission has never heretofore exercised its powers under section 216(f) through an arbitrary yard stick and that therefore the proposed rule constitutes a departure from prior standards, citing Highway Motor Freight Lines, Inc., v. A. C. E. Transp. Co., Inc., 42 M.C.C. 513; and Advance Transp. Co. v. Allard, 305 I.C.C. 751, (Advance case). They also call attention to the fact that in B. & O. R. Co. v. United States, 298 U. S. 349, the Supreme Court stated that there is no single standard of reasonableness, when at page 359 it held:

> * * * There is no single test by which 'just', 'reasonable' or 'equitable' divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what divisions will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases.

Transamerican is in agreement with the proposed rule provided the revised definitions suggested by it in connection with Rules A-1, 2, and 3 are adopted.

ATA contends that the proposed rule is so obviously sound as to require no discussion. It would change the proposed rule, however, to substitute the words "TOFC transportation" for the words "TOFC service." ATA, in answer to those opposing the rule, asserts that nothing in the rule requires railroads to provide joint intermodal TOFC service and that it would only preclude a railroad from receiving as its division of a "voluntary" joint motor-rail rate a greater sum than it would receive from a shipper for an all-rail terminal-to-terminal movement.

The examiners deem it unnecessary to comment on each of the objections raised by those opposed to this rule. It is sufficient to state that we are of the opinion that many of the arguments advanced by the parties opposing the rule are correct. We conclude, based on the record herein, that it has not been shown that the proposed rule is required in the public interest, and that, in any event, the rule is beyond the present statutory power of the Commission under the act. In this connection, attention is invited to the fact that the United States Supreme Court has frequently held that the Commission is "an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the act by implication but should be conferred in clear and unmistakable terms." See United States v. Pennsylvania R. R. Co., 242 U. S. 208; and Interstate Com. Commission v. Railway Co., 167 U. S. 479. Further, the Commission has found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon it the power to act under given circumstances would warrant the assumption of such power through its own construction of the act. Wisconsin R. R. Commission v. C. & N. W. Ry. Co., 87 I.C.C. 195.

No one has pointed out wherein the Commission has the power, under the act, to adopt the proposed rule. Nor is there any evidence of an intention to confer upon the Commission such power. We conclude therefore that this rule should be rejected.

[fol. 1477]

RULE B-5

Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

This rule would prohibit a railroad from discriminating between or among the motor or water common carriers with which it joins in the provision of joint intermodal TOFC service. It also requires the determination by the railroad of the motor and water carrier operating authorities. The latter portion of the rule will be separately discussed.

Most of the parties who oppose proposed Rule B-4 also oppose proposed Rule B-5. Generally, they object to the rule on much the same grounds as set forth above in connection with Rule B-4. It is not necessary to repeat those contentions here. Other contentions raised by those opposed to the rule follow.

The New York Central points out that the Commission's sole authority to deal with through routes, joint rates, and divisions arises under sections 1(4), 3(4), 15(3), 15(6), 216(c), 216(f), 307(d), and 307(e) of the act; that the Commission is without authority to require railroads to enter into joint rate arrangements with any motor carrier; and that, once having voluntarily done so, there is no requirement dealing with discrimination or prejudice which would force the railroads to join with any other motor carriers, regardless of circumstances or condition.

The PRR calls attention to the fact that in Strickroot v. Detroit & C. Nav. Co., 253 I.C.C. 535, (Strickroot case), the Commission, division 2, denied the request of a motor carrier that a water carrier be required to join with it in the establishment of through routes and joint rates, stating at pages 537-538:

*** We are without authority under either part II or part III of the act to require defendant to join with complainant in the establishment of through routes and joint rates on this traffic. The provisions of section 216(c) of part II and of section 305(b) of part III of the act in respect of the establishment of through routes and joint rates between common carriers of property by motor vehicle and common carriers of property by water are permissive, not mandatory.

There is no provision that the application of these sections of the act and our jurisdiction are or may be limited or expanded as a result of the past action of the carriers. The voluntary maintenance in the past of through routes and joint rates, partly by motor vehicle and partly by water, does not give us jurisdiction to require their continuance or reestablishment. In his exceptions, complainant by inference contends that we have such authority under the declaration of national transportation policy in the act, as amended, to the effect that there shall be fair and impartial regulation of all modes of transportation which will preserve the inherent advantages of each without unfair or destructive competitive practices. We do not agree that the declaration of policy indicates that the provisions of sections 216(c) and 305(b) have any different meaning or purpose than that here given them. We are not clothed with substantive power other than that given by the substantive provisions of the act.

The PRR also argues that the proposed rule may not be adopted on the ground of prohibiting "discrimination" as section 3(4) does not apply to carriers subject to Part II of the act.

The L & N contends that the proposed rule has several objectionable features. It has entered into Plan I arrangements with many motor carriers, has worked out satisfactory arrangements with such carriers, and expects to expand this part of its TOFC program by establishing like arrangements with additional motor carriers. It believes, however, that it should have the right to decide for itself whether it will or will not enter into arrangements with a particular motor carrier. The L & N is of the opinion that the proposed rule would require a railroad to establish TOFC arrangements with a motor carrier even though the motor carrier was not financially responsible, or would not agree to the same conditions as worked out jointly with other motor carriers.

The Seaboard argues that the proposed rule lacks any reasonable basis whatsoever, and that, if adopted, would undoubtedly result in the curtailment of TOFC service to the public.

The SFA Railroads suggest that the rule be deleted in its entirety on the grounds that it is superfluous, unlawful, or inequitable. They argue that as far as water carriers are concerned, the rule is superfluous, pointing out that section 1(4) of the act makes it the duty of railroads to establish re sonable through routes with common carriers by water and just and reasonable rates and charges applicable thereto, and that section 3(4) makes it unlawful for a railroad to discriminate in its rates and charges to the water carriers or to unduly prejudice any water carrier in the distribution of traffic. The SFA Railroads take the position

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that if the Commission believes a rule along the general lines of proposed Rule B-5 should be adopted, they suggest that the rule read as follows:

> Any railroad or railroads may provide TOFC service jointly with any motor or water common carriers, PROVIDED that such common carriers shall not knowingly enter into such arrangements with any carrier or carriers not holding sufficient operating authority to perform the service contemplated before the effective date of said joint arrangement or otherwise knowingly perpetrate a violation of any law, and FURTHER PROVIDED that it shall be the duty of each such carrier to ascertain whether its own authority is sufficient under the law to perform that service prior to entering into said joint arrangement.

The Southern joins in much of the argument presented by the other railroads. It also suggests the adoption of a rule somewhat along the same lines as suggested by the SFA Railroads.

Seatrain believes the proposed rule is directed to the elimination of preferences and discrimination by rail carriers against other common carriers. It suggests that the rule be amended to give substance to the above objective, by adding the following as rule 5(a):

> Any railroad which provides TOFC service jointly with any motor common carrier or any other railroad, shall not refuse to enter into like arrangements with water common carriers under similar circumstances and conditions except that such railroad shall have the duty of ascertaining whether the connecting water carriers hold appropriate authority to transport the involved commodities. If the connecting water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

The SFA Railroads oppose the above rule suggested by Seatrain. They argue that both the Commission and the courts have refused to impose such requirements on the railroad industry under existing law, and that the rule suggested is irrelevant and beyond the scope of the issues herein. We agree.

The SP now provides Plan I service between numerous points along the Pacific Coast even though it now has its own all-rail TOFC service between the same points. It provides such service, even though it considers its all-rail TOFC service to be very good, on the basis that the motor carriers will always control traffic between the points, and that it is to the advantage of the SP to carry the motor common carriers' trailers along with its own and accept from

the motor carriers a division. In instances, however, where the SP does not believe it would be adding new revenue by extending Plan I service to a "paralleling trucker", then extension of the Plan I service cannot, according to the SP, be justified from an economic standpoint. The SP looks upon Plan I as a form of partnership in which the railroad and the motor carrier must have a certain degree of confidence in one another. Before entering into Plan I service with a motor carrier, the SP desires to know something about the motor carrier's business.

The Short Haul Conference objects to the proposed rule on the ground that it disregards various practical considerations. It points out that joint arrangements between modes of transport have existed for many years. According to the Short Haul Conference, such arrangements take into consideration (1) payment of bills and financial security, (2) volume and frequency of movement of traffic, (3) availability and proper care for equipment, (4) balanced movements, (5) consideration of schedules, (6) possibility of freight diversion to a competitor, and (7) personal considerations. It asserts it is a matter of common knowledge that line-haul motor carriers do not and will not enter into interchange arrangements with other motor carriers until the aforementioned considerations have been fully reviewed. The Short Haul Conference also contends that the proposed rule is not only unworkable, but would not be in the public interest.

The NIT League, the Coca Cola Company, the Chemists Assn., National Dairy, RLEA, and the Department of Defense oppose the rule on much the same grounds as those heretofore discussed. In effect it is contended that the Commission may not issue a general rule making mandatory that which is permissive under the act.

Transamerican is in agreement with the proposed rule subject to its revised definition heretofore described. In addition, it suggests that there should be added to the rule the following:

> provided however, that nothing herein shall be construed as prohibiting a railroad from establishing charges for the transportation of the trailer or trailers of a motor carrier commensurate with the amount of use of such service by the motor carrier if such charges based upon such usage are available to all other motor carriers making a like usage.

In support of its proposed revision, Transamerican admits that it has in mind its present use of "substituted intermodal TOFC" as defined by it in connection with the PRR. That railroad makes a whole train available to, and for the exclusive

use of, Transamerican. Transamerican takes the position that this arrangement, and others made between railroads and motor carriers, should not be disturbed. It asserts that it has been advised by the PRR that the railroad will make available a train or trains to other motor carriers on the same terms as to Transamerican, if such other motor carriers desire to make a comparable use of TOFC service. The examiners are of the view, based solely on the few facts of record, that the rules which they find should be adopted will not affect the described TOFC service.

The Bureau suggests that the rule be revised to read as follows:

> Any railroad, motor common carrier or water common carrier which provides TOFC service jointly with a common carrier of another mode shall not refuse to enter into a like arrangement with other common carriers under similar circumstances and conditions, except that such railroad, motor common carrier or water common carrier shall have the duty of ascertaining whether it or its connecting common carriers hold appropriate authority to transport the involved commodities to the involved points. If the origin or connecting common carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

It admits that the above revision is basically in conflict with previous decisions of the Commission. In its reply verified statement, the Bureau notes that its views in this respect are shared by many railroads who oppose the proposed rule. In view of this, the Bureau asserts that the area of controversy between it and the railroads has thus been narrowed, and that in essence the issue is:

> whether the Commission's previous statements with respect to compelling coordinated service between independent common carriers by rail and motor vehicles were accurate interpretations of the law (sections 216(c) and 3(4) of the Interstate Commerce Act) or based upon false premise and hence in error.

The ATA favors the proposed rule, but suggests that it be revised to reflect the definitions it proposes. It contends that much of the opposition to the proposed rule assumes that the rule "requires" railroads to hold out joint intermodal service and disregards the fact that it simply "adds clear rules for application when a railroad does hold out such service." It argues that the dangers inherent in allowing a railroad to select the motor or water carriers with which it provides joint intermodal TOFC service are manifest.

The Southern refers to suggestions having been made that motor carriers be required to interchange traffic with other motor carriers and states that the industry has always sucessfully opposed such suggestions pointing out how unreliable and financially irresponsible many motor carriers are. It argues that the motor carrier industry generally supports the proposed rule even though the motor carriers insist that they not be required to deal with their more "undesirable brethren." The Southern believes that adoption of the proposed rule would probably force the railroads to cancel all existing TOFC arrangements rather than to be placed at the mercy of any and all motor carriers who decide they want to use TOFC service.

The Commission in its 75th Annual Report to the Congress recommends that section 216(c) be amended "to authorize the Commission, after investigation and hearing, when necessary and desirable in the public interest, to require the establishment of through routes and joint rates between motor common carriers of property and between those carriers and common carriers by rail, express, and water." In connection with the above recommendation, the Commission stated:

> At present, common carriers of property by motor vehicle are permitted, but may not be required, to establish through routes and joint rates with other such carriers or with common carriers of other modes subject to the act.

It is noted that the Commission in its 76th Annual Report broadened the request somewhat and recommended that Parts I, II, and III, be amended to authorize the Commission to require the establishment of through routes and joint rates, under the above-described conditions. The Commission repeated that "motor common carriers of property subject to Part II may not be required to enter into joint-rate arrangements with each other or with common carriers of other modes. Likewise, carriers of other modes may not be required to establish such arrangements with motor carriers."

The above statement reflects the views of the Commission in all decisions which have been called to the attention of the examiners. Our comments with respect to Rule B-4, are equally applicable with respect to that portion of proposed Rule 5 which would in effect prohibit a railroad from discriminating between or among motor common carriers in providing joint intermodal TOFC service. We conclude that under the present provisions of the Interstate Commerce Act, through routes and joint rates between rail and motor common carriers are not mandatory, but are entirely optional. As stated in the Strickroot case, the National Transportation Policy does not provide any basis for a conclusion to the contrary. Accordingly, we also conclude that joint intermodal

TOFC service cannot be required even in those instances where such service clearly would be in the public interest. Undoubtedly, there exists instances where joint intermodal TOFC service, although clearly in the public interest, will not be provided on a purely voluntary basis. In the circumstances and looking toward the future growth of intermodal TOFC service, the examiners suggest that all parties join with the Commission in urging the adoption of the Commission's above-described recommendation to Congress to amend the act.

The second portion of the proposed rule deals with the "duty" of the railroads to ascertain whether the connecting motor or water carriers hold appropriate authority.

The New York Central is of the view that this question also was disposed of by the Commission in the New Haven case wherein it stated at page 104:

> We do not now suggest that a railroad should police the operations of motor carriers holding authority from us.

And at page 107:

> Although the railroads are under no obligation to police the operations of motor carriers with respect to their certificates, we believe that . . . they should satisfy themselves that the motor carriers have authority . . .

In view of the above, the New York Central argues that the second portion of the proposed rule is exactly opposite to the Commission's conclusion in the New Haven case. It believes that it is one thing to discipline carriers which knowingly or otherwise provide transportation in violation of the act, but that it is quite another to make one carrier responsible for policing another. It considers the latter to be the duty of the Commission.

The B & M, B & O, C & O, the Coast Line, the L & N, PRR, Erie, Nickel Plate, the Western Railroads and others also oppose the second portion of the proposed rule. Some suggest that the rule be modified to read as follows:

> Any railroad or railroads may provide TOFC service jointly with any motor or water common carriers and any water common carrier may provide TOFC service with any railroad or motor common carrier, PROVIDED that such common carrier shall not knowingly enter into such arrangements with any carrier or carriers not holding sufficient operating authority to perform the service contemplated before the effective date of said joint arrangement or otherwise knowingly perpetrate a

violation of any law, PROVIDED further that it shall be the duty of each such carrier to ascertain whether its own authority is sufficient under the law to perform that service prior to entering into said joint arrangement.

Bekins suffests the following two changes in the rule:

(a) Add at the end of the first sentence thereof, the following phrase:

"... and whether such joint intermodal TOFC service may be participated in between the proposed origin and destination points in compliance with Rule B-3.

(b) in the second sentence after the word "authority" and before the word "no", add the following phrase:

"... or such service would violate Rule B-3., .."

Bekins asserts that the above changes stem from the fact that unless the railroad is required to examine into the operating authority and authorized routes of the motor carrier and to satisfy itself that the motor carrier does have suitable authority, there will be many violations of the proposed rules. It has been its experience that before any motor carrier undertakes TOFC service with the railroad, there is a period of negotiations between the sales and management officials of the carriers. Bekins believes that it should be relatively easy for the railroad to require proof from the motor carrier at that point as to the motor carrier's authorized service and to make certain that it conforms to the proposed TOFC rules.

ATA argues that the second portion of the rule would not place a greater obligation on the railroads than all carriers now have as to their connecting lines.

The Bureau would revise the rule as heretofore stated. It believes that its revision would place the burden of unlawful operations equally upon any railroad, motor common carrier, or water common carrier which provides TOFC service jointly with a common carrier of another mode.

The examiners note that in the New Haven case, the Commission stated that it was not suggesting that "a railroad should police the operations of motor carriers holding authority." In that case, however, the Commission also considered the extent to which a railroad handling trailers under what is known as Plan I service must ascertain and be

subject to the limitations in the motor carrier's certificate as to (a) territory and (b) commodities. The Commission therein concluded, at page 107:

> Although the railroads are under no obligation to police the operations of motor carriers with respect to their certificates, we believe that, when they enter into joint-rate arrangements with such carriers, they should satisfy themselves that the motor carriers have authority to operate with respect to the commodities concerned between the points where the substituted service is performed.

The second portion of the proposed rule does not require the railroads to "police" the operations of the motor or water carriers, if they enter into joint intermodal TOFC arrangements with such carriers. It merely places upon the railroads the "duty" to ascertain whether the motor or water carriers hold appropriate authority to join in the arrangements, and follows the above-described conclusion of the Commission in the New Haven case. It is difficult for the examiners to believe that the railroads would ever enter into any TOFC arrangements with motor or water carriers unless the railroads first ascertained or satisfied themselves whether such carriers held appropriate authority between the involved points. Clearly, they could not do otherwise and comply with the provisions of the Act and the Commission's regulations thereunder, especially with respect to the filing of rates and routes.

It is noted, for example, that the Plan I agreement between the SP and various motor carriers, heretofore described, provides in part that the motor carriers shall not tender for transportation trailers which contain certain commodities. Attention also is invited to Appendix IV which shows (1) that the Chicago, Rock Island and Pacific Railroad Company (Rock Island) verifies the operating authority of each motor carrier participating in Plan I arrangements with that railroad and determines among other things that any circuity existing is well within the zone of reasonableness; (2) that the IC also makes it a practice to check the operating rights of a motor carrier in order to be assured that the motor carrier has proper authority to serve the designated points in Plan I operations; and (3) that the St. Louis-San Francisco Railway Company (Frisco) also makes it the practice to select motor common carriers to perform TOFC service that are fully authorized and responsible.

In view of the above, the examiners know of no reason why the carriers should not have the duty to make certain that the motor or water carriers hold appropriate authority to join in TOFC arrangements before such arrangements are made effective. Although we have concluded that the major portion

of the proposed rule should be rejected, we believe that portion of the rule governing the duty of making certain that the various carriers entering into TOFC arrangements hold appropriate authority from the Commission, is necessary and reasonable and should be adopted with some modifications. Accordingly, we find that the following rule, in lieu of proposed Rule B-5, should be adopted:

> Any railroad or railroads may provide TOFC service jointly with any motor or water common carriers, PROVIDED that the common carriers by railroad, motor, and/or water shall have the duty of ascertaining whether it or its connecting common carrier hold appropriate authority from the Commission to render the service contemplated before the effective date of such joint arrangements. If the origin or connecting common carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

RULE B-6

> The billing carrier participating in joint intermodal TOFC service may refuse to reveal the identities of the shippers or consignees to its connecting carriers, in which event the billing carrier shall assume, with respect to the shippers or freight forwarders, full responsibility for the complete movement.

This rule would govern the release of connecting carriers' liability. It also may be said to have as its purpose the encouraging to the maximum extent possible the coordination of rail and motor carrier service through the device of TOFC transportation.

The NIT League, Chemists Assn., National Dairy, the New England League, Manufacturers Association of Connecticut, Florida Shippers League, Bekins, Helms, the FF Institute and many of the railroads object to the proposed rule and suggest that it be eliminated. In substance, they argue (1) that the proposed rule would appear to alter the long-established principles governing common carrier liability to shippers; (2) that it is completely inconsistent with bona fide joint-carrier arrangements; (3) that present provisions of the act concerning disclosure of information should be able to accomplish any lawful and proper objectives that may be contemplated by the proposed rule; (4) that the rule is ambiguous and uncertain in that it cannot be ascertained therefrom what responsibilities the participating carriers will have if the billing carrier does reveal the identities of the shippers or consignees to its connecting carriers; (5) that with

respect to Plan V service, if the originating carrier refuses to reveal the necessary information to its connecting carrier, it would make Plan V operations impossible; and (6) that the subject is not an appropriate one for rule making.

Some of the rail carriers would have no serious objections to the proposed rule provided it were amended to cover only Plan I service. They admit that the rule states the existing practices in connection with such service and that these practices undoubtedly have contributed in a large measure to the success of Plan I operations. They point out that under a Plan V movement, the revenue waybill, showing both consignor and consignee, accompanies the shipment and that the connecting carrier knows the identity of both the consignor and consignee. It is argued therefore, that the proposed rule is unworkable and not applicable with respect to a Plan V movement. Some of those opposed to the rule believe that the division of responsibility in a joint arrangement is best left to the agreement of the parties, and that the parties to such an arrangement are in a better position to appraise the facts of their own operations and to make much better rules for all eventualities than can the Commission by a general rule.

The Bureau apparently agrees with some of the above views of the parties as it suggests that the proposed rule be amended to read as follows:

> The billing origin carrier participating in joint intermodal TOFC service in lieu of its authorized over-the-road or line-haul service may refuse to reveal the identities of the shippers or consignees to its connecting carriers, in which event the billing origin carrier shall assume, with respect to the shippers or freight forwarders, full responsibility for the complete movement. A billing origin carrier participating in joint intermodal TOFC service other than in lieu of its authorized over-the-road or line-haul service may not refuse to reveal the identities of the shippers or consignees to its connecting carriers, and the billing origin carrier participating in this type of joint intermodal TOFC service may not assume full responsibility for the complete movement.

Transamerican is in general agreement with the proposed rule, but suggests that there be added thereto the following:

> provided, however, that nothing herein shall be construed as relieving the railroad from liability to the motor carrier in connection with operations under 'substituted intermodal TOFC service.'

The above proposed amendment is made by Transamerican out of an abundance of precaution so that there may be no question

concerning the liability of the railroad to the motor carrier in connection with operations which Transamerican defines as "substituted intermodal TOFC service." Transamerican asserts that this is the method now used by it in connection with such service and it desires that it be carried forward in the future.

ATA believes that the purpose of the rule is to encourage to the maximum extent possible the coordination of rail and motor carrier service through the device of TOFC transportation. It admits that there are some practical difficulties in connection with operations under such rule, inasmuch as the delivering carrier must be supplied with sufficient documents to permit the identification of the consignee and presumably it would also include identification of the consignor. ATA is willing to accept the proposed rule, but suggests that the word "service" be changed to "transportation." In answer to the parties opposing the proposed rule, ATA points out that the rule is permissive rather than mandatory and it agrees that it can only apply when the billing carrier both originates and delivers the shipment.

As seen, there is very little support for this proposed rule. No doubt it would affect shippers to a large extent, but all shippers or shipper associations commenting on the rule oppose it. In any event, we agree that the rule would be unworkable with respect to Plan V shipments. Undoubtedly, the rule states generally certain of the existing practices governing Plan I shipments. The record does not indicate, however, that there has been any disagreement between railroads and motor carriers participating in Plan I service with respect to the matters covered by the proposed rule. Moreover, no shippers are here complaining that loss or damage to their TOFC shipments are not settled by the carriers involved. It would appear therefor that the Plan I agreements between the two modes of transportation are working to the satisfaction of all concerned, and that there now exists quite a bit of coordination between rail and motor carriers in the conduct of TOFC transportation. We note that the Plan I agreement, between the SP and various motor carriers, covers, among other things, "loss or damage to the trailer or its contents" and how such matters are to be adjusted are set forth in that agreement in some detail. We assume that Plan I agreements between other railroads and motor carriers contain somewhat similar provisions. In the circumstances, we agree with the suggestion of certain of the parties opposing the rule that the division of responsibility in a joint arrangement such as involved in Plan I service is best left to the agreement of the parties concerned; and that they are in a better position to appraise the facts of their own operations and to make much better rules for all eventualities than can be done by a general rule such as proposed. Accordingly, proposed Rule B-6 is rejected.

RULE B-7

Tariffs embracing joint intermodal TOFC rates or charges may provide for TOFC service for the entire line-haul movement. /Note: Although this rule is in apparent conflict with Commission decisions in Substituted Freight Service, 232 I.C.C. 683, and Interchange of Traffic at Point of Origin, 46 M.C.C. 623, it is intended to represent what appears to be a widespread practice under present Plan I operations./

Under this Rule as proposed, rail could be substituted for truck services for the entire line-haul movement. Some of the parties suggest that this Rule be amended to provide that it apply only to Plan I service. We agree that it is unlikely that the entire line-haul movement involving Plan V shipments would be in TOFC service and we do not believe Plan V shipments should be considered under the Rule. We find that the Rule should be revised to cover Plan I service only. Accordingly, no further consideration will be given the comments of the parties with respect to this particular issue.

The B & M, C & O, Erie, Nickel Plate, Eastern Railroads, SPA Railroads, ATA, Consolidated, Transamerican, Helms, New England League, and Chemists Assn. have no objection to the proposed Rule although some offer amendments thereto.

The Manufacturers Association of Connecticut, Short Haul Conference, National Dairy, FF Institute, Southern, and the Western Railroads oppose the Rule. Their argument may be summarized as follows: that the Rule is contrary to the findings of the Commission in Interchange of Traffic at Point of Origin, 46 M.C.C. 623 (Interchange of Traffic case), the Substituted Service case, and the New Haven case; and that terminal operations (at point of origin and destination) are those of the line-haul carrier (the railroad under the proposed rule) under section 202(c) of the act.1/ One party suggests that for a motor carrier to participate in Plan I service, the motor carrier should perform line-haul service from or to a point beyond the commercial zone of the point of interchange.

The examiner have heretofore considered to a large extent the principal arguments advanced by those opposed to the proposed rule under the caption "legality of Plan I Service" and found them without merit. We have no doubt that we could approve the proposed rule, with some modifications, based on our conclusions respecting Plan I service. However, we need

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1/ Briefly, section 202(c) excludes from regulation, local cartage performed for designated classes of carriers and the transportation is regulated in the same manner as the transportation of the carrier to which such services are incidental.

not base our conclusion solely on the above as there are other factors which support our findings as to the proposed rule.

Plan I service, as heretofore stated, is a joint-line service between two modes of transportation under a joint rate arrangement which is authorized under section 216(c) of the act. Also under Plan I the shipments move only on the billing, and under the rates, of the motor carrier.

In the Substituted Service case, the Commission stated at page 690:

> The suggestions made herein *** are not intended to cover instances where the service is entirely by motor carrier and no actual rail service is performed or instances where the port-to-port service is entirely by motor vehicle and no actual water service is performed. Where all-motor service is rendered from origin to destination or from port to port, all-motor tariffs published in accordance with part II should be filed to cover. /Emphasis supplied/

It is evident from the above that the Substituted Service case lends no support to those opposed to the rule. Under Plan I, the service is not performed entirely by one mode of transportation as hereinbefore explained in some detail.

Nor is the proposed rule contrary to the conclusions of the Commission in the New Haven case. As pointed out by the Southern, in the New Haven case, the Commission found at page 103:

> *** that motor operation of trailers by a railroad in terminal-area collection-and-delivery service in connection with the railroad's trailer-on-flatcar service is an operation within the partial exemption of section 202(c)(1) of the act. /Emphasis supplied/

The motor carrier portion of Plan I service is not performed in connection with the railroad's TOFC service. The motor carrier portion of Plan II service, however, is performed for and in connection with the railroad's TOFC service.

Both the PRR and the ATA are of the view that there is no conflict between the proposed rule and the findings in the Interchange of Traffic case. We agree. In that case the Commission, division 3, concluded that the service performed was pick-up and delivery for the line-haul carrier and therefore within the exemption of section 202(c) of the act.

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In the Traffic in East and Midwest case, the Commission, in passing upon the necessity, if any, of a long motor haul in connection with a joint motor-rail rate, stated at page 273:

> *** Nor can we accept the contention that because the haul which a motor common carrier might receive on some traffic would be short, or terminal in character, that it may not participate in such a joint rail-motor route. On this point we see no reason for departing from the following conclusion reached in Trucking L.C.L. Freight in Lieu of Rail Service, 185 I.C.C. 71, 73:
>
> > 'And while terminal carriers may publish switching charges, and act as the agents of connecting road-haul carriers when the latter assume and pay those charges, there is nothing in the Act which prohibits the terminal carriers from participation in their own right in joint through rates as they have elected to do here.'

Later, the Commission has occasion to again consider various questions arising under section 202(c) of the act. In United Truck Lines, Inc., Ext. - Malaga Reduction Plant, 64 M.C.C. 535 (United case), it stated at pages 539-540:

> *** As used in section 202(c), 'transportation in the performance of collection or delivery services' means only that intracity or intraterminal transportation performed in the picking up and gathering together at origin, or in the distribution at destination, of shipments prior or subsequent to an intercity or intercommunity line-haul movement thereof and as an incident to such intercity or intercommunity line-haul movement. Terminal Area case. In other words, freight may be picked up or delivered in Wenatchee only as an incident to a line-haul movement by United over its Malaga route.
>
> *** Furthermore, as it, the line-haul carrier, is not authorized to serve Wenatchee, with the single exception mentioned above, Apple City's operations between East Wenatchee and Wenatchee 'for' United do not come within the partial exemption of section 202(c) of the act. Nor is there any evidence to establish that Apple City's operations between the named points are 'for' any other line-haul carrier holding appropriate authority to serve such points. A bona fide collection and delivery service cannot stand alone but must be 'incidental'

to an authorized line-haul movement. In the circumstances, it is evident that if its operation is to be lawful, Apple City itself must be considered to be the line-haul carrier over the route between East Wenatchee and Wenatchee with respect to all traffic originating at, or destined to points on United's line as heretofore described.

Apple City does hold authority to operate between Wenatchee and East Wenatchee. Although such authority covers only the commercial zone of Wenatchee and is such as would not now be issued in view of the decision in the Terminal Area case, it is outstanding and does authorize service between two distinct municipalities, Wenatchee and East Wenatchee. Under it, we think it must be conceded that Apple City can lawfully perform a line-haul service between such points and may interchange freight with United at East Wenatchee which is a point of service common to the authority of both carriers. [Emphasis supplied]

As can be seen from the Commission's discussion in the United case and in the Traffic in East and Midwest case, it is clear that the operations of a motor carrier picking up a shipment at the point of origin, which shipment is to move on the motor carrier's billing and at the motor carrier's rates, even though such shipment is interchanged with the rail carrier at the point of origin for movement in TOFC service to the destination city, where the shipment is to be returned to the same motor carrier for delivery to the consignee in that city, cannot be considered as being performed for the railroad nor is it incidental to the service by rail. Accordingly, the service of the motor carrier would not be exempt, in these circumstances, under section 202(c) of the act.

The SFA Railroads and the Western Railroads suggest the rule be revised to read substantially as follows:

Tariffs embracing joint intermodal or single mode rates or charges may provide for substituted TOFC motor or water common carrier service for the entire line-haul movement.

We agree with the ATA that the above revision raises issues that are not within the scope of this proceeding. It is rejected.

We have heretofore adopted Rule 8A[15] pertaining to circuity of operations in Plan I service and the Rule here adopted will be made subject thereto. We conclude that the following Rule, in lieu of proposed Rule B-7, should be adopted:

Tariffs providing for Plan I TOFC rates or charges, or Substituted Service Directories, if used, may provide for Plan I TOFC service for the entire line-haul movement, except to the extent such service may be prohibited under Rule 8A above.

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[15] Rule 8A is one of the Rules adopted by the examiners. All

[fol. 1493]

RULE B-8

Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

The C & O, L & N, and the FF Institute voice no objection to this rule and the Southern believes the rule desirable. Transamerican also is in agreement with the proposed rule provided it is made subject to its proposed revision of Rule A-2.

The Western Railroads take the position that no one has offered any good or sufficient reason for the rule; that there is no demonstrated need for it; that there is no showing that it would serve a useful purpose; and therefore that the rule should be eliminated. RLEA also contends that the proposed rule is wholly unnecessary at the present time.

The Seaboard, Erie, Nickel Plate, B & M, New York Central, Coast Line, and PRR would clarify the rule. It is believed that substantially all of the arguments advanced by the named railroads are included in the statement of the PRR. That carrier contends that a distinction between "ordinary joint intermodal arrangements" and "substituted service arrangements" should be made in considering this rule. Accordingly, the PRR suggests that the following be added to the rule:

Where TOFC service is performed as substituted service, such substitution may be made at any point on primary carrier's authorized route.

It believes that if the primary carrier were required to hold authority to serve all points at which it proposes to use substituted service, it would destroy the very nature of substituted service, and that if this were true, Rule B-3 would be completely unnecessary. The PRR knows of only one case--Gilbert Carrier Corp., Extension - Kearny, N. J., 72 M.C.C. 204, --which is contrary to the above statement. In the cited case, the application was unopposed and the PRR argues therefore that the real issue involved was never actually litigated. It also calls attention to the fact that more recently the Commission in the NATA case found that in substituted service the substitution may be made at a point which is not technically a "common point of service" for the motor carriers so long as the motor carrier is authorized to operate over the entire route.

Midwest concurs in the above position of the rail carriers. It relies on the findings in the NATA case, and argues that the proposed rule is not correct if the tender by a motor carrier to the railroad of its trailer at the railroad ramp is regarded as an "interchange" and that the

place of tender be a "common point of service" to both the motor carrier and the railroad. Midwest contends that, if the tender by the motor carrier to a railroad at a railroad ramp is made at a place on the motor carrier's "authorized route", such interchange should be permitted as no competitive advantage will be gained by such carrier.

The Chemists Assn. does not oppose adoption of the rule as written so far as it applies to Plan V service. It too joins the above parties with respect to interchange of Plan I shipments. The Chemists Assn. also suggests that the rule be revised to permit irregular-route motor common carriers to engage in substituted service, and suggests that the Rule be revised to read as follows:

> Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.
>
> The interchange of traffic moving in substituted TOFC service between a railroad and a regular-route motor carrier shall be at points on the motor carrier's regular route. It is not necessary that the motor carrier be authorized to provide service to or from the interchange points.
>
> The interchange of traffic moving in substituted TOFC service between a railroad and an irregular-route motor carrier shall be at points on reasonably direct routes between origin and destination. It is not necessary that the motor carrier be authorized to provide service to or from the interchange points.

ATA calls attention to the fact that numerous parties have suggested that the limitation proposed in this rule should not apply to joint intermodal TOFC service where the participating motor carrier holds authority to perform the entire transportation. ATA supports this position. It suggests that the rule be revised to provide that:

> Where a motor carrier authorized to transport a shipment from origin to destination participates in joint intermodal TOFC transportation in lieu of its authorized over-the-road service the shipment or shipments may be placed on and removed from a rail car or cars at any point within the percentage provisions of /Rule B-3/.

The Western Railroads oppose the above suggestion of ATA. They contend that to permit a motor carrier to use TOFC service at a point the motor carrier is not authorized to serve would significantly enlarge the authority of the motor carrier.

[fol. 1495]

As seen, we have heretofore concluded that a motor common carrier may use Plan I service and that in so doing its status is that of a connecting carrier under a joint-rate arrangement which is authorized under section 216(c) of the act. Most of the parties believe that the proposed rule should not be applicable with respect to Plan I service and some cite the NATA case in support thereof. The findings in that case have hereinbefore been discussed under the caption "Legality of Plan I Service" and for the reasons stated thereunder, we do not consider the NATA case as authority for the requested exemption. All of our findings herein have had as one of their primary purposes to encourage the orderly growth of TOFC service. We do not believe that the proposed rule would hamper that growth to any material extent, and certainly it will not "destroy the very nature of substituted service" as alleged.

Since what is now Part II of the act was enacted, the Commission has repeatedly found that a motor carrier may interchange traffic only at a point it is authorized to serve. Both Plans I and V involve interchange of traffic between two modes of transportation and the examiners are of the opinion that the facts of record do not support any change in the past practices of the Commission. To the contrary, to permit the interchange of traffic at points the motor carrier is not authorized to serve may well lead to abuses and questions concerning the operations of the motor carrier. In the circumstances, the examiners find that Rule B-8 should be adopted.

RULE B-9

> Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous transportation service at all points authorized to be served by it.

This proposed rule would require motor and water carriers to render reasonably adequate and continuous transportation service to all points on their lines notwithstanding their participation in TOFC service.

The NYC, B & M, C & O, Erie, Nickel Plate, Coast Line, Western Railroads, and the FF Institute have no objections to the proposed rule. On the other hand, the PRR, Seaboard, Southern, SFA Railroads, Eastern Railroads, Chemists Assn. National Dairy, and the Department of Agriculture contend that the rule is unnecessary. They argue that there is no reason for adoption of the rule; that the certificates held by the carriers now require them to render reasonably adequate and continuous service; that any action looking toward the revocation of motor and water carrier authorities must be based on statutory provisions such as those found in the

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Interstate Commerce Act and the Administrative Procedure Act; that if the rule is intended to restate the present obligations of motor and water carriers to render reasonably adequate and continuous service, it is unnecessary; and that if it is intended to enlarge the present obligations of the carriers, it is beyond the Commission's power. One or more of the parties opposing this rule also argue that it could create an artificial restraint on coordinated service, pointing out that under substituted service today, the shipper may specify all-highway service if it so desires.

The New England League and the NIT League would strengthen the proposed rule to make certain that the motor or water common carriers continue to carry out their responsibilities under their franchises from the Commission. While the specific changes suggested by these two parties differ in some minor respects, their position in effect is that the proposed rule should be restated as follows:

> Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous all motor or water transportation service, respectively, at all points authorized to be served by it.

The Bureau also would amend the proposed rule along lines similar to those suggested immediately above. It suggests the following:

> Notwithstanding its participation in joint intermodal TOFC service in lieu of its authorized over-the-road or line-haul service, a railroad, motor, or water common carrier shall continue to render reasonably adequate and continuous transportation service to all points authorized to be served by it.

ATA takes the position that the proposed rule is noncontroversial and needs no revision other than to change "TOFC service" to "TOFC transportation." It asserts the only real objection to the rule is that some clarification of its meaning is sought.

Transamerican is in general agreement with the proposed rule, subject to its revision of the definition contained in Rule B-2, heretofore described. It does, however, suggest the following addition to the rule:

> The term 'reasonably adequate and continuous transportation service' as used herein means reasonably adequate and continuous transportation service to the shipping public by a motor carrier regardless of whether the service be rendered by

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the use, in whole or in part, of 'substituted intermodal TOFC service' or by all motor carrier service\

Transamerican argues that where "substituted intermodal TOFC service" as defined by it, is carried on by a motor carrier, there has been no abandonment of motor carrier service between any points. Transamerican asserts that it has been conducting substantial motor carrier operations between all points covered by its certificates of public convenience and necessity. The Substituted Service case is referred to where the Commission at p. 690 indicated that if there is substantial use of substituted service for its over the road service, the motor carrier "runs the risk of having its certificate revoked in whole or in part under section 212", of the act. Transamerican is of the opinion that this expression of the Commission lends no encouragement to coordinated rail and motor service. It believes its suggested addition to the rule would clarify the situation and encourage coordination of rail and motor carrier service by eliminating any apprehension on the part of motor carriers that their certificates would be in jeopardy if extensive use of "substituted intermodal TOFC service" be made. Transamerican argues that the shipping public is protected by tariff provisions giving notice that the motor carriers may at its election, use "substituted intermodal TOFC service" between named points.

The NIT League and the Southern oppose the suggestions of Transamerican. Southern argues that Transamerican's proposal would give the rule a meaning exactly opposite from that intended. Since motor carriers are not required to render reasonably adequate and continuous transportation service by statute, Southern believes that the proposed revision by Transamerican would have the effect of eliminating the statutory requirement.

The Bureau, while neither agreeing with nor taking exception to Transamerican's proposal, believes that the issue of "adequate and continuous transportation" should be clarified by the Commission. It directs attention to the findings in Wagner Freight Lines, Inc., v. Schaar, 67 M.C.C. 369, wherein adequate and continuous transportation was discussed.

The examiner agree with those parties opposing the adoption of this rule. As they point out, the certificates now held by motor and water common carriers provide that such carriers shall render reasonably continuous and adequate service to the public pursuant to the authority granted and that failure to do so shall constitute sufficient grounds for suspension, change, or revocation of the certificate issued. In Smith Bros. Revocation of Certificate, 33 M.C.C. 465, the

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Commission considered, in some detail, its power to terminate certificates based upon the requirement contained therein that the holder must render reasonably continuous and adequate service, and found that this clause, included in the certificates, does not constitute a self-executing forfeiture term or condition. At page 472 the Commission said: "irrespective of the self-executing term or condition in respondents' certificate, the certificate continues in full force and effect unless and until terminated by us in accordance with the provisions in section 212(a)."

In view of the above, we conclude that the proposed rule is unnecessary. It may be that in some circumstances the Commission may direct a change in the service rendered, upon a finding that the carrier is not rendering reasonably adequate and continuous service in compliance with the authority contained in its certificate. It must be remembered that motor carriers generally serve all points along their routes and that the public has a right to expect adequate service from the carrier. While the Commission has no power to compel a motor carrier to continue to operate if it desires to cease all of its operations, the Commission does have the power to order a carrier to serve all points authorized or to cease its operations entirely. See Towns of Bristol and Hill, N. H., v. Boston & M. Transp. Co., 20 M.C.C. 581.

The Bureau has referred to the Schaar case wherein adequate and continuous transportation was discussed. The pertinent portions of the discussion made therein are set forth below. We believe this should provide a motor carrier with enough information to enable it to determine for itself whether it is rendering adequate and continuous service over the highway in serving the points authorized under its certificate. The Commission, division 1, stated, beginning at page 373:

> Under the terms and conditions of his certificate, the defendent is obliged to render reasonably continuous and adequate service to the public pursuant to the authority granted, and a failure to do so is sufficient ground for suspension, change, or revocation of the certificate. Our power to revoke a certificate is circumscribed by express provisions in section 212(a), and is adequately discussed in Pennsylvania Greyhound Lines, Inc., v. American Bus Lines, 52 M.C.C. 117, decided August 30, 1950. In that proceeding, the Commission, division 5, said: 'a revocation of a certificate may be effected only after a notice and hearing and then only for willful failure to comply with an order issued after a notice and hearing under section 204(c).' Notice and hearing which is the very essence of due process means an opportunity to be heard. In Dohany v. Rogers, 281 U.S. 362, 369, it is said that the requirements of due

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process are satisfied so far as procedure is concerned if the person has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.' Section 5 of the Administrative Procedure Act provides, in part:

> (a) Notice.--* * * In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. * * *
>
> (b) Procedure.--The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, * * *

It is apparent that the statutory requirements of notice and hearing are satisfied if the parties are given reasonable notice and afforded a reasonable opportunity to be heard, and that we may require a responsive pleading respecting the desire of a defendant to an oral hearing, and, in the event the defendant fails to comply with this requirement, he may be deemed to be in default and to have waived his right to such oral hearing. [Emphasis supplied.]

RULES B-10 AND C-4

Under these two rules common carriers participating in TOFC service are prohibited from acting as the agent of a shipper or freigh forwarder without providing therefor in tariffs. The two rules are similar, the parties have treated them practically as one, and they will be discussed together.

Rule B-10 provides:

> A rail, motor, or water common carrier participating in joint intermodal TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

In general Rule C-4 is the same as Rule B-10 above except that it applies to a railroad providing all-rail TOFC service. It is not considered necessary to set forth Rule C-4 herein. It is set forth in Appendix I.

Some 14 shippers object to the proposed rules. They contend that the rules are unnecessary and that the wording

[fol. 1500]

thereof is too broad and indefinite. They, as well as numerous others, question the meaning of the word "agent" as used in the rules. In fact, except for a few parties hereafter named, all persons commenting on these rules oppose them. It is asserted that the proposed rules (1) would reduce flexibility and speed in the operations of carriers; (2) could be construed to bar carriers from acting as a mere "conduit of information from the shipper to other carriers"; (3) should be eliminated because they would permit carriers to act as agents for shippers by merely filing tariffs to that effect; (4) would hamper carriers in advising, consulting with, or furnishing information to a shipper or freight forwarder that would enable it to make arrangements for the complete transportation of its freight and thus adversely affect flexibility of TOFC service, if a broad interpretation of the word "agent" were followed by the Commission; (5) are not clear but are vague and indefinite and, if adopted, would require the issuance of supplemental orders for clarification; (6) would serve no useful purpose and are an unwarranted interference into the usual, normal, and accepted practices of all transportation companies; (7) would place an undue burden upon the shipper to arrange for transfers when it uses TOFC service to destinations beyond the scope of the participating carrier's operating authority; (8) are unnecessary as they are now covered by Tariff Circular 20; and (9) are broad enough to stop practices with respect to TOFC traffic which would be permitted to be continued with respect to other traffic.

The railroads point out that it is very difficult to define in a tariff the various services for which a need arises only infrequently; and that at times, motor carriers are directed by shippers to move traffic "best and cheapest way" and, in practice, such carriers may arrange for the movement of goods through the use of another carrier. As an example, the New York Central receives Plan II shipments at New York City which are entitled to delivery within the terminal area and upon occasion, it develops that the instructions actually call for delivery at a point outside the terminal area. In the interest of time, the New York Central will turn the shipment over to a certificated motor carrier for delivery and the charges of that motor carrier are billed to the shipper. It doubts that such service could be covered by a tariff provision.

The L & N has a practice of acquainting shippers with local conditions at destination and of furnishing such information as the names of reliable drayage companies and others in a position to provide satisfactory delivery service at destination. It believes that such assistance is a necessary portion of the service which it should be expected to render without charge, and that in so doing, the L & N

[fol. 1501]

is not an agent of the shipper. The SFA Railroads and the Short Haul Conference generally are in agreement with the position of the L & N.

The Southern would strike the words "joint intermodal" from proposed Rule B-10, and the FF Institute would strike the words "without providing therefor in tariffs filed with the Commission" from both rules. It is of the opinion that to permit carriers engaged in TOFC service to act as the agent of shippers in arranging for transportation by other carriers would permit carriers to accomplish, through an agency arrangement, what they might not accomplish under the proposed rules.

The Western Railroads have no objection to a tariff filing requirement that will cover certain activities of common carriers as agents for shippers or freight forwarders in arranging for transportation by other carriers subject to the act. They contend, however, that until there is a clearer definition of the full scope of the phrase "act as the agent" they are unable to agree to the language proposed in the rules; and that it has long been settled that a rail carrier cannot act as the agent of a shipper in arranging for transportation by other carriers unless said service is provided for in tariffs on file with the Commission. The Western Railroads note that it is a common practice in the solicitation of freight by rail employees to offer a shipper a through rate and a through route by connecting rail lines, under the provisions of tariffs properly on file with the Commission, and they do not believe that this practice should be covered by the proposed rule.

The B & M, C & O, Erie and the Nickel Plate have no objection to the rules. Transamerican is in general agreement with the rules provided they are revised to reflect the definitions of TOFC service suggested by it.

The ATA contends that these rules are non-controversial and need no revision other than to change "TOFC service" to "TOFC transportation." It is of the opinion that the answer to those opposed to the rules, is that any service held out by regulated carriers should be covered by appropriate tariff provisions and that this is one of the paramount principles underlying not only this proceeding, but the regulation of transportation itself. ATA calls attention to a speech in January 1963, by Commissioner Murphy, in which he said:

> Without open publication of tariffs which are adhered to by both carrier and shipper, the effectiveness of our form of regulation would be but a myth.

[fol. 1502]

ATA argues that the term "agent" has a sufficiently clear meaning so that no difficulty will be occasioned in determining when a carrier is acting "as an agent of a shipper or freight forwarder in arranging for transportation by other carriers."

The Bureau submitted evidence establishing that the Erie and the B & O were charged with violation of the Elkins Act for loading freight into trailers for freight forwarders without appropriate tariff authority, that both carriers entered pleas of nolo contendere, and that they were fined $1,000 each. About the same time the PRR was charged with, as pertinent, of departing from the terms of its Plan III tariffs by transporting certain trailers under those tariffs which had been loaded by employees of the PRR. The court proceeding was handled on a stipulation of facts. The court found that the trailers were loaded "by an agent of the shipper and the shipper bore the expense of such loading"; that there was no departure from the provisions of the tariff of the PRR; that the PRR "was not performing a transportation service within the meaning of the Interstate Commerce Act in having its employees load trailers under the facts disclosed"; and that the PRR was not guilty of the violations charged. Following this court decision, somewhat similar charges pending against the CB & Q and the Santa Fe were dismissed at the request of the United States Attorney.

The Bureau argues that a common carrier by railroad, subject to the Act, may not provide or perform a service for a shipper with respect to the interstate transportation of freight without appropriate tariff authority. It believes that a carrier cannot be considered an agent of a shipper in the performance of a service which, when performed by the carrier, must be available to the general public as required by section 6 of the act. The Bureau contends that the above holding of the United States District Court at Chicago that the PRR may continue under a private unpublished contract to act as the agent of a particular shipper in loading said shipper's trailers with freight, demonstrates the need for the Commission to prohibit a carrier from acting as an agent of a shipper on traffic the carrier is transporting. It believes that the agency or private contract theory is contrary to the purpose of the act which requires that all interstate common carrier tariffs be filed with the Commission to insure that all shippers be treated alike. The Bureau is in favor of the purpose and intent of the proposed rules. It suggests, however, that to make it clear that the Commission is opposed to the agency theory with respect to all services which may be performed, supplied, or rendered by a common carrier and not merely opposed to such services with respect to "arranging for transportation by other carriers", that Rule B-10 be revised to read as follows:

[fol. 1503]

> A railroad, motor, or water common carrier participating in joint intermodal TOFC service shall not perform any service for a shipper or freight forwarder, including the service of acting as an agent for such shipper or freight forwarder, unless said service is provided for in the applicable TOFC tariff published, posted and filed with the Interstate Commerce Commission.

It would revise Rule C-4 in a similar manner.

The Western Railroads argue that the Bureau's support for the rules is an attempt on the part of the Bureau to inject the scope of the practices of loading and unloading under Rules B-10 and C-4. Such practices are included under proposed Rule C-2(e) hereafter discussed and need not be repeated here. That proposed rule, with some modification, as hereafter seen, is adopted.

The examiners agree with those opposed to the rules and conclude that both rules should be rejected. The wording of the proposed rules is indefinite and, if adopted, they would undoubtedly result in many requests for clarification as is evident from the evidence adduced by those opposing the rules. We doubt that any revision of the rules would eliminate the questions raised. The attention of the parties is directed to the other rules adopted herein. Such other rules require carriers to publish rates or charges in their tariffs covering all services offered in connection with their TOFC service. It could be that the general intent of proposed Rules B-10 and C-4 is covered by the rules adopted herein.

RULES B-11 AND C-5

Except that Rule B-11 covers "joint intermodal", while Rule C-5 covers "all-rail", TOFC service, the wording of these two rules is the same. Briefly, they require the railroads to assume "full responsibility" for the safe loading and securing and unloading of trailers, used in TOFC service, on and from rail cars. Both rules are set forth in full in Appendix I. For convenience, we shall set forth here only Rule B-11. It provides:

> Railroads participating in joint intermodal TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

The New York Central, PRR, B & O, Coast Line, L & N, Western Railroads, Eastern Railroads, B & M, C & O, and the FF Institute either have no objections to the proposed rules or have no objection[1] to the proposed rules so far as

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[1] We have included in this category those railroads who admit they now assume responsibility for safe loading and unloading.

they may be intended to ensure safety of operations. A number of the railroads now check their TOFC traffic with respect to safety of operation. For example, the New York Central now inspects all rail cars before departure to ensure safe handling of the freight and safe working conditions for its employees; the B & O also inspects shipments as to safety of transportation; and the L & N is of the view that the responsibility of determining whether the highway trailers are properly secured is a "normal function of the rail common carrier" to insure safe carriage in line-haul transportation.

In some instances, however, the actual loading and unloading is performed by so-called agents or contractors of the railroad (local drayage companies of motor common carriers) under contracts which specifically detail the responsibility between the railroad and the other parties. Some of the rail carriers request that the rules be clarified so as not to prevent such loading and unloading. Some request clarification not only of the meaning of "full responsibility" as used in the proposed rules but also to make certain that the rules may not be interpreted to prevent the railroads from publishing rates for ramp-to-ramp service which do not include loading or the handling of the trailers to or from the rail car or at points not on rail property and thus curtail some existing TOFC rates and services.

The Southern believes that the proposed rules are desirable except that the words "joint intermodal" should be stricken from proposed Rule B-11 so as to make it applicable to all TOFC transportation and thus eliminate the necessity for proposed Rule C-5. Upon occasion, the Southern has refused to accept for transportation trailers which did not conform to the Commission's safety regulations. It believes that the right of the railroads to do so should be stated in the rule. Accordingly, it suggests that the rule also provide that:

> Railroads shall have the right to refuse to accept for transportation any highway trucks, trailers, or semitrailers (or the demountable container portions thereof) which do not conform to the safety regulations prescribed by the Commission.

Transamerican also is in general agreement with the proposed rules.

ATA believes that neither of the proposed rules is controversial, and that they are so obviously sound with respect to safety of operation that there should be no valid objection to them. It suggests, however, that the term "TOFC transportation" be substituted for the term "TOFC service." In answer to some opposed to the rules, ATA takes

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the position that there are certain obligations of common carriers which cannot as a matter of public policy be delegated and that the final preparation of transportation equipment for line-haul movement is one of them. It considers the argument that the proposed rule would prevent a railroad from permitting a shipper or connecting carrier to perform the loading and unloading of highway trailers to and from flatcars as "patently specious." ATA contends that the loading and unloading of highway trailers to and from flatcars, whether in joint intermodal service or in all-rail service, is a part of the rail transportation to be provided by the railroads and therefore, one as to which the responsibility for safe operation cannot be delegated; and that the rules do not provide that the railroads may not accomplish the performance of the service through persons other than direct employees. ATA does not believe, however, that the rail carriers may escape their responsibility to ensure that the job is done properly and safely.

The Bureau is of the view that these rules, if adopted, would merely prevent a railroad from delegating its responsibility, for the adequate securing of trailers to flatcars, to inexperienced motor carriers and shippers. It calls attention to the fact that the railroads have delegated this function to shippers as shown in a note to one of the tariff provisions which provides:

> Trailers or Containers shall be loaded on the flatcar and adequately secured thereto by the shipper or his agent at the shipper's expense. The method used shall be approved by the railroad. Trailers or Containers shall be unloaded from the flatcar by the consignee or his agent at consignee's expense.

The Bureau also is of the view that the rules would not present a railroad from requiring that the shipper or motor carrier assume the expense of the transfer of the trailer to or from the flatcar; and that, under the rules, the railroads would be free to set forth a charge for such service in their tariffs published, posted and filed in accordance with the act.

In their verified statement, the Western Railroads had no objection to the principle of a rule fixing the responsibility for safety, and suggested some amendments to both proposed rules. Such amendments will be given consideration, but we do not consider it necessary to describe the amendments in detail as the Western Railroads now oppose the adoption of either rule. Considering the almost total lack of comment with respect to these two rules, they contend that the "problem" which the rules attempt to rectify simply does not exist. In answer to the Bureau, the Western Railroads argue that there is no

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evidence of record where an "inexperienced motor carrier" has loaded, secured, or unloaded a highway trailer in TOFC service; and that the assumption by the Bureau that the railroads now have the responsibility for the adequate securing of trailers to flatcars simply is not supported by the facts. They deny that the railroads have delegated to the shipper the "function" of loading, securing, and unloading trailers. The Western Railroads point out that the loading, securing, and unloading of trailers is accomplished under the direction of the rail carrier, particularly in Plan I. They assert that any suggestion that the railroads are trying to delegate their "responsibility" to motor carriers simply fails to take into consideration that TOFC is a joint or coordinated operation between motor carriers and railroads under Plans I and V, and that the "responsibility" referred to by the Bureau clearly rests with the motor carrier. With respect to the other three TOFC plans, the Western Railroads assert that there is nothing unusual about a shipper, particularly if it happens to be an industry located on a rail siding, to have the responsibility for loading its own cars. Admittedly, under Plan II the railroads assume the responsibility and the same is usually true when ramp-to-ramp service under Plan III is provided. The Western Railroads contend that the proposed rules involve many questions of liability, charges, and application of the bill of lading statute; would have a far reaching effect; raise many problems not apparent at this time; and that neither rule should be adopted.

The SFA Railroads also would delete both rules, primarily on the ground that they are of doubtful legal validity as tending to increase the liabilities of carriers without legislative or judicial sanction. They argue that the words "full responsibility" have a legal significance probably not intended by the drafters; and that the term implies a liability greater than that under common law, citing Mill Factors Corporation v. Ming Toy Dyeing Co., 41 F. Supp. 467, 468, wherein the Court stated:

> If only common law liability was the intention of the parties, then there was no need for saying anything at all, no less expressing the obligation in terms of 'full responsibility'.

The SFA Railroads also call attention to the fact that under Plan I, it generally has been the direct responsibility of the motor carrier to load and unload trailers from rail cars. With respect to proposed Rule C-5, they argue that it is impractical with respect to Plan IV which contemplates that the shipper will own both the rail and trailer equipment and perform the loading and unloading, and that, if such rule is adopted, it would be virtually impossible for the rail carriers to continue Plan IV operations.

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The Erie and Nickel Plate agree with some of the above contentions of the SFA Railroads. Certain shippers also raise objections to the rules similar to those set forth above.

The examiners view both of the proposed rules as relating primarily to safety of operation. Although some parties object to the wording of the proposed rules or to the use of the words "full responsibility" therein, undoubtedly all parties would agree that safety of operations, whether in TOFC or some other type of service, is of the utmost importance. We agree with the parties that the words "full responsibility" as used in the rules raise many problems in connection with TOFC service. However, it is clear that the railroads can and should assume responsibility for the "safe securing" of the trailers on the rail cars. With respect to "loading" and "unloading", we think the use of these two words in the rules may lead to some unnecessary complications. For example, "safe loading" may possibly be interpreted as referring to the stowing and blocking of the merchandise or commodities in the trailer or container. Clearly the railroads should not assume responsibility for "safe loading" if so interpreted as that would be the responsibility of the person[1] loading the merchandise or commodities in the trailer. The examiners conclude that some rule is necessary if the Commission is to make certain that TOFC operations will be conducted in a safe manner. Although the record does not show any accidents resulting from present practices, in TOFC service, the examiners consider safety[2] of operations too important to be left solely to chance or to the discretion of the parties.

The Commission now has rules and regulations governing safety of operations of motor vehicles. As seen, the Southern has suggested that any rule adopted provide that the railroads may refuse to accept for transportation in TOFC service any vehicle not complying with the Commission's safety regulations. We believe this suggestion sound and

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[1]It may be that the rule adopted herein should also provide that the person (motor carrier, forwarder, or shipper) tendering a loaded trailer or container to the railroad should be required to so load and brace its contents that it will travel safely. Based solely on this record, however, we do not believe it necessary.

[2]Also note that proposed Rule D-4 pertains to placarding of trailers or containers containing explosives or other dangerous articles used in TOFC service and that an appropriate rule is adopted by the examiner also in the interest of safety.

it will be adopted. This is not to say that the railroads in effect are required to make a safety check of any vehicle tendered for transportation. It means only that the railroad has the right to refuse to transport those vehicles which they believe do not conform to the motor-carrier safety regulations of the Commission. In this connection it is noted that practically all railroads today conduct certain motor carrier operations either in their own names or through the use of wholly owned subsidiaries and generally would be somewhat familiar with the safety regulations.

The examiners conclude that the following rules, in lieu of proposed Rules B-11 and C-5, should be adopted:

A. Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on the rail-cars when moving over their lines; and, unless otherwise provided for by tariff or agreement between the parties, shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

B. Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portion thereof) which do not conform to the motor-carrier safety regulations prescribed by the Commission.

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RULES GOVERNING ALL-RAIL TOFC SERVICE

RULES C-1 AND C-2(f)

Rule C-1 provides:

> Rates or charges for all-rail TOFC line-haul service, and for any transportation or auxiliary service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent, in either of the following ways:
>
> (a) Publish rates or charges which specifically include pickup from shipper and/or delivery to consignee by the railroad or railroads.
>
> (b) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when all service and equipment is provided by the railroad.

Both the Bureau and the ATA ask for an even more restrictive Rule than now proposed in that the railroads would not only have to provide all equipment, but would be limited to publishing either all-inclusive rates or terminal-to-terminal rates, but not both. The ATA contends that the concept that the railroads should furnish all instrumentalities and services necessary to accomplish the transportation is basic to the Interstate Commerce Act as provided in Sections 1(3) and 1(4), and as discussed in General American Tank Car Corporation v. El Dorado Terminal Company, 308 U.S. 422,428. The ATA believes this Rule together with Rule C-3 are by far the most important proposals under consideration. It contends that this Rule simply reflects the fundamental principle that between any two points a common carrier may not maintain or charge more than one rate for a particular type of transportation and that the rate must include the furnishing by the railroad of all instrumentalities and services necessary to accomplish the transportation from origin to destination. In answer to the railroads contention that this Rule will not only curtail but eliminate Plans III and IV, ATA contends to the contrary that the Rule would permit exactly the same quality of transportation which the shippers and the railroads claim as the great advantage of Plan III.

The Bureau favors this type of Rule, however, it has suggested changes. It would insert the words "with respect to the same commodities from or to the same points" after the word "service" and the first comma in the Rule. It would insert the words "with the Interstate Commerce Commission" after the word "file" and it would insert the

words "when all service and equipment is provided by the railroad" after the word "railroads" at the end of sub-paragraph (a). It would add a new sentence to paragraph (b) which would read as follows:

> Rates or charges for all-rail TOFC line-haul service shall not be published, posted and filed with the Interstate Commerce Commission in tariffs designed to apply only when the shipper or freight forwarder provides its own equipment, however, allowances to be paid to the shipper or freight forwarder for providing their own equipment may be set forth in said tariffs as provided in this section by paragraph (f) of Rule 2.

The railroads, the NIT League, the F.F. Institute, and the shippers generally with the exception of certain meat packing companies in the middlewest are opposed to this Rule. The major criticism is that under such a Rule the railroads would be prevented from continuing to maintain their Plans III and IV rates and would require the railroads to provide their own trailers and flatcars as a part of their tariff obligation. They point out that the motor carriers are presenting the same argument as was rejected in the Eastern Central case, at pages 51-52. The railroads do not oppose nor do they seek to avoid a requirement that the charges in connection with TOFC shipments should be published. This is without regard as to whether or not such services are "transportation" services, "ancillary" services, or services by any other name. However, insofar as these rules appear to be contrary to the decision of the Commission in the Eastern Central case, the PRR contends that the Commission is going beyond its authority in this proceeding. While it is opposed to Rule C-1 it suggests that it be modified to provide as follows:

> Rates or charges for all-rail TOFC line-haul service, and for any service provided by a railroad in connection with all-rail TOFC service shall be provided for in tariffs published, posted and filed by a railroad or its agent.

Other carriers such as the Coast Line and the C & O also subscribe to this modification of the proposed Rule.

The St. Louis Southwestern Railway Company (Cotton Belt) participates only in Plan III rates between St. Louis and East St. Louis, on the one hand, and Dallas, Fort Worth and Houston on the other. The freight forwarders at each end furnish their own trailers and when the southbound trailers are made empty at Dallas by the

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consignee the shipper owned trailers are leased by the consignee to another freight forwarder for the northbound movement from Dallas to East St. Louis. There is no empty return movement. The Cotton Belt is not involved in any way in the leasing of the trailers for the northbound movement. It furnishes the flatcars in the line-haul movement and as a result this service has been successful in satisfying the shippers with a fast and dependable service. Prior to this Plan III movement, boxcar service was available and was used but never to the extent that this Plan III arrangement is now used.

The B&O indicates what would happen if Plan III was eliminated as a result of adopting the proposed Rule C-1. In 1955, Plan III showed gross revenues of $664,000 and in 1961, the gross revenues increased to $2,861,000.

Burlington Industries opposes this Rule and argues that it would so restrict TOFC services as to remove the very incentive that made TOFC transportation acceptable to the shipping public. This company believes that all rates and charges for line-haul service or for any auxiliary service in connection with TOFC service should be published in a tariff and filed with the Commission and posted for public inspection.

Transamerican is generally in agreement with the Rule but suggests additional language at the end of subparagraph (b) as follows:

> provided however, that the rates to shippers for such service are the same as those charged shippers by motor carriers by the same points.

Although Berman Leasing Company takes no affirmative position with respect to this Rule, the Commission's attention is called to the fact that this Rule would operate to reduce the activities of independent leasing companies.

The Stanley Works, Inc. (Stanley) objects to this Rule as being unduly restrictive. It suggests that a "period" be placed after the word "terminals" in subparagraph (b) and the balance of the paragraph stricken. As an alternative to that amendment, a new Rule should be added reading substantially as follows:

> (c) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when trailers, semitrailers or flatcars are owned, leased, or otherwise are under the control and dominion of the shipper or freight forwarder.

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Since many respondents discuss proposed Rule C-2(f) along with Rule C-1, we will follow that pattern.

RULE C-2(f)

> If the shipper, freight forwarder, and/or consignee directly or indirectly renders any service connected with such transportation (such as ramping, deramping, and tie-down of trailers on cars), or furnishes any equipment or other instrumentality used therein (such as a trailer, semi-trailer or car), the charge or allowance paid to the shipper, freight forwarder, and/or consignee, therefore, shall be published as provided for in paragraph (a) of this Rule.

This Rule along with Rule C-1 is objected to by the railroads. The Northern Pacific Railway Company (Northern Pacific) argues that these Rules would compel railroads to hold themselves out to supply all equipment in TOFC service with provisions for allowances, if, as stated in Rule C-2(f), the shipper or freight forwarder furnished any equipment. If Rule C-1 were adopted it believes that terminal-to-terminal rates would obviously bar a crystalized relationship to rates for TOFC service which includes performance of pickup and delivery operations within the terminal areas. The railroads cannot afford to be proscribed in the establishment of competitive rates in the developing areas of TOFC. The Northern Pacific contends that the payment of allowances under Rule C-2(f) would be practically impossible. Trailers and containers vary greatly in size, capacity, design and cost a standard allowance fixed at some mean value would not necessarily compensate a shipper successfully to induce him to move his trailer by rail over the line-haul portion of the journey. Such a rule would result according to the Northern Pacific in a maze of specific allowances, which, by its very existence, would generate demands for relationships by allowances.

The Frisco contends that to require rates or charges limited to apply only when all service and equipment is provided by the railroad is obviously contrary to the very heart of Plan III, and that under Rule C-2(f) allowances would be paid where any equipment or services are provided. It believes Plan III is desirable because it attracts profitable traffic, eliminates rail terminal service, and permits rail service in conjunction with shipper handling at origin and destination resulting in a cost saving for the railroad when compared to Plan II. If proposed Rules C-1 and C-2(f) were adopted, the Frisco argues that difficulties would be encountered in (1) the type of equipment the shipper

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would furnish, (2) the terminal areas involved and conditions within the terminal areas, (3) the destination of shipments from or to the railroad ramp insofar as the individual shipper is concerned, (4) the length of the rail haul and the time in transit, and (5) an allowance published by the railroads might be rendered ineffective and non-compensatory to the shipper by elements of cost of equipment, labor agreements and the like which are totally beyond the control of the railroads.

The Western Railroads propose that Rule C-1 be restated as follows:

> Tariffs embracing all-rail TOFC rates or charges shall set forth the service covered by the published rates or charges, the routes over which such service will be performed, and the names of the carriers participating therein.

They argue that Rule C-2(f) be deleted entirely. These rail carriers further request the Commission to follow the theory announced at the prehearing conference to the effect that this proceeding is not to be considered in any way a forum for the rehearing of any formal cases nor is it a proceeding for the purpose of trying a rate case. Under this theory it is urged that the Eastern Central case should stand as written and consequently Rules C-1 and C-2(f) must be stricken.

The Santa Fe extols the virtues of Plan IV as contrasted with Plan II. It argues that under Plan IV the rail carriers benefit from the utilization of more heavily loaded equipment, released of badly needed boxcars for other purposes, an economical and efficient handling of TOFC traffic, and are relieved to a large extent of the necessity for making capital investment in their car supply. It is said that Plan IV constitutes a separate and distinct transportation service tailored to meet the shippers needs and differs from Plan II service by more than the supplying of certain equipment and service between shippers. Under Plan IV the shippers incur only the expense attendant upon the empty or light load movements represented by their own personal experience. Under Plan II on the other hand, the rate necessarily reflects the average expenses of this character incurred by the railroads for all shippers. Manifestly, it is contended that the benefits thus extended under Plan IV cannot be afforded shippers through the medium of allowances contemplated under Rule C-2(f).

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Plan IV was designed and is accomplishing for the Santa Fe and other rail carriers a way of moving a volume of less-than-carload shipments. The Plan induces the shippers to assemble these larger less-than-carload shipments into a single shipment and move them at a carload rate. Freight forwarders, shipper associations and individual shippers have applauded Plan IV service. Since the inception of this service on the Santa Fe in August 1958 through September of 1962, the railroad has handled 30,308 carloads of traffic.

It is the contention of the ATA in this proceeding that any all-rail TOFC service held out to the public must stem from, and the rates and charges therefore must be related to, the most complete all-rail TOFC service maintained between the points involved. Unless that be done by requiring the railroads to publish in plain and unambigous terms the rules and regulations and charges relating to the most complete service, with appropriate tariff provisions for allowances therefor when the railroad permits and the shipper elects to provide certain designated portions of the equipment or services for his own account, there can never be any certainty of tariff publication, as is required by Section 6 of the act. Otherwise it is contended that the railroads will be free to continue to manipulate tariff provisions and physical services until there is a complete breakdown of regulations.

The ATA points out that the maintenance of the two sets of rates makes possible the intervention of a third party between the shipper and the carrier. This third party is a shipper association or a freight forwarder which, purchasing the line-haul transportation at "wholesale", is willing to pass along to the actual shipper some slight saving under what he would otherwise pay at "retail" if he dealt directly with the railroad itself by utilizing its complete service. In so doing, the shipper association or the freight forwarder, as the case may be, comes into direct competition with the complete service of the railroad, limited, however, to the high grade traffic only. The ATA decries this development for the reason that it is contrary to the very goal of regulation, namely, that adequate, efficient, and economical transportation be readily available to the public at large at charges which are just, reasonable, and non-discriminatory.

The ATA contends that Rule C-1 would accomplish two things. First, it would require that the rates or charges for any all-rail TOFC transportation and for any services limited thereto shall be provided for in tariffs published, posted and filed. This requirement would be in accord with Section 6(1) of the act and would in no way prohibit or restrict TOFC transportation but would only require that it be arranged for and conducted openly and without discrimination. Secondly, the rule would prohibit the maintenance of more than one all-rail TOFC service between the same two points. The railroads would be given the right to elect whether or

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not that service would include provisions for pickup and delivery services or, instead, be limited to service between railroad terminals. In either event, the ATA construes the proposed rule to require the railroads to provide all equipment and all services necessary or incidental to accomplish the type of TOFC transportation a particular railroad elects to offer. It would revise the rule to conform to the format of the entire proposal treating the word "transportation" as it is treated in the statute to include all services and all instrumentalities.

In Rule C-2(f) the ATA sees this Rule as implementing the provisions of Section 15(13) to the extent that it would permit the railroads to make allowances from the rates and charges published in tariff form to cover the all-rail TOFC transportation held out between railroads in accordance with the provisions of the first Rule discussed above. It favors these Rules as being necessary to effective regulation and to the prevention of the use of discriminations, preferences and prejudices between railroads as weapons in the continuing competition between and among themselves as well as with motor carriers and other modes of transportation.

The Southern finds Rule C-1 objectionable because it would prevent the continued use by shippers of certain TOFC service which they now enjoy. For example, the Rule would preclude the further use of modified Plan II where the railroad furnishes the equipment and performs the line-haul service with the shipper performing pickup and/or delivery service. Because of distribution problems and the restrictions as to the permissible number of stops for partial unloading at destination, some shippers who have found Plans II and III unsuitable for their operations are using modified Plan II service. The Southern also points out that it has in effect numerous Plan III proportional rates to and from Alexandria, Va., which are applicable only on shipments having a prior or subsequent movement beyond Alexandria. The Southern argues that this flexibility must be continued in order that the railroads can offer the shippers the type of service that best fits their program. It is contended that in this way the railroads have managed to return to regulated carriage a large amount of traffic formerly moving by private carriage. The Southern suggests that Rule C-2(f) be amended to read as follows:

> Rates or charges for all-rail TOFC line-haul service, and for any additional transportation service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent.

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The examiners view Rule C-1 as limiting the railroads to two TOFC arrangements. The first one (C-1(a)) would require pickup and/or delivery to be performed by the railroad and included in the rate. This arrangement compares with the present Plan II. The second or alternate method proposed (C-1(b)) would be to publish a terminal-to-terminal rate with all service and equipment provided by the railroad. As already noted, proposed Rule C-2(f) would require the railroad to pay allowances for any service or equipment furnished by a shipper or freight forwarder because if Rule C-1 was to be adopted the railroad would be furnishing all services and equipment. Leasing of trailers or rail cars by the railroads to shippers would be prohibited under Rule C-3.

The ATA insists that the furnishing of all instrumentalities and services by the railroad necessary to accomplish the transportation is basic under the proper interpretation of sections 1(3) and 1(4) of the act. The General American Tank Car Case, is cited in support of that position. Section 1(3) broadly defines "transportation" as including "all instrumentalities and facilities of shipment or carriage ***" and "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." Section 1(4) makes it the duty of every common carrier subject to Part I "to provide and furnish transportation upon reasonable request therefor ***."

It has long been recognized that the right of shippers to supply cars is one that only Congress can abolish. In United States v. Pennsylvania Railroad Company 242 U.S. 208, the court held that the Commission had no power to require railroads to provide cars of a special type. In the course of its opinion, the court quoted from a report of the Commission to Congress to the effect that, even assuming that a law prohibiting shippers from supplying cars would be constitutional, it would seriously interfere with property rights which have grown up under the present system, and that in many instances cars can be provided by the shipper himself with more advantage to both shipper and railroad, and without injury to the public. The lengthy history of private car ownership is set forth In The Matter of Private Cars, 50 I.C.C. 655, 656-660. There, the Commission pointed out that Congress has recognized the use of privately owned cars in transporting the commerce of the country, and noted that a wide variety of shippers could not have reached their large volume of business except for their possession of private cars.

Instances of shipper provision of facilities and all services in the movement of goods is legion among the reports of both the Commission and the courts. For example, in Atchison, T. & S. F. Ry. Co. v. United States, 232 U.S. 199, the court held that although refrigeration is a part of the transportation service which a carrier is required to furnish on demand, the carrier has no absolute right to furnish such

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service at a charge and the shipper may do so. It is well recognized that the unloading of carload freight is the obligation of the shipper and not of the railroad. United States v. Interstate Commerce Commission, 352 U.S. 158, 162; Atchison, T. & S. F. Ry. Co. v. United States, supra, at 216.

We conclude that Section 1(3) is merely definitional, and is but a preliminary to the requirement of Section 1(4) that the railroads shall furnish service upon reasonable request. These provisions of the statute impose no absolute obligation upon carriers to furnish all facilities and services in all instances, and there is no prohibition contained in the wording of the statutory language against the right and privilege of shippers to furnish facilities and services.

The Bureau recognizes that if Rule C-1 is adopted there would be no need for a shipper to lease trailers or flatcars from anyone. In fact such a rule would cancel Plans III and IV leaving Plan II as the only service to be offered to the shipping public. The idea of confining TOFC service to shipments which could move under Plan II rates with allowances for any trailers or flatcars supplied by the shipper was advanced by the motor carrier industry in the Eastern Central case and was rejected. It is again contended that Section 15(13) is designed to prohibit exactly what the railroads have done, namely, maintain one set of rates for a complete service, and another and utterly unrelated set for an incomplete service, the latter being converted at the railroad's election into a complete service by the provision of all of the necessary additional services by the railroads at other than tariff rates. Reference is made to that portion of Section 15(13) which provides that if the owner of property transported renders any service or furnishes any instrumentality, the charge and allowance therefor should be published in tariffs and shall be no more than is just and reasonable. One of the principles which the Commission adopted in the Eastern Central case was that publication by a carrier of rates for a complete service does not prevent it from offering to perform a lesser service at a lower rate.

The New York Central points out that from a practical standpoint the Rule is objectionable in that a flat allowance for any given service introduces an element of discrimination, however lawful, between shippers. It has been found much more practical to simply permit the shipper to perform the service at his own cost. While this proposed Rule insofar as it follows Section 15(13) of the Act is not objectionable, it cannot apply where the carrier by its tariffs does not undertake to perform a complete service in the first instance. In order to preserve this distinction the New York Central proposes the following Rule in lieu of proposed Rule C-2(f):

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> No allowance shall be payable to any shipper, freight forwarder and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with this Commission.

The Excelsior Truck Leasing Company, contends that this Rule would in effect reverse the Commission's decision in the Eastern Central case. It points out that one possible problem could arise if both allowances and differing rate levels were permitted. There is the possibility that shippers might become confused as to actual charges for a given service. To overcome this difficulty the PRR suggests the following new Rule C-2(f):

> "Separate, non-alternating rates may be published to cover each all-rail TOFC service. When such rates are published no allowance shall be provided in connection with any such rate."

Under this Rule the railroad would have an option to decide if it wishes to publish different levels of charges for varying amounts of service. Having made that decision, however, and in order to avoid confusion or ambiguity in the tariffs, the Rule would prohibit the payment of allowances.

The B&O opposes the theory of allowance payments to shippers and suggests that it would cause the railroads to be tendered old equipment and that shippers with new equipment would be reluctant to provide it in the event the allowance fails to cover the cost of such equipment.

The Coast Line agrees with the modification suggested by the New York Central. The L&N would amend the Rule to read as follows:

> If the shipper, freight forwarder, and/or consignee directly or indirectly performs the ramping, deramping, and tie-down of trailers on cars, the charge or allowance paid to the shipper, freight forwarder, and/or consignee therefor shall be published in tariffs filed with the Commission.

The Bureau contends this Rule is permissive and not mandatory. To avoid any misunderstanding the Bureau believes the Rule should be restated in almost the same language as recommended by the New York Central.

[fol. 1519]

The FF Institute are is opposed to this Rule and they would agree to the modifications suggested by the PRR.

This matter of the rail carriers paying allowances has been considered and rejected by the Commission in the Eastern Central case. A shipper using Plan II TOFC service, where the carrier obligates itself to furnish everything, should not be entitled to an allowance. If, however, in such a case, the carrier wishes to publish an amount in its tariff that it will pay the shipper in order to relieve itself of its otherwise lawful obligation, it should be permitted to do so. On the other hand, allowances by the railroads to shippers or freight forwarders for the use of their trailers in Plan III and for the use of the shippers owned or leased flatcars in Plan IV service would be illegal. The lower rate is the consideration for the shipper's supplying the instrumentalities in Plans III and IV.

We recognize that situations can exist where the railroad might desire to publish an allowance for the performance of a service or the furnishing of equipment in the course of TOFC shipments. In the interests of preventing what might otherwise become a discriminatory practice we find that proposed Rule C-2(f) if modified as we recommend will be just and reasonable.

We find that proposed Rule C-1 is unreasonable, not in the public interest and should be rejected. We further find that proposed Rule C-2(f) should be modified to read as follows:

> No allowance shall be payable to any shipper, freight forwarder and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

[fol. 1520]

RULES C-2(a), (b), and (c)

Rule C-2(a) provides

> Each carrier performing or holding out to perform all-rail TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and rules governing storage, demurrage, detention of highway vehicles, cartage, switching, floating, lighterage, wharfage, weighing, diversion, reconsignment, icing, refrigeration, heat, C.O.D. services, transit services, absorptions, allowances, and other special or accessorial services or practices, and an explicit statement of all other charges and rules which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of the service to the shipper.

The New York Central believes that unless this Rule is restricted to the services performed by the railroad, it would require the cancellation of Plans III and IV. To make the distinction as to the common carrier service clear, it suggests that the following paragraph be added:

> This rule applies only when the railroad as in actual possession of the property in its capacity as a common carrier and only within the limits of the service offered under the applicable tariff. For example, the provisions of this Rule apply only with respect to ramp-to-ramp service when the shipment moves under such a rate.

One of the most objectionable features of Rule C-2(a) to many parties is that it fails to include the leasing of trailer equipment by railroads to shippers. The rail carriers are quite frank to admit that trip leasing is a very important feature in the use of Plan III and to prohibit the leasing of trailers to the shipping public would be very detrimental.

The PRR concurs in the necessity for the publication of leasing charges to be included in this Rule but it urges that the word "allowances" should be stricken. The Seaboard considers the rule unnecessary and the Coast Line suggests that in lieu of Rules C-2(a), (b), and (c) the following rule be adopted:

> Each railroad performing, or holding itself out to perform, TOFC service shall publish, post and file tariffs (by itself or through an agent)

[fol. 1521]

which shall contain in clear and explicit terms all of the rates and charges for their Rules governing the leasing of equipment to shippers, freight forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges.

The L&N highly favors the leasing of trailers to shippers and it does not object to having the charges and Rules for leasing published in tariffs. It suggests that this Rule be changed to read in accordance with the suggestion made by the Coast Line.

The Cotton Belt considers the rule unnecessary since it appears to be patterned substantially upon the requirements of Rule 10(a) of Tariff Circular No. 20 - Freight.

The F.F. Institute recommends the deletion of the words "absorption" and "allowances" and suggests that the words "including leasing of equipment" be inserted between the words "practices" and the word "and" in the 10th line of the Rule.

The ATA endorses the Rule and suggests that the phrase "TOFC transportation" be substituted for the term "TOFC service" wherever the latter occurs.

Shippers generally oppose the Rule on the grounds that it would nullify Plan III TOFC service and place all charges, rates, and rules in an administrative straight jacket.

Eastman Kodak suggests that the words "when any of which are performed or provided for the carriers" be inserted after the words "and other special or accessorial services or practices." This shipper would strike the balance of the Rule. Eastman is concerned with this Rule primarily as it has application to the publication of the charges of tractor service in connection with Plans III and IV. It contends that publication of charges for tractor service within the commercial zones should not be required of the railroad. There are a number of methods whereby a shipper can provide itself with such service, such as a cartage company or a truck rental company. It is argued that the railroads should not be burdened with restrictions not borne by their competitors.

The Western Railroads argue that there is absolutely no evidence in this record, by any party, supporting this Rule and that it should be found unnecessary and unjustified.

The PRR, along with many other railroads, and a large segment of the shipping public, agree that charges for services rendered should be published. The pattern of

prices and services that have grown up in connection with Plans III and IV have been a valuable tool in preventing both the start and the growth of private carrier operations.

Our attention is directed to a recent study by Frank A. Smith, the Director of Research of the Transportation Association of America, which show that the year 1962, based on preliminary estimates, marked the first year since 1955 that the collective total traffic of rail, highway and water carriers gained on their unregulated competitors in the intercity freight field.

RULE C-2(b)

"All tariffs containing rates for the all-rail TOFC transportation of property shall specify whether such rates do or do not include pickup and delivery service.

RULE C-2(c)

"When charges for pickup or delivery service are in addition to line-haul TOFC transportation charges, they shall be published in tariffs as provided in paragraph (a) of this rule."

The New York Central believes these two Rules are unnecessary. This railroad now publishes in its flexi-van tariff all terms thereof which include or exclude pickup or delivery service. On occasions a shipper will request the N.Y.C. Transport Company to perform cartage service. That company in performing local cartage simply acts as the agent of the shipper at a system wide rate of $7.75 an hour for the use of the driver and tractor. Generally, the reaction to these two Rules are that they are unnecessary because rail tariffs have complied with these requirements for years. It is argued that no one has complained that the rail tariffs are deficient in these respects. The SFA Railroads would delete these two Rules and include such provisions in their newly suggested Rule for Rule C-2(a). The PRR objects to Rule C-2(c) because many rail carriers have subsidiaries which engage in the general cartage business. When such carriers perform pickup and delivery service for a shipper they should be under no greater compulsion to publish charges than any other motor carrier nor should they be treated any differently. Accordingly, it submits that the Rule be modified as follows:

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> When charges for pickup or delivery service are in addition to the line-haul TOFC transportation charges, and when such service is not performed under any exemption or exception to the Interstate Commerce Act, the charges shall be published in tariffs, as provided in paragraph (a) of this rule.

The record is convincing that the rates and charges of all TOFC service must be published in appropriate tariffs and filed with the Commission. However, we reject the idea that the rates and charges for any all-rail TOFC service be related to the most complete all-rail TOFC service and requiring allowances be made to shippers for performing any service. These arguments were considered at length and denied by the Commission in the Eastern Central case at page 46, wherein it said: "with respect to "allowances", obviously none can be made to a shipper for performing a service the avoidance of which is the consideration for the lower rate."

The rail respondents do not object to publishing their TOFC rates and charges. We find that the following Rule[19] in lieu of proposed Rules C-2(a), (b), and (c) is just and reasonable and should be adopted:

> "Each railroad performing, or holding itself out to perform, TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to or from shippers, freight forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges."

Rule C-2(d)

> The area within which pickup or delivery service shall be performed shall be described specifically and the description published in clear and explicit terms at tariffs as provided in paragraph (a) of this rule. It will be sufficient to state that pickup and delivery service will be performed at all places or locations within the limits of the incorporated cities, towns, or villages, from, to, or between which

[19] A full discussion of the leasing of equipment will be found under Rule C-3.

[fol. 1524]

the rates apply, if that is the only application intended. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

The New York Central would abolish the Rule because its flexi-van tariffs describes the terminal areas in which it will perform pickup and delivery service under Plan II. There is no pickup and delivery service under Plan III but the NYC Transport Company's local service for the shipper is restricted to the commercial zone as defined by the Commission.

The Coast Line and the L&N would restate the Rule by deleting the language following the first sentence of the proposed Rule.

The NIT League objects to the Rule and believes it proper to refer to Commission decisions for area description for pickup and delivery service.

Best Way of Indiana suggests that the Rule limit the terminal areas of the railroads to the equivalent zone as found in Commercial Zones and Terminal Areas 54 M.C.C. 21. Otherwise the motor common carrier is placed in an unfavorable competitive position. Reference is made to the fact that terminal areas have been prescribed for motor carriers but that railroads through tariff publications have and can extend the terminal areas of municipalities served by them beyond that permitted by motor carriers. See The New York Central Transport Co. - Modification, 89 M.C.C. 389,398.

The Bureau, in its presentation, has effectively shown the past practices of the Gainesville Midland Railroad Company in providing free pickup of Plan II trailers outside a five mile radius of Gainesville, Ga. contrary to its applicable tariff. In view of the partial exemption permitted under section 202(c) of the act, it becomes imperative that a specific description of the pickup and delivery area be published in tariff form. This consistency is required if the tariff is to provide full disclosure of the services being offered the shipping public.

It is further suggested by the Bureau that the Commission make a determination as to what constitutes a reasonable area in which the railroad may perform collection and delivery service and what motor transportation is embraced within the partial exemption provided in Section 202(c). The record does not contain sufficient facts upon which such a determination could be based even if it were included within the scope of this proceeding.

[fol. 1525]

The matters being considered here are too broad in nature and therefore will lack the ability to reach specific situations such as this question which the Bureau suggests.

This Rule would require the rail carrier to define the area within which pickup or delivery service in connection with TOFC will be provided. The latter portion of the proposed Rule forecloses the description of that area by a mere reference to a Commission decision. In each instance this pickup and delivery area must be specifically defined and made fully descriptive within the confines of the tariff itself. Many carriers have followed this practice for years and they do not object generally to this requirement. As noted above many of the rail carriers would restate the Rule and delete the language concerning the sufficiency of a statement that pickup and delivery service will be performed at all places or locations within the limits of the incorporated cities, towns, or villages, from, to, or between which the rates apply, if that is the only application intended. We agree with the railroads that the aforementioned language should be deleted, as we conclude that it is not necessary in view of the first sentence in the rule as adopted. We find that the following rule should be adopted:

> The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

RULE C-2(e)

> All tariffs containing rates for the all-rail TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of the property from the highway vehicle by the carrier (including the number of laborers to be used). When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in tariffs as provided in paragraph (a) of this rule.

The consensus of opinion to this Rule so far as the railroads are concerned is that it is acceptable except for the parenthetical expression in line five which should

be deleted. They contend that the number of laborers to be furnished for loading or unloading equipment is a matter for managerial discretion in each case. The Western Railroads state that they are complying with the proposed Rule with the exception of the number of laborers to be used. For example, the Santa Fe and the Burlington publish a charge of $9.49 per ton for the loading or unloading of freight of all kinds moving in TOFC service at their freight houses in Chicago. It is argued that a requirement to state the number of laborers is far too restrictive because the carriers could not indicate the number to be used from day to day and from load to load due to the variance that exists. If the carrier is short of equipment at the terminal, for example, it would use additional men so that the trailer can be reloaded more rapidly. It is pointed out that the motor carriers do not have a similar Rule and they have been subject to regulation since 1935.

The Milwaukee Railroad contends that such a Rule would impose hardship on the rail carriers unless additional help can be provided when it is for their convenience. It is pointed out that trailers arriving at odd hours make a difference with respect to the number of laborers needed. TOFC service, while designed to be competitive with motor carrier service, does not have the flexibility that the motor carriers have in all their loading operations. The rail traffic must on scheduled trains which means that the loading or unloading must be completed very expeditiously. It is therefore important that the carriers not be restricted but should be permitted to make the maximum use of their equipment.

The NIT League objects to the phrase and urges that provision in the tariff be made for other standards such as man hours or hourly charges for additional laborers rather than attempting to have the number of laborers designated as the Rule now provides.

The Bureau agrees that no Rule should be imposed upon the rail carriers which is more restrictive than is presently imposed upon the motor carriers when the Rule applies to competitive service. The Bureau would delete the phrase from the Rule. The ATA agrees that the phrase should be eliminated and that charges be stated in tariffs on a man hour or some other comparable basis so that when a carrier does furnish additional labor it must be compensated therefore.

We are in agreement with the position taken by the Western Railroads that this Rule should be restated and that the parenthetical phrase "including the number of laborers to be used" is unreasonable and should be deleted.

[fol. 1527]

We find that the Rule should be restated to read as follows:

> All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

RULE C-3

> "Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers of freight forwarders.

This Rule would prohibit the railroads from leasing trailers to or from shippers in TOFC service. This proposal is the culmination of the series of Rules which would bring about a more strict and exacting TOFC performance by the railroad industry. As seen the proposed Rules would require that rates and charges be predicated on the furnishing of all equipment and service by the rail carriers; that wherever additional services are offered the charges therefore would be required in published tariffs; and that wherever services are provided by shippers, the allowances therefor would be likewise published in tariff form. The ATA believes that Rule C-3 is essential if stability and sanity are to be restored to the transportation of freight by common carriers, both rail and motor. Parties that support proposed Rule C-3 do not allege that the leasing of trailers is illegal per se. Why, then, do these parties support the proposed rule?

The motor carriers take the position that TOFC service is a good thing and that all-rail TOFC service must stem from, and the rates and charges therefor must be related to, the most complete all-rail TOFC service maintained between the points involved. They make no objection to Plan II. Plan III service, however, which is showing a very definite increase in popularity and a definite increase in tonnage, is a service which concerns the motor carriers in many respects. They object to the charges being stated in terms of aggregate amounts for the transportation of any articles of commerce

up to a maximum of 70,000 pounds with virtually the only limitation being that no more than 60 percent of the weight of any single shipment can consist of a single article. They state that the requirement for the shipper to furnish two trailers has given rise to numerous problems and undesirable practices that now confront the transportation industry.

The evidence is clear that Plan III is not limited to the transportation of shipper-owned trailers. Instead, the majority of the trailers are owned by the railroads or their subsidiaries and are trip-leased to the shippers on a one-way basis. The evidence further shows that a rental charge is made by the railroads for leasing the trailers which charge is not in any tariff publication but is a charge either privately negotiated between the railroads and the individual shippers or it is a charge that the railroads make known to a shipper upon inquiry. ATA contends that when a railroad offers a Plan III service and in conjuntion therewith furnishes two trailers on a trip-lease basis plus pickup and delivery service, both at unpublished negotiated rates, the net result, in terms of transportation, is that the railroad offers the shipper exactly the same service that it would offer under Plan II. The difference being that the total amount of charges collected by the railroad bears no relation whatever to the amount it would charge if Plan II rates were applied. The Commission answered this argument in the Eastern Central case, when it said: "The fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate." It is also argued that Plan III service as it is now offered to the shipping public is a fertile breeding ground for practices which are clearly not in harmony with the purpose of regulated transportation and is a standing invitation for such violations as discrimination, preference, prejudice, and rebating.

Of the shippers that have filed representations and statements in this proceeding almost all of them are opposed to Rule C-3. A number of meat packers located in the middle west are the only shippers that are supporting the adoption of this rule. Ironically, if we understand their argument, they are really insisting upon the rates and charges for all TOFC service to be published in tariffs and, secondly, it is their desire that the railroads serving their plants publish Plan III rates which they can use. It is the combination of these two things that caused these meat packers to believe that they are victims of discrimination, preference and prejudice. Those issues are before the Commission in Docket No. 33133 - All Freight in Trailer-on-Flatcars - Between the East and Chicago & East St. Louis, et al.

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The Bureau sets forth numerous examples of the way various railroads trip-lease trailers to shippers for TOFC movement. The method, to a large extent, has become standardized. It is shown that the railroads have had lease forms printed which provide that the trailer is to be used on the lessor's line in TOFC service, and that the charges set forth in the lease are on a per trip basis. In theory these leases are to be executed at the time the shipper picks up the empty trailer at the rail ramp. However, in practice, instances are shown where the formality in connection with the signing of the lease is non-existent. In some instances it has been shown that a lease was never signed; in some instances the lease is signed after the transportation has commenced or after the completion of the Plan III or Plan IV movement; and in some instances the lease is signed by the local cartage agent for the shipper although the cartage agent has had no direct dealings with the actual shipper. The Bureau suggests that under such a lax method of leasing trailers the railroads can easily discriminate between shippers such as trip leasing trailers to some shippers and not to others. This record fails to show any instance where a shipper was refused a trailer upon request if in fact the trailer was available. The Bureau sees no reason why the Commission should sanction or approve any arrangement such as now being experienced in connection with the leasing of trailers by the railroads. Accordingly, it favors the adoption of Rule C-3 and in its opinion there would be added advantages such as preventing an affiliate of a railroad from engaging in the practice of trip-leasing equipment to rail shippers, of preventing a railroad from leasing trailers from a shipper which is an obvious means of granting a concession, and of allowing railroads, if they so desire, to continue to lease trailers to motor common carriers.

A large number of shipping interests have filed statements in this proceeding. Such public shippers range from the nation's largest corporations to the shipper who only makes an occasional shipment in TOFC service per month. Both the Department of Defense, undoubtedly the largest shipper by volume in the nation and the Department of Agriculture indicate their strong opposition to this rule.

One of the inevitable results if Rule C-3 were adopted, would be the virtual elimination of Plans III and IV. While a shipper who owns his own trailers may use Plan III under the tariffs as now published, it is prefectly understandable that shippers would prefer to lease their trailers or containers based on the economics of their transportation problem. Many shippers do not have sufficient volume to utilize their own trailers all of the time and therefore it is reasonable to expect that

they would desire to lease equipment as it is needed. Indeed this is one of the keys to the success of Plan III.

We have just recited the contentions of those supporting Rule C-3 and their reference generally to the fear of discrimination, preference, and prejudice inherent in the practice of leasing trailers to and from shippers. On this point we agree with the opponents of the Rule and find that these allegations are so fragile, vague, and uncertain that they cannot be considered probative or entitled to weight in support of the proposed Rule C-3. Neither the Interstate Commerce Act nor the Elkins Act require that otherwise lawful rates or arrangements be struck down because of a remote possibility that discriminatory practices may occur in the future. See F. H. Peavey & Co. v. Union Pac. R. Co., 176 Fed 409; modified and affirmed, Interstate Com. Comm. v. Diffenbaugh, 222 U.S. 42. In the Eastern Central case, the Commission declared that potential discrimination is not sufficient to support a finding of unlawfulness and otherwise lawful activities may not be contended on speculation alone. See also Southern Pacific Co. v. Interstate Commerce Commission, 200 U.S. 536, 556.

In the Eastern Central case, the Commission stated at p. 15:

> "Several eastern railroads, including the New York Central, Pennsylvania, Lackawanna, Nickel Plate, Lehigh Valley and Baltimore & Ohio, have leased, either directly or indirectly through subsidiaries, trailers or flexi-vans on a trip-lease basis to shippers, including freight forwarders and shipper associations. *** The railroads have found that the utilization of their trailers in Plan III service through trip-lease arrangements has had the effect of reducing their empty trailer-miles, as it enables the 'interweaving' of Plan II and Plan III trailer utilization."

Thus the Commission in that proceeding was aware of the fact that the railroads were trip-leasing trailers to shippers and it found that such trip-leasing was not unlawful, so long as all shippers at the same location were treated alike. See also the General American Tank Car case, where the Supreme Court clearly recognized the legality of equipment leasing to shippers.

The railroads are fully cognizant of the effect upon TOFC service if trip-leasing of trailers or containers to shippers is prohibited. Besides the fatal blow that would be dealt Plans III and IV, they have set about to show the importance of trip leasing. They argue that it is to their benefit from a trailer utilization standpoint and that by

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trip-leasing they are able to obtain revenue freight for trailers which would have moved empty to a point where Plan II traffic became available for loading. The utilization of trailers is much higher than when boxcars are used to move the freight. A study conducted by this Commission in connection with loaded and empty car miles to determine the empty return ratio for flatcars used in TOFC service indicates that the empty return ratio has been drastically reduced and it is contended that this substantial reduction is indicative of the extent to which trip-leasing of trailers in Plan III has enabled the railroads to more effectively utilize their equipment. Trip-leasing is also important to the railroads in their constant effort to cut down private carriage competition. It is contended that, in most cases, it is less expensive to a private shipper to lease trailers for Plan III service compared with the expense of owning and maintaining a fleet of trailers for the same service. This assists the small shipper as well as the large shippers. The record shows a very strong opposition to the proposed Rule prohibiting trip-leasing of trailers by shippers throughout the country.

Sea-Land supports Rule C-3, however, the purport of Sea-Land's position indicates that its main objection stems from the inroads that TOFC is making on its traffic and the failure of the railroad to publish the charges in order that it may effectively compete. This position is hardly one that we can consider in this proceeding.

We have heretofore shown the large expenditure made by railroads and their subsidiaries on trailers, flatcars and TOFC ramps. While these large investments would not sway our conclusions if in fact we found trip-leasing to be unlawful, our conclusion turns on points other than the question of the Commission's authority or the lact thereof to impose the proposed rule.

Since it is clear to us that the leasing of trailers by railroads is not unlawful, we are convinced, on the basis of the record before us, tha a great injustice would be rendered TOFC service if proposed Rule C-3 was adopted. We believe other methods are available and fully capable of stamping out possible discrimination, preference, prejudice or rebating where leasing arrangements are involved. The railroads, with the exception of the New York Central, are willing to have their leasing arrangements and services in connection therewith published in tariff form and filed with the Commission. The New York Central objects to that method because it presents the opportunity for protest and the possible suspension and periods of investigation which it believes should be avoided. This rail carrier would be willing to make its charges known insofar as any leasing arrangements are concerned but it

suggests that such information should merely be filed with the Commission for public information and not published in a tariff. In this way, it is contended that all of the elements to be accomplished by tariff publication could be effected and the traffic could continue without periods of delay.

The matter of requiring the railroads to publish in their tariffs the rates and charges for various services or practices in TOFC service was found necessary in connection with our discussion of proposed Rule C-2(a). In that Rule we also required the filing of rates and charges for and Rules governing the leasing of equipment. The objection of the New York Central to publishing such rates and charges is not convincing. As stated, the record establishes that the rates and charges for all TOFC services must be published in appropriate tariffs and filed with the Commission.

We find that the proposed Rule C-3 is unjust and unreasonable, that it is not in the public interest, and therefore it should be rejected.

This proceeding has brought several practices to our attention, especially in connection with leasing arrangements, that may require some affirmative action on the part of the Commission.

According to evidence gathered by the Bureau's witnesses there is reason to be concerned about the methods used by railroads in leasing trailers to and from shippers and the lack of formality in the signing of leases. While we agree that the leasing of trailers should not be prohibited, we are equally convinced that some of the leasing practices are ill conceived and fraught with possible discrimination to the extent that the hand of regulation should seek to channel these natural pressures for the maximum public good. We adhere to a method of full disclosure of rates and charges for all services by complete publication in tariffs filed with this Commission and open for all to see. In this way, we anticipate the possibility of any shipper, having the proper tariffs available, of being able to chart the course of his shipment in TOFC service so completely that he can compute his exact transportation charges from the tariff publication. In addition, such a method assures a shipper that his competitor shipping the same commodity, over the same route, using the same service, will be required to pay the same common carrier charges.

Examples of what effect the publishing of all charges in a tariff will mean are as follows:

The Bureau presented evidence showing that the NYC Transport Company has an arrangement with W. M. Tynan, a wholesaler of meat, whereby Tynan-owned refrigerated trailers are returned empty to Chicago at no expense to

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Tynan. Tynan's trailers loaded with fresh meat were transported from Chicago to New York in Plan III service by New York Central during January 1962, and when made empty at New York the trailers were leased to the NYC Transport Company at $1.00 per month and returned to Chicago empty by the New York Central at no expense to Tynan. This is a negotiated arrangement, which is not published in any tariff nor is such a contract offered generally to other shippers who may be in a similar situation as Tynan. Despite the argument of the New York Central that the economics of this arrangement are ignored by insisting that such an arrangement cease, we are of the opinion that in the future by requiring the railroads to publish their rates and charges with respect to all services and practices this particular situation will either cease or all shippers in the same or similar situation as Tynan will be able to lease their trailers to the NYC Transport Company for a fixed amount per month and have such trailers returned to their origins empty and free of charge. Maybe such an arrangement will emerge as a new Plan of TOFC service.

The Bureau has presented additional evidence concerning various leasing practices with respect to the actual signing of the leases on behalf of the carriers, shippers, and other agencies involved in the transportation complex. The Bureau is thoroughly convinced, on the basis of the apparent lack of formality in these leasing arrangements, that a Rule prohibiting leasing by the railroads would immediately remove the changes of discrimination. While we do not agree with this position, nevertheless the evidence presented makes it abundantly clear that unless the railroads require their shippers or their bona fide authorized agents to actually sign the leases for equipment used in TOFC service more drastic regulations can be expected in the future.

Our Rule 14 (as shown in the order herein) requires, among other things, that tariffs governing TOFC service "shall contain in clear and explicit terms" the "rules governing the leasing of equipment". We expect the railroads to set forth their leasing rules and regulations in their tariffs. It is important that the provisions of the tariffs generally should be made as clear and definite as practicable so as to lessen the need or opportunity for the exercise of individual judgment by tariff users, and to avoid disputes arising from the language employed and the phrases used.

We believe that the key to successful TOFC service is the ability of the common carrier to remain flexible, for if in the pursuit of the perfect TOFC service, the best that is possible is wrecked, we will have failed not only the transportation industry but also the public trust.

RULE C-6

"Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges provided for in Rule C-2 above."

The New York Central finds this Rule objectionable mainly because it adds another bookkeeping requirement having no relation to actual operations. Many of the railroads have no objections to the Rule. The Coast Line objects to the phrase "provided for in Rule C-2 above." It would delete those words and insert "published in tariffs on file with the Commission." This change is concurred in by the L&N and the SFA Railroads.

The FF Institute objection to this Rule relates primarily to the words "demurrage" and "storage." It suggests a change in the Rule providing for payment of storage when equipment is left on the railroad property for an unreasonable length of time. Demurrage represents a charge payable to the carriers for the detention of the carriers equipment. It would have the Rule read as follows:

"Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service while being held on railroad premises, at the request of or for the convenience of such shippers or freight forwarders, shall be subject to reasonable charges for track storage and/or yard storage to be published as provided for in Rule C-2 above."

The Western Railroads are opposed to this rule. They point out that under Plans III and IV the supplying of highway vehicles is the responsibility of the shippers. The rail carriers receives its tariff charges for the transportation from ramp-to-ramp. The shipper arranges for the storage of the vehicles at his own expense. The Milwaukee is not aware of any occasion where shippers have stored vehicles at a railroad terminal. However, if that should be the case the storage charges therefor, would be a matter of contract between the parties. It is argued that such storage charges are not transportation and therefore not subject to the jurisdiction of the Commission. Railroads provide parking areas for private automobiles at their passenger stations and no one contends this is subject to tariff charges. Certain parking areas on occasion assess a daily charge and that charge is not provided for by a tariff. They further argue that a similar rule does not exist with respect to the motor carriers at their terminal areas and that the rule should be rejected.

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The ATA asserts that this rule is a corollary to C-2 and would agree with the suggestion made by the SFA Railroads that the holding of shipper-owned equipment on railroad property be subject to rules and charges "published in tariffs on file with the Commission."

With the constant growth that is shown in TOFC service, railroad property surrounding or adjoining ramp locations is becoming crowded and even more congestion can be expected in the future. We are convinced of the necessity for having uniform rules and regulations together with reasonable storage and/or demurrage charges to shippers or freight forwarders on highway vehicles and/or rail cars while on railroad property. We believe the words "provided for in Rule C-2 above" should be changed to read "published in tariffs on file with the Interstate Commerce Commission." With these changes we find that the following rule should be adopted:

> "Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission."

BILLING AND NOTIFICATION RULES

RULE D-1

> "No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a bill of lading therefor and received from the shipper or freight forwarder any manifest used in connection therewith."

The Bureau has referred to instances which allegedly have occurred with various named railroads where the issuance of a bill of lading has been deferred in Plans II and III service until after the rail transportation of the trailers has commenced. Section 20(11) of the Act provides that a railroad upon receiving property for transportation "shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property." In view of this section of the act, the Bureau contends that the practice of delaying issuance of the bill of lading constitutes a discrimination against less favored shippers and is in violation of the Act and the Elkins Act, citing United States v. Koenig Coal Co., 270 U.S. 512, 518. The Bureau takes the position that this proposed rule is designed to end this discriminatory practice and accordingly recommends its adoption.

The railroads find the rule highly objectionable. They do not object to the issuance of a bill of lading when the traffic is tendered, however, they do object to the issuance of a manifest. The principal reason for this objection is

delay. One of the real objectives of TOFC service is its speed and dependability. The carriers have experienced this question before but have solved it in different ways. Suggestions have been made to modify the rule as follows:

> "No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a bill of lading therefor."

The IC objects to the rule and asserts that it is common practice among the larger shippers and all the freight forwarders to move carloads of merchandise of all descriptions as rapidly as possible, to make connections with fast freight trains and to submit revenue bills of lading and manifests shortly thereafter. The IC hopes to continue this type of practice and contends there is no reason why TOFC traffic should wait for clerks to fill out papers before traffic can start its movement in order to take advantage of faster trains.

The L&N recommends that the language of rules D-1 and D-2 be combined to read as follows:

> "Certification as to weight and contents of a highway truck, trailer or semi-trailer (or the demountable container portion thereof) shall be made by the shipper to the originating carrier."

The Western Railroads object to this rule because it is impracticable, results in delay, subjects the railroads to competitive disadvantage, and its purpose can be realized in another way without these detrimental effects. These carriers states that such a requirement was published in their tariffs requiring the submission of the manifest of the shipper to the origin carrier along with the bill of lading. Experience showed that such a requirement was impractical and caused delay in the service. The shippers were simply unable to supply the manifest at the time the shipments were ready to move. Consequently, the tariff was amended to provide a time limit of not more than 72 hours following tender of the bill of lading within which the manifest must be furnished. This 72 hour period is still in effect and is satisfactory to all concerned. If there is unwillingness to adopt the 72 hour period, the Western Railroads suggest that shippers be required to furnish the manifest prior to delivery of traffic at destination as an alternative. This would allow the shippers time to prepare the manifest and would furnish the delivering line the information it needs in order to properly assess the freight charges within the period allowed under existing credit regulations. In any case it is recommended, in connection with this rule, that it should apply with equal vigor to all-motor, all-water and/or joint motor-water service. Otherwise the rule would impose competitive service disadvantages upon the railroads resulting in a diversion of traffic and loss of revenues.

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The Western Pacific Railroad Company (Western Pacific) points out that most western railroads use the same ramps for the loading of trailers moving under all of the designated TOFC plans. Thus if the carrier is confronted with trailers covered by a manifest and some are not it would become necessary to either switch out such cars or allow the entire cut of cars to stand on the track until the manifest was received. Not only would this cause extra expense of the additional switching, but the yards would become confused and a delay in the train schedules would undoubtedly result. A railroad yard during switching operations in the make-up of trains is a very busy place and the carriers are striving for the least amount of confusion or delay.

Bekins suggests that after the word "lading" and before the word "therefore" there be inserted "or receipt." It is contended this change is essential to permit household goods carriers to continue to operate in their present manner which provides only for the issuance of a detailed receipt or check list at the time of pick-up.

The FF Institute agrees with the requirement for the issuance of the bill of lading prior to movement but opposes the requirement for a provision of a manifest and suggests that it be striken. Shippers generally oppose the rule.

The ATA favors the rule and notes that the objections are based on the contention of unnecessary paper work and a delay in the movement of the shipments and that a number of shippers and freight forwarders oppose the requirement that no shipment be transported until the origin carrier has received the manifest which may be used in connection therewith. The ATA points out that the rule provides only that if any manifest is used in connection with a shipment it must be tendered to the carrier prior to transportation. So far as the bill of lading being issued prior to transportation, such a requirement is so fundamental it should be accepted without argument.

The Southern argues that there is no apparent justification for making the requirements as to the issuance of a bill of lading in connection with TOFC shipments any more stringent than in connection with shipments in boxcars and thus the rule should be clarified to permit the continued use of memorandum billing on TOFC shipments.

Section 20(11) of the act is primarily concerned with two things; first, that the originating carrier shall issue a receipt or bill of lading for property it receives for transportation; and secondly, to make the common carrier liable to the lawful holder of such receipt or bill of lading for any loss, damage, or injury to such property caused by the common carrier. The most repeated objections to the proposed rule are the possible delays that would result by requiring the issuance of a receipt or bill of lading prior to the beginning of transportation and the receipt from the shipper of any

manifest used in connection with such equipment. We have no interest in imposing unnecessary delays in TOFC transportation by placing the carriers in a straight-jacket. However, we are not convinced that any unnecessary burden is imposed by requiring the originating carrier to issue receipts or bills of lading to the shipper prior to the time the shipment actually begins moving in the stream of transportation. To hold otherwise is to become blind to the historical background requiring the issuance of receipts or bills of lading when a common carrier receives property for transportation. It seems unnecessary to recite that background here. This is especially true because the rail carriers in this proceeding do not quarrel with the basic requirement of issuing a bill of lading, their argument is based entirely on the theory of delay.

With respect to the requirement that the carrier also receive a manifest, it has been pointed out that the manifest must be received in the event one is prepared for use in connection with the shipment. A manifest is an invoice of the cargo which in some instances is required by the carriers' tariff but is not required by statute. The preparation of a manifest in many instances is very time consuming. It is therefore apparent that delays can occur where time is of the essence to the shipper. We find, therefore, that the rule should be relaxed somewhat as to the requirement of the manifest being received prior to the beginning of transportation since the primary purpose of the manifest is concerned with the amount of actual charges to be assessed the shipper. We conclude that the Rule should be modified to provide that in the event a manifest is used it should be delivered to the originating carrier within 24 hours of the time the shipment reaches the destination ramp. We find that Rule D-1 should be modified to read as follows:

> No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor, and where a manifest is used by the shipper or freight forwarder, such manifest shall be delivered to the originating carrier not later than 24 hours after the shipment reaches the destination ramp.

RULE D-2

> Certification as to the weight and contents of a highway truck, trailer, or semi-trailer (or the demountable container portion thereof) shall be made by the shippers or carriers at the time of its tender to a railroad or connecting carrier.

The New York Central believes the rule should be amended by striking the language to provide that any such certificate should be made by the shipper to the originating carrier.

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The B&M points out that under Plan I service there is merely a substitution of rail for highway movement over a portion of the haul. To require a shipper or motor carrier to certify to the weight and contents in a Plan I movement would have an adverse effect upon that particular service. Normally the railroad is not advised of the contents in the trailer. As to Plan III shipments, the B&M points out for example, that many Plan III tariffs include a mixture rule requiring a certificate by the shipper indicating that a manifest be prepared showing the total weight of each article loaded.

The PRR urges that the rule be modified to require a shippers certificate to be filed only with the originating carrier and the words "connecting carrier" should be deleted. The originating carrier bills the shipments and is actually the one concerned with such a matter. It suggests that a desirable modification should be made for a shipper to certify the weight of the shipment does not exceed _____ pounds in which case it would not be necessary to certify the exact weight. It believes this would be especially important where maximum weights are published.

The SFA Railroads would amend the rule to read as follows:

> Certification as to the weight and contents of a highway truck, trailer, or semi-trailer (or the demountable container portion thereof) shall be made by the shipper to the originating carrier.

The Western Pacific is opposed to the rule due to delays that might occur in preparing the certification and argues that if this rule should be adopted the identical requirement should be made in connection with all-motor, all-water and/or joint motor-water service. In opposing the rule, this railroad further argues that there are provisions in the Act that prohibit mis-description and overbilling of freight, and that the present standars shipping documents are sufficient. It is contended that it is unnecessary for shippers to certify the weights of commodities moving under estimated weights of weight agreements, because Rule 11 of the Uniform Freight Classification No. 6 provides that estimated weights, when authorized, must be used to the exclusion of all other weights. The carrier believes there is no need for a railroad to require a connecting motor carrier participating in Plan V to make a certification when the motor carrier is a subsidiary of the railroad. Nor is there any need to certify the contents of TOFC shipments moving on rates of "freight all-kinds" since those rates apply regardless of the commodities and irrespective of the weights of the individual commodities in each trailer.

The FF Institute believes, that the intended purpose of the rule would be accomplished if certification was required to the effect that the weight and contents comply with the

applicable tariff requirements. Under this theory a certification requirement would be left to the discretion of the railroad in publishing its tariff.

Midwest Haulers, Inc. would modify the rule so as to make it the duty of the railroad to weigh all trailers tendered to them for transportation by a motor common carrier. This carrier takes the position that there is no merit to the requirement that the motor carrier certify to the railroad the weight of the trailer because Plan I rates and charges are predicated on gross weight. It asserts that it is the practice of all of the railroads with whom Midwest now concurs for TOFC shipments to weigh the trailer at the time of tender with but one exception.

Transamerican would add the following language to the rule: "This rule shall not be construed as applying to substituted intermodal TOFC service."

The Western Weighing & Inspection Bureau was established by the western railroads in 1887 and its membership comprises all of the Class I Railroads in the western district. Its function is weighing, supervision, and freight inspection, among other things. It has 936 officers and employees. More than 6,700 weight agreements between shippers and the western railroads are now in effect. The western trunkline tariff provides that the shipper shall report and certify to the carrier on the shipping documents correct gross weights and correct descriptions of commodities. Upon such certification the property should not be weighed by the carrier. Periodic checks of the shippers records are made to make sure that the shippers weights and commodity descriptions are correct. Any undercharges found to be due resulting from incorrect weights must be paid promptly by the shipper and unsatisfactory weight agreements may be canceled upon 10 days notice. Large portions of the shipments moving in TOFC service are covered by weight agreements and should be taken into consideration by the Commission's Bureau when it states that certain western railroads do not always weigh trailers tendered to them and do not have scales at all receiving ramps. It is possible that the unweighed trailers referred to in the exhibits of the Bureau are covered by weight agreements. The proposed rule if adopted would cause duplication of work and it is argued that if it is adopted, freight covered by weight agreements should be specifically excepted from its application.

The Bureau suggests that the rail carriers be required to install scales at their ramps to test-weigh all TOFC shipments. Many railroads are in the process of installing scales, however, it is argued that it is not necessary to adopt a rule in order that this be done. It is also pointed out that the installation of scales as proposed by the Bureau would impose a tremendous financial burden upon all carriers. The ATA recognizes the intention of the rule is to guard against discriminatory practices. If that purpose is to be served, it

[fol. 1541].

argues, it is essential that certification by the shipper or connecting carrier is made at the time the shipment is tendered or otherwise the rule would have no force or effect.

The railroads are all opposed to this rule. The New York Central contends the Commission has ample authority to prosecute for false billing and the carriers are not ready or willing to make the necessary expenditures for the installation of scales at all ramps. It is believed that the certification as to weight and contents of a trailer should be made by the shipper to the originating carrier and that further rules in this direction are unnecessary.

Common carrier tariffs, with few exceptions, publish charges in cents per 100 pounds thus the weight of a shipment becomes important in billing. There are other times when knowledge of the weight is important, for example, the matter of determining the number of diesel units for sufficient power. The weight of a shipment is essential to the carriers and they should not be permitted to shrug-off the responsibility of obtaining such important data. This is merely a sound regulatory principle with which the carriers should comply.

We have considered with great satisfaction the work of the Western Weighing & Inspection Bureau with its western railroads and the apparent success with weight agreements. We are not convinced, however, that a Rule requiring a certification of weights of trailers by shippers to the originating railroad needs to be a duplication of effort. In effect, such a Rule fits into the very purpose of the Weighing and Inspection Bureau's function.

It is not uncommon for the railroads in their TOFC tariffs to prohibit the transportation of certain commodities. Moreover, as will be shown in our discussion under proposed Rule D-4, the movement of explosives or other dangerous articles requires specific notification to the carrier. We are convinced that the shipper should certify, however, that the shipment contains no commodity which the individual carrier's tariff prohibits and that the shipper should also certify whether or not the shipment contains explosives or other dangerous articles. There appears to be no need for the shipper to certify as to other commodities.

We find that the following Rules, in lieu of proposed Rule D-2, should be adopted:

> A. Certification as to the weight of a highway truck, trailer, semitrailer (or demountable container portion thereof) shall be made by the shipper at the time of its tender to the originating carrier.

B. Shippers shall certify at the time of tendering a shipment to the originating carrier, whether or not the contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) consists of (1) any commodity which is prohibited from movement in TOFC service by the carrier's tariff, and (2) explosives or other dangerous articles.

RULE D-3

Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

A number of the parties object to the provision in the rule that, "Unless otherwise provided for and made available to other *** carriers", on the ground that such a provision would not be lawful under the act for the reasons given in connection with their objections to proposed Rule B-5. We agree with the objections raised as to that Rule. For the reasons stated in our discussion of proposed Rule B-5 and in view of the fact that no one has presented any facts to suppo this provision or to establish that the Commission may adopt the above provision of this Rule under the act, we conclude that it should be rejected. Accordingly, no further consideration need be given the views of the parties as to the need, if any, for the adoption of the provision in question i connection with this rule.

The New York Central, PRR, C & O, B & M, IC, L & N, Seaboard, SFA Railroads, Southern, Western Railroads, and several shippers or shipper associations object to the proposed rule or propose certain modifications thereof. The major criticism is directed to the requirement that two or more vehicles "be tendered on the same day." Admittedly, thi requirement is now contained in a number of the rail carriers tariffs providing for Plan III rates and some believe that th apparent purpose of the rule is to insure that rates for multiple movements be applied only to movements as qualify for such rates. They contend, however, that this is not the only reasonable provision of this type which could be published; that the railroads should not be unduly restricted by any all-inclusive rule; that the situation may arise where a multiple trailer movement might best be accomplished over some other period of time; that the time limits are tariff matters which may and should be handled on a case-by-case basis; and that the rule would hamper the further development of TOFC service.

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Several of the rail carriers suggest the rule be amended to provide that two or more trailers "shall be tendered" to the carrier within the time period described in tariffs on file with the Commission. They are of the opinion that under such a provision the carriers would be free to choose the time period for the tender of the trailers and that it would better serve the convenience and flexibility of the shipper. Stanley would amend the rule to provide for emergencies due to weather and other unforeseen circumstances and other shippers suggest the rule be revised to provide for tender of the trailers "within a 24 hour period."

The Bureau has presented some evidence with respect to the loading of trailers on flatcars by the Erie and the Nickel Plate. Both railroads load trailers on flatcars in the order they are received. In some instances, two trailers that are paired for the purpose of billing are dispatched on separate days and arrive at destination on different days. The Bureau favors the proposed rule. It contends that if it is impossible for the railroad to hold one trailer at the ramp while awaiting the arrival of the second trailer, then the tariffs should be amended so as to provide rates or charges based on a tender of one trailer rather than on a tender of two trailers at the same time.

The Erie admits that trailers are placed on flatcars in the sequence received, but denies that this is the cause of trailers being dispatched on different days. At its Jersey City, N. J., yard, it has a cut off time of 8 p.m. for trailers transported on its 10 p.m. train, and a cut off time of 11 p.m. for its 12:30 a.m. train. Erie also admits that any trailers which miss the first cut off time are transported on the second train. It does not consider it practical to hold all trailers for loading on a particular train.

In their replies to the Bureau, several of the parties point out that since the proposed rule merely requires that two trailers be "tendered" on the same day, it would not insure that the trailers would be dispatched on the same day or on the same flatcar. We agree. It is noted that the IC receives trailers moving under various plans; that its practice is to place the trailers on flatcars that are available, using the cars and the space thereon to the best advantage of the IC. Other rail carriers do likewise. They are of the view that the loading of trailers on to flatcars is an operating matter; that efficiency dictates the loading of trailers as quickly as possible; that such practices eliminates the need for last minute loading and frees space in the terminal area; and that if it were necessary for a carrier to hold a trailer until its mate arrived before loading on to a flatcar, there would be much confusion and chaos at the TOFC loading ramps.

Transamerican is in general agreement with the proposed rule. It suggests, however, that the rule be revised to bring it into general agreement with its suggested definition in proposed Rule A-2.

ATA believes the purpose of the proposed rule is laudable in that it is designed to forestall the breakdown of regulation which would occur were some shippers permitted to deliver freight laden trailers on different days and have them billed as if they were a single shipment tendered on one day. Based on the experience of the motor carriers and their own existing tariff requirements, it suggests that the rule require the tender of all component parts of a shipment at one time. Accordingly, ATA suggests that the rule be revised to read as follows:

> Rates or charges for TOFC transportation predicated on shipments of property requiring more than one highway vehicle shall apply only when the entire shipment is tendered for transportation at one time.

In answering to those objecting to the rule, ATA argues that this rule as well as proposed Rules D-1 and D-2 are designed to guard against discriminatlry practices and is in accord with the spirit and purpose of the act. It contends that there should be no objection to bringing a degree of uniformity to this area of transportation, and that to change the time period to 24 hours would leave the door open for further abuse. ATA asserts that with hundreds of trailers tendered at all hours of the day, it would be almost impossible to keep track of which trailers, if any, are being held beyond any prescribed time limit.

Helms is of the view that there is only one kind of tender for a shipment according to the law and the requirements of the Commission's Tariff Circular. It is of the opinion that one shipper should assemble the entire shipment at one time, at one place, for tender thereat to the carrier at such place, at one time, and on one day only.

As seen, the railroads receive trailers in TOFC service moving under various Plans; and the trailers are placed on the flatcars as they become available. We think it clear that such practices permit a railroad to use its cars and space in the terminal area to its best advantage, and are more efficient. These are operating matters. This is not to say, however, that some rule should not be adopted to provide a reasonable time for tender of two or more trailers in order for the shipper to qualify for an appropriate rate. We agree with ATA (1) that there should be some degree of uniformity to this area of transportation, and (2) that to change the time limit to 24 hours would make it difficult, if not impossible, to keep track of which trailers, if any, were tendered within that time limit. Admittedly, a number of the railroads have tariffs which now provide for tender of two or more trailers on the same day. Their suggestion that any rule adopted provide for the tender of two or more trailers within a time period described in tariffs would be close to prescribing no rule at all if it were any period of time over one calendar day. We believe this

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is especially true in view of the necessity for placing the trailers on flatcars as quickly as possible.

In view of the described practices, perhaps the time has arrived when there should be no further need to base rates on a shipment requiring the tender of two trailers. It is evident from the present practices of the railroads that no attempt is made to hold one trailer, of a shipment requiring tender of multiple trailers, until its mate or mates arrive, before placing the first trailer tendered on a flatcar. In fact, the railroads object to any suggestion that they be required to do so on the ground it would cause much confusion and chaos at the TOFC loading ramps and no doubt this is correct. In the opinion of the examiner, however, this is but another reason why, as a practical matter, rates or charges based on the tender of two or more trailers, should be changed to require the tender of only one trailer. Moreover, this record shows many instances where a shipper of only one commodity, or of quantities requiring no more than one trailer at a time, finds it necessary to have its trailer "married" to a trailer of another shipper through some device, in order to ship, for example, in Plan III service. We believe it doubtful that if a change to rates or charges based on shipments in one trailer were made, that it would divert rail carload traffic. The examiners realize that this is not a rate proceeding and that therefore we could not prescribe such a change herein, even if it be assumed that we were so inclined. We also realize that certain matters are solely the responsibility of the management of the railroads. Whether the problem here discussed is one of those, we express no opinion. However, we would consider ourselves derelict in our duties if we did not call these matters to the attention of the Commission and of the parties.

Based on the record respecting the need, if any, for proposed Rule D-3 and in view of our comments thereon, we find that the following rule, in lieu of proposed Rule D-3, should be adopted:

> In order to qualify for a rate applicable on the movement of multiple highway vehicles (or the demountable container portion thereof), to or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered to the carrier within the time period, not to exceed one calendar day, specified in tariffs on file with the Commission.

RULE D-4

> Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement.

This rule is concerned with the placarding of shipments of explosives or other dangerous artices.

The ATA asserts that the proposed rule is self-explanatory and non-controversial. Although ATA is in agreement with the rule, it suggests that it be revised to reflect the application of the regulations to "transportation" rather than to "service."

The New York Central, B & M, C & O, Erie, Nickel Plate, L & N, and the FF Institute have no objection to the proposed rule. Transamerican is in general agreement with the rule subject, however, to its suggested revised definition heretofore described.

The Eastern Railroads take the position that the rule is superfluous. They contend that the Commission presently has exclusive regulations concerning the transportation of explosives as set forth in 49 C.F.R. Parts 71 to 78, which have been included in the carriers' tariffs; and that these regulations include numerous provisions applicable to the transportation of dangerous commodities in TOFC service.

The PRR and the Western Railroads are in general agreement with the Eastern Railroads. The PRR also contends that the rule is unnecessary since the general regulations of the Commission respecting the transportation of explosives are sufficiently broad, definite, clear, and certain to cover any TOFC movement of explosives.

The Coast Line also is in agreement with those opposing the rule. It believes that it is not necessary to require by rule that shipments of dangerous articles be tendered in time for the railroad to comply with the existing rules. Coast Line asserts that a shipment of explosives would be held over until the next train if not received in time to placard and position the cars to be used.

The Southern also considers the rule unnecessary. If a specific rule is considered necessary or desirable, it suggests that it be amended to require that the arrangements be made "by a shipper with the originating carrier in sufficient time to permit conformance with the applicable carrier regulations."

The Chemists Assn. opposes the rule on much the same grounds as those heretofore stated. It asserts, however, that if any additional requirements relating to the placarding of shipments of explosives or other dangerous articles are needed, they should be made by amending the Explosives Rules.

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The examiners view this rule as being in somewhat the same category as Rules B-11 and C-5. All pertain to safety of operation. Admittedly, the Commission has regulations governing the transportation of explosives and other dangerous articles. Safety of operations of course affects the public in general. Adoption of the proposed rule with the modification hereafter described serves to emphasize safety in connection with TOFC operations. Regulations adopted under the Transportation of Explosives Act (18 U.S.C. 831-835) establish requirements as to loading and handling of dangerous commodities. They not only apply to all carriers, but also apply to shippers. In the circumstances, the examiner believe that the rule should also require that if a shipper tenders a shipment of dangerous commodities, it be required to certify to the railroad that the shipment complies with the Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

The examiners find that the following rule, in lieu of proposed Rule D-4, should be adopted.

> Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement; except that shipments containing explosives or other dangerous articles shall not be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

RULE D-5

All-freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:

"Not more than ___ percent of the articles (or commodities) in this shipment consists of an article or articles embraced by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all commodity) rates do not apply; and the applicable rate on the shipment will be _____

/In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the Class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."/

Under this Rule it is proposed to establish a standard mixture rule, certification form, and penalty provision for publication in tariffs covering all-freight rates when such a mixture rule is provided.

The Bureau, ATA, the railroads, FF Institute, and others suggest that the proposed rule be clarified so that the certification relate to the percentage of the weight of the lading of the shipment in lieu of a percentage "of the articles" in the shipment. We agree and no further consideration need be given the comments of the parties with respect to this proposed amendment.

A large number of persons commented on this rule and in general most of them oppose it. For example, 48 or more shippers or shipper organizations oppose the proposed rule generally on the basis that the rule, if adopted, would severely restrict the present 60 percent mixture provisions in TOFC tariffs. Most of the opposition pertains to the proposal, in the Rule, to use the Uniform Freight Classification (UFC) as a standard to determine if articles to be mixed would come under separate items therein. Most of the shippers opposing the rule state that they have had no difficulty in interpreting the present mixture rules.

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ATA contends that this rule is particularly important if TOFC transportation is to become a healthy component of the transportation system rather than the means of destroying it; that in the absence of some such requirement, all-freight rates for TOFC transportation could be utilized as a means of avoiding and thereby defeating higher charges made with respect to the commodities transported and the conditions and circumstances of their movement; and that such a rule is necessary to assist carriers in maintaining and enforcing their obligation to observe just and reasonable classifications of property as required by section 1(6) of the act, citing All Commodities, New England to Chicago and St. Louis, 315 I.C.C. 419. It asserts that the railroads heretofore have required that each shipment consist of more than one article; and that as disclosed by the testimony of railroad witnesses in Docket No. 33133, the matter of the distinction between articles is "anybody's guess."

Transamerican agrees generally with the rule. It suggests that the following be inserted in line 3 thereof, after the word "shall":

"apply only to one trailer load and shall".

The proposed addition to the rule would, in Transamerican's opinion, prevent abuses to what it believes to be the obvious intent of the rule. On the other hand, the Southern contends that such a revision would clearly be contrary to the best interests of the railroads and the shipping public; and that it should be rejected.

The Bureau believes that the proposed rule was drafted in an attempt to straighten out a chaotic situation. It is of the opinion that the railroads have not made a bona fide effort to police the applicable tariff provision and that shippers of all classes have resorted to strained or exaggerated interpretations of the 60 percent rule so as to circumvent the restriction. The Bureau notes that the Commission in the Eastern Central case, stated at page 13:

> Provisions for a limitation on the weight of any one article, having as their objective the protection of straight carload traffic, are reasonable conditions to attach to the application of these rates and charges. With recourse to the governing classification and exceptions thereto (in the absence of a specific commodity description in the piggyback rate tariff), no more difficulty should be encountered in determining what is covered by the name of one article than when shipping on all-freight rates in boxcars.

The Bureau contends that the 60 percent rule presently in TOFC tariffs must either be amended (as proposed by Rule D-5) or eliminated so as to promote and not retard the direct use by shippers of available TOFC service. It takes the position that the rule merely proposes a published

standard, the UFC, for use to determine if the 60 percent provision in the applicable TOFC tariff has been complied with; and that as stated by the Chemists Assn., the railroads are "free to establish all-freight rates subject to no mixing restrictions of any sort."

The Bureau presented evidence to show that a shipment of "CARC HOGS" was transported from La Crosse, Wis., to New York, N. Y., and moved in Plans II and III service. The applicable Plan III tariff was restricted so as not to apply when over 60 percent of the total weight of the shipment consisted of one commodity. When moving in Plan II service the shipment was described as two trailers of the commodity described above, but the shipment while moving in Plan III service was described as two trailers "FRT ALL KINDS". The Bureau also shows that a freight forwarder has found the 60 percent rule, which permits a shipper to tender 48,000 pounds of a single commodity for a Plan III movement, beneficial in situations wherein Plan II rates of 48,000 pounds of the same commodity is higher than the Plan III charge; and that Ringsby Truck Lines, Inc., has tendered Plan IV shipments to the Rock Island in violation of the 60 percent restriction set forth in the applicable tariff.

The New York Central investigated this matter as soon as it was brought to its attention. It developed that there was a definite error and the shipment was immediately rebilled at the Plan II charge covering fresh meats and packinghouse products from Chicago to New York. All of its agents were again reminded of the tariff requirements for Plan III shipments. The New York Central argues that the described instance constitutes nothing more than the normal amount of human error which will inevitably occur. In connection with the described shipment, the New York Central asserts that no manifest was tendered and the required certificate was not executed and therefore that the consignment should never have been accepted by its agent. It contends that the proposed rule would not prevent this type of error occurring in the future.

The railroads and many others oppose the use of the UFC as a standard or guide, as proposed. Their opposition may be summarized as follows: (1) that many commodities, although separate and distinct in their manufacture and ultimate use, have been grouped under the same item in the UFC, for example, Chemicals, NOIBN; (2) that the proposal is an obvious misuse of the classification itself and in a manner never intended; (3) that it is completely unrealistic; (4) that it would retard the use of TOFC service; (5) that it would make the present mixture rules more restrictive; and (6) that it is beyond the authority of the Commission.

The Western Railroads are of the view that reference to the UFC is improper and unnecessary in those instances where

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the tariff within which the all-freight TOFC item is published contains a complete list of commodity rates. Admittedly, certain tariffs which provide all-freight provisions do not contain a full line of commodity rates and in those cases it perhaps would be necessary to refer to the UFC to establish whether or not a single article or commodity was embraced within a single rate item of the classification tariff. The Western Railroads believe that in such instances the all-freight item could refer to the UFC as a governing publication. They have no objection to the requirement that a certificate be filed by the consignor that his shipment complies with the all-freight tariff provisions. However, they are of the view that the requirement in the proposed rule that a certain rate be established for the entire shipment if it does not comply with the rate item, would not be appropriate, as it would be impossible to predetermine a rate to apply on the entire shipment prior to shipment in the terms as proposed by the Rule. They suggest that, if it is found subsequent to the movement, the shipment does not comply with the TOFC all-freight rate tariff provisions, it be rated on the basis of the rates that apply to the individual commodities making up the entire shipment. If penalty provisions are to be provided, the Western Railroads also suggest that such provisions be established individually on the type of movement to which they apply and argue that one uniform rule would not be possible.

The Bureau agrees with the Western Railroads that where the tariff within which the all-freight TOFC item is published contains a list of commodities it would be proper to refer to such a list rather than to the UFC. The Bureau does not agree, however, with the suggestion of the Western Railroads that the penalty portion of the rule be revised to read as follows:

> If it is found subsequent to shipment that the shipment does not comply with the TOFC all-freight-rate tariff provisions, the shipment must be rated on the basis of rates that apply to the individual commodities making up the entire shipment.

It contends that with both Plan III and Plan IV rates in effect, the above suggestion makes no provision for including or excluding the weight of the containers and/or the weight of the containers and flatcar when computing the rate applicable on a shipment that does not comply with the mixture rule. The Bureau notes that the Doyle Report to the Committee on Commerce of the United States Senate, contained the following:

> The 60 percent rule should be watched closely by carriers and Commission alike to evaluate its effect upon development of combined service. If it appears that this rule obstructs attainment of the objectives of combined service it should be amended or struck down.

The Western Railroads argue that the Bureau's failure to agree to a change in the penalty provision is based on a misunderstanding as to how the rates would be applied. They assert that the shipper, when it pays the applicable freight rate under the tariff, pays for the weight of the containers and/or containers and flatcar, and further that it pays the commodity rate or penalty provision on the excess which does not comply with the mixture rule. In the circumstances, the Western Railroads are of the view that the Commission therefore need not provide in any rule for a standard penalty when shipments do not comply with the applicable mixture rule.

The FF Institute suggests that the proposed rule be amended to read as follows:

> If the certificate has not been signed at the time when the bill of lading is issued, the shipment shall not be accepted. In the event a shipment is found in transportation without such certification and which does not comply with applicable tariff restrictions, such all-freight (all commodity) rates do not apply; and the applicable rate on the shipment will be _____.

The above suggestion is based upon the belief (1) that if it is incumbent upon the shipper to make the certification, it should be equally incumbent upon the carrier to refuse the shipment unless the certification is made; and (2) that if through oversight or neglect of both the shipper and carrier, a shipment should find its way into transportation without the necessary certification, the penalty should apply only if the shipment does not, in fact, comply with the applicable tariff restrictions. The FF Institute also suggests a mixture rule based on articles embraced by the commodity description of a single "l.c.l. or A. Q. Item" of the current UFC. It believes that such a suggestion would be the most effective way to preserve the separate identity of each individual commodity.

The Eastern Railroads contend that the motor carriers supporting the proposed rule have failed to adduce any factual basis for its enactment and that while the Bureau supports the rule it also is unable to find any true necessity for it. They assert that the existing mixture rule has not unduly hampered the development of Plan III service and that until such time as it does, the matter should be left to the railroads' discretion.

The SFA Railroads argue that the subject matter of the proposed rule is one of the main issues in Docket No. 33133 which is now pending before the Commission; that in that proceeding a full record, which discloses the highly complex matter of the rule, has been made on the very subject matter of proposed Rule D-5 and to retry that

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highly complex issue in this rule making proceeding is an unnecessary duplication of work. They assert that the language proposed in Rule D-5 differs substantially from that in the "modified" 60 percent rule contained in many railroad tariffs.

In many respects, the objections of the Southern to the proposed rule are the same as those outlined above in connection with the arguments advanced by the SFA Railroads. In addition, the Southern argues that any amended or new rule could be examined in suspension and investigation proceedings at the time they are published. It would revise the proposed rule to read as follows:

> All-freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms the conditions under which such rates apply.

The Department of Defense objects to the proposed rule. It calls attention to the fact that the President, in his April 1962, Transportation Message to Congress, issued a mandate to the Department of Defense and the General Services Administration in general to take all measures and to do all things within their authority looking toward the establishment of simplified procedures in the establishment and construction of rates. The Defense Department believes that the proposed rule requires some clarification. As it reads the rule, it applies only where all-freight rates are restricted by the carrier in its tariffs. The Defense Department does not believe the rule requires that freight all kinds rates shall involve percentages of commodities.

A number of individual shippers, shipper organizations, and others, also oppose the adoption of the proposed rule. Their objections to the proposed rule would be included generally in one or more of the arguments and contentions of those parties described above. In the circumstances, it is not deemed necessary to set forth specifically the objections raised by each shipper, shipper organizations, or other parties who object to the rule. Some of the shippers object to the principle of being obliged to join shipping associations in order to combine its shipments with that of another shipper in order to meet certain arbitrarily proposed restrictions as to the percentage of one commodity or article as compared to the total shipment. Some argue that the fact that articles may be classified as different for transportation purposes, dependent upon the container or package in which contained, has long been settled, citing in support thereof Cobb Co. v. Missouri-

K.-T. R. Co., 163 I.C.C. 241. Some believe that if a mixing rule is necessary that commercial rather than classification considerations should govern the definition of what constitutes a single article.

The Heavy-Specialized Carriers Conference of ATA suggests that the rule should provide an exception for "articles requiring special equipment and related articles moving therewith such as machinery parts, contractor's materials, supplies and equipment", all of which move on a single tonnage or hundred weight rate. Carriers of articles requiring special equipment generally do not subscribe to the UFC.

The railroads of course are "free to establish all-freight rates subject to no mixing restrictions of any sort", but that is not the issue herein. In the Eastern Central case, the Commission stated at page 13:

> Provisions for a limitation on the weight of any one article, having as their objective the protection of straight carload traffic, are reasonable conditions to attach to the application of these rates and charges.

Most of the parties seem to agree that some reasonable mixture provision is needed, but differ primarily as to how it should be worded or applied. The record definitely establishes that the UFC is not a proper basis for a mixture rule. The examiners agree with the suggestion of some of the parties that, if the tariff within which the all-freight TOFC item is published contains a complete list of commodity rates, it would be proper to refer to such a list. We doubt, however, that a general rule based on this would cover all situations as all such tariffs do not contain a complete list of commodity rates. In the circumstances, we are of the opinion that the railroads themselves should be given an opportunity to make their tariff provisions governing a mixture rule more clear and explicit. They should also provide therein for a certification by the shipper that the shipment consists of more than one article as described in the applicable tariff and the percentage one article bears to the total weight of the shipment. Accordingly, the examiners find that the following rule, in lieu of proposed Rule D-5, is reasonable and should be adopted:

> All-freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms the conditions under which such rates apply.

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ADDITIONAL RULES

Certain of the railroads and other respondents have proposed a Rule which would prohibit the payment into the Teamsters' Union Welfare Fund of $5.00 for each trailer or container placed on, or delivered to, rail flatcar, birdy-back, fishy-back or barge operations. On the basis of section 6(7) of the act as to railroads, and sections 217(b) and 222(c) as to motor common carriers and the Elkins Act, which require these common carriers to adhere to their published rates, the Bureau recommends the adoption of a Rule which would prohibit a common carrier subject to the act from paying money to a Union or Union Welfare Fund for the right to engage in TOFC operations.

The Interstate Commerce Act does not give the Commission authority to adjudicate labor disputes and whether this is a labor dispute or a violation of existing law in the form of soliciting or demanding a rebate, the evidence before us is too limited upon which to form a judgment. "The agency must make findings that support its decision, and those findings must be supported by substantial evidence." See Interstate Commerce Comm. v. J-T Transport Co. 368 U.S. 81, 93. Full knowledge of the facts might indicate an adjudication by the National Labor Relations Board is required or it could be that action should be commenced under section 1 of the Elkins Act concerning rebating. The Supreme Court in United States v. Braverman 373 U.S. 405, recently reaffirmed its holding that in order to ensure carrier efficiency, rates must be maintained unimpaired and that the Elkins Act no more intended to allow third persons to tamper with the statutory scheme than it intended to allow carriers and shippers themselves to do so. The record shows that several of the state legislatures have outlawed these penalty charges imposed by the Teamsters' Union.

We find that to consider the adoption of a Rule in this field goes beyond the issues in this proceeding and can be far more appropriately and effectively handled in ways other than promulgating a rule. We conclude therefor that no action be taken on this suggested rule.

CONCLUSION

We believe that the transportation industry is on the threshold of a new and exciting era. At last the heat of competition between the various modes of transportation appears to be congealing into a formula that is not only beneficial to the various common carriers but also to the shipping public. The common carriers of all modes are showing increased economy and efficiency and more rapid transit to shippers in an attempt to meet private carrier competition and to keep the erosion of that traffic from cutting any deeper.

No innovation in transportation has ever achieved full maturity without the need for certain rules and uniform guide lines. TOFC transportation is no exception. This rule making proceeding is the vehicle looked upon by carriers, shippers, the Commission, and even the courts to lay down the standards by which TOFC service can most effectively serve the public interest. Based on this record we are thoroughly convinced that the greatest amount of flexibility must remain available to the management of the carriers in order to make TOFC operate at peak efficiency.

We are also convinced that the regulatory process must be kept actively informed to insure equal advantages to all. In this connection we recommend that the Commission improve its facilities for the continuous observance of TOFC operations by establishing a new Bureau, if need be, with the responsibility of accumulating and analyzing data relating to TOFC practices as they develop in the future and with the purpose of keeping the Commission constantly informed. In our discussion of proposed Rule B-3, we have found that an 85 percent circuity rule should apply to motor common carriers using Plan I service in lieu of their authorized over-the-road service unless otherwise permitted by the Commission upon the filing of an appropriate application therefor. See adopted Rule 8A. This affords an additional reason for the Commission to designate a place in the table of organization for the receipt and processing of such applications. Our Rule 8B also provides for the filing of certain information with the Commission in any event, which will require administrative handling and possible adjudication.

Recommendations, suggestions, and arguments made by the parties but not specifically discussed have been fully considered in reaching the conclusions herein.

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PREMISES CONSIDERED, it is ORDERED that the following rules designed to govern trailer-on-flatcar (TOFC) transportation in interstate or foreign commerce and the practices in connection therewith applicable to railroads subject to Part I; motor common carriers subject to Part II; water common carriers subject to Part III; and freight forwarders subject to Part IV of the Interstate Commerce Act, be, and they are hereby, prescribed:

1. "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car.

2. "Plan I TOFC service" is service performed by a railroad in substitution for motor common carrier service to, from, and between named points over the motor carrier's route, at the option of the motor carrier, unless otherwise directed by the shipper, the traffic moving from initial origin to final destination at all-motor rates and on motor carrier bills of lading under an arrangement or an agreement between the two modes of transportation.

3. "Plan V TOFC service" is that performed under published joint rail-motor rates over through routes with certificated motor common carriers.

4. "Joint intermodal TOFC service" includes Plan I and Plan V TOFC services as defined above.

5. "All-rail TOFC service" means any transportation, other than transportation embraced in Plans I and V above, provided by a railroad or railroads subject to Part I of the Interstate Commerce Act, which transportation includes the performance of TOFC service.

6. Tariffs embracing joint intermodal TOFC rates or charges, or Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the routes over which such service will be performed or the origin, destination, points of interchange between modes of transportation and rail routes; and the names of the carriers participating therein.

7. Tariffs setting forth rates or charges for joint intermodal TOFC transportation may be published

only by rail, motor, or water common carriers, or their agents, on commodities the transportation of which is subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

8A. Motor common carriers shall not participate in Plan I TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 85 percent of the distance between such points computed (1) if a regular-route carrier, over its authorized regular route, or (2) if an irregular-route carrier, through any gateway point which it is required to use; except as may be permitted by the Interstate Commerce Commission upon consideration of an appropriate application filed by a motor common carrier or a railroad in which relief is sought from the percentage provisions of this rule.

8B. Motor common carriers participating in Plan I TOFC service which comes within the 85 percent circuity provision provided in part (A) of this rule, shall file with the Interstate Commerce Commission, on the same date that tariffs or substituted service directories are filed, information showing the name of the rail carrier to be used, the total mileage from origin to destination over its all motor route, the points between which TOFC service of the rail carrier is to be used, and the total mileage from origin to destination over the joint motor-rail-motor route to be used.

9. Any railroad or railroads may provide TOFC service jointly with any motor or water common carriers, PROVIDED that the common carriers by railroad, motor, and/or water shall have the duty of ascertaining whether it or its connecting common carrier hold appropriate authority from the Interstate Commerce Commission to render the service contemplated before the effective date of such joint arrangements. If the origin or connecting common carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

10. Tariffs providing for Plan I TOFC rates or charges, or Substituted Service Directories, if used, may provide for Plan I TOFC service for the entire line-haul movement, except to the extent such service may be prohibited under Rule 8A above.

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11. Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

12A. Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff or agreement between the parties, shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

12B. Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portion thereof) which do not conform to the motor-carrier safety regulations prescribed by the Interstate Commerce Commission.

13. No allowance shall be payable to any shipper, freight forwarder and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

14. Each railroad performing, or holding itself out to perform, TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to or from shippers, freight forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges.

15. The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Interstate Commerce Commission for the description nor to

state that the area within which pickup and delivery service will be performed is that defined by the Interstate Commerce Commission in a formal proceeding.

16. All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

17. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

18. The handling by a railroad of motor or water carrier's trailer, loaded with commodities the motor transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible only under all-rail TOFC tariffs.

19. No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor, and where a manifest is used by the shipper or freight forwarder, such manifest shall be delivered to the originating carrier not later than 24 hours after the shipment reaches the destination ramp.

20A. Certification as to the weight of a highway truck, trailer, semitrailer (or demountable container portion thereof) shall be made by the shipper at the time of its tender to the originating carrier.

20B. Shippers shall certify at the time of tendering a shipment to the originating carrier, whether or not the contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) consists of (1) any commodity which is prohibited from movement in TOFC service by the carrier's tariff, and (2) explosives or other dangerous articles.

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21. In order to qualify for a rate applicable on the movement of multiple highway vehicles (or the demountable container portion thereof), two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered to the carrier within the time period, not to exceed one calendar day, specified in tariffs on file with the Interstate Commerce Commission.

22. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement; except that shipments containing explosives or other dangerous articles shall not be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Interstate Commerce Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

23. All-freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms and conditions under which such rates apply.

It is further ordered, that the motions filed by certain Southern Freight Association Territory Railroads and Consolidated Freightways to strike portions of pleadings of the Commission's Bureau of Inquiry and Compliance and certain other verified pleadings, to which replies were filed by the Bureau, The Motor Convoy, Inc., and the American Trucking Associations, Inc., be, and they are hereby, overruled.

It is further ordered, that requests to cross-examine certain witnesses filed by the Freight Forwarders Institute, the Eastern Railroad respondents, and certain Southern Freight Association Territory Railroads be, and they are hereby, denied.

It is further ordered, that the petition filed by the Freight Forwarders Institute requesting that issues pertaining to Plan I TOFC service and related matters be separated from the issues in this proceeding be, and it is hereby, denied.

It is further ordered, that requests to separate all issues from this proceeding pertaining to the transportation of motor vehicles in multi-level rail car service filed by the Eastern Railroad respondents, The National Automobile Transporters Association, General Motors Corporation, Auto Transports, Inc., The Chesapeake and Ohio Railway Company, and the Ford Motor Company be, and they are hereby, granted.

It is further ordered, that the effective date of this order shall be thirty days from the date of service hereof, unless stayed by the Commission or the timely filing of exceptions thereto in accordance with the General Rules of Practice.

It is further ordered, that a copy of this order be delivered to the Director, Division of the Federal Register, for publication in the Federal Register as notice to all interested persons.

It is further ordered, that this proceeding be, and it is hereby, discontinued.

Dated at Washington, D. C., this 14th day of August A. D. 1963.

By the Commission, Hearing Examiners Harold P. Boss and Richard S. Ries.

HAROLD D. McCOY

(SEAL) Secretary

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APPENDIX I

PROPOSED TOFC RULES

A.

DEFINITIONS

Rule 1 -

"Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

Rule 2 -

"Joint intermodal TOFC service" means any transportation of property (the motor and/or water transportation of which is subject to economic regulation under the Interstate Commerce Act) jointly provided by a railroad or railroads subject to Part I of the act and a motor common carrier or carriers subject to Part II of the act or a water common carrier or carriers subject to Part III of the act, and which includes, for the whole[1] or any part of the line-haul movement, the performance of TOFC service as defined in (1) above; except that the term "joint intermodal TOFC service" does not include the transportation of property moving under contract rates as set forth in section 409 of the act.

Rule 3 -

"All-rail TOFC service" means any transportation, other than transportation embraced in (2) above, provided by a railroad or railroads subject to Part I of the act, which transportation includes the performance of TOFC service as defined in (1) above.

B.

RULES GOVERNING JOINT INTERMODAL TOFC SERVICE

Rule 1 -

Tariffs embracing joint intermodal TOFC rates or charges shall set forth the service covered by the published rates or charges, the routes over which such service will be performed, and the names of the carriers participating therein.

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1 - See Rule B-7 below.

Rule 2 -

Tariffs embracing joint intermodal TOFC rates or charges may be published only by rail, motor, or water common carriers, or their agents, on commodities subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

Rule 3 -

Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon consideration of an appropriate application filed by the motor carrier in which it seeks relief from the percentage provisions of this section. [Example: In connection with a shipment originating at A and destined to D, a motor common carrier holding authority to transport such shipment from A to D (a distance of 300 miles by its authorized highway routes), serving the intermediate points of B and C, participates in joint intermodal TOFC service in lieu of its authorized over-the-road service in the following manner: The shipment is transported from A to B by the motor carrier over its authorized highway route (a distance of 100 miles), at which point it is placed on a rail car for TOFC movement to C (a distance of 80 miles over the rail route used as compared to 100 miles over the motor carrier's authorized highway route), and C the shipment is returned to the originating motor carrier for ultimate delivery at D (a distance of 100 miles over the motor carrier's authorized highway route). Although the rail line distance (80 miles) between B and C is less than 90 percent of the motor carrier's authorized highway route between the same points (100 miles), the above rule allows this operation inasmuch as the combined motor-rail-motor route between A and D (280 miles) is more than 90 percent of the motor carrier's authorized highway route (300 miles) between A and D.]

Rule 4 -

The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

Rule 5 -

Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except

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that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

Rule 6 -

The billing carrier participating in joint intermodal TOFC service may refuse to reveal the indentities of the shippers or consignees to its connecting carriers, in which event the billing carrier shall assume, with respect to the shippers or freight forwarders, full responsibility for the complete movement.

Rule 7 -

Tariffs embracing joint intermodal TOFC rates or charges may provide for TOFC service for the entire line-haul movement. /Note: Although this rule is in apparent conflict with Commission decisions in Substituted Freight Service, 232 I.C.C. 683, and Interchange of Traffic at Point of Origin, 46 M.C.C. 623, it is intended to represent what appears to be a widespread practice under present Plan I operations./

Rule 8 -

Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

Rule 9 -

Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous transportation service at all points authorized to be served by it.

Rule 10 -

A rail, motor, or water common carrier participating in joint intermodal TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

Rule 11 -

Railroads participating in joint intermodal TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

C.

RULES GOVERNING ALL-RAIL TOFC SERVICE

Rule 1 -

Rates or charges for all-rail TOFC line-haul service, and for any transportation or auxiliary service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent, in either of the following ways:

(a) Publish rates or charges which specifically include pickup from shipper and/or delivery to consignee by the railroad or railroads.

(b) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when all service and equipment is provided by the railroad.

Rule 2 -

(a) Each carrier performing or holding out to perform all-rail TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and rules governing storage, demurrage, detention of highway vehicles, cartage, switching, floating, literage, wharfage, weighing, diversion, reconsignment, icing, refrigeration, heat, C.O.D. services, transit services, absorptions, allowances, and other special or accessorial services or practices, and an explicit statement of all other charges and rules which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of the service to the shipper.

(b) All tariffs containing rates for the all-rail TOFC transportation of property shall specify whether such rates do or do not include pickup or delivery services.

(c) When charges for pickup or delivery service are in addition to line-haul TOFC transportation charges, they shall be published in tariffs as provided in paragraph (a) of this rule.

(d) The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in tariffs as provided in paragraph (a) of this rule. It will be sufficient to state that pickup and delivery service will be performed at all places or locations within the limits of the incorporated cities, towns, or villages, from, to, or between which the rates apply, if that is the only application intended. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed

is that defined by the Commission in a formal proceeding.

(e) All tariffs containing rates for the all-rail TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of the property from the highway vehicle by the carrier (including the number of laborers to be used). When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in tariffs as provided in paragraph (a) of this rule.

(f) If the shipper, freight forwarder, and/or consignee directly or indirectly renders any service connected with such transportation (such as ramping, deramping, and tie-down of trailers on cars), or furnishes any equipment or other instrumentality used therein (such as a trailer, semitrailer or car), the charge or allowance paid to the shipper, freight forwarder, and/or consignee therefor shall be published as provided in paragraph (a) of this rule.

Rule 3 -

Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

Rule 4 -

A railroad providing all-rail TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

Rule 5 -

Railroads providing all-rail TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

Rule 6 -

Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges provided for in Rule C-2 above.

Rule 7 -

The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible under all-rail TOFC tariffs.

D.

BILLING AND NOTIFICATION RULES

Rule 1 -

No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a bill of lading therefor and received from the shipper or freight forwarder any manifest used in connection therewith.

Rule 2 -

Certification as to the weight and contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) shall be made by the shippers or carriers at the time of its tender to a railroad or connecting carrier.

Rule 3 -

Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

Rule 4 -

Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement.

Rule 5 -

All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

Rates subject hereto apply only when shipper certifies

[fol. 1569]

on shipping order and bill of lading at time of shipment as follows:

"Not more than ____ percent of the articles (or commodities) in this shipment consists of an article or articles embraced by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity) rates do not apply; and the applicable rate on the shipment will be _____ .

/In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the Class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."/

APPENDIX II

TON-MILE DISTRIBUTION AMONG INTERCITY FREIGHT CARRIERS FOR HIRE AND PRIVATE TRAFFIC: 1947 TO 1961

(IN MILLIONS OF TON-MILES)

Year	RAILROADS			FOR-HIRE MOTOR TRUCKS[a]			PRIVATE AND OTHER MOTOR TRUCKS[b]			TOTAL - ALL TRUCKS			TOTAL INLAND WATERWAYS		
	Ton-Miles[1]	% of Total	Index	Ton-Miles[2]	% of Total	Index	Ton-Miles[2]	% of Total	Index	Ton-Miles[2]	% of Total	Index	Ton-Miles[3]	% of Total	Index
1947	664,523	65.24	100	37,693	3.70	100	64,402	6.32	100	102,095	10.02	100	146,711	14.40	100
1948	647,267	61.94	97	46,706	4.47	124	69,339	6.64	108	116,045	11.11	114	161,846	15.49	110
1949	534,694	58.38	80	47,891	5.23	127	78,745	8.60	122	126,636	13.83	124	139,396	15.22	95
1950	596,940	56.17	90	65,648	6.18	174	107,212	10.09	166	172,860	16.27	169	163,344	15.37	111
1951	655,353	55.63	97	72,292	6.14	192	115,720	9.82	180	188,012	15.96	184	182,216[e]	15.47	124
1952	623,373	54.48	94	70,843	6.19	188	123,764	10.82	192	194,607	17.01	191	168,367	14.71	115
1953	614,199	51.01	92	76,510	6.36	203	140,653	11.68	218	217,163	18.04	213	202,439[e]	16.81	138
1954	556,587	49.56	84	72,301	6.44	192	140,924	12.55	219	213,225	18.99	209	173,679[e]	15.46	118
1955	631,385	49.53	95	82,906	6.50	220	140,348	11.01	218	223,254	17.51	219	216,506	16.98	148
1956	655,891	48.40	99	83,015	6.12	220	165,831	12.24	257	248,846	18.36	244	219,978	16.23	150
1957	626,222	46.89	94	84,408	6.32	224	169,766	12.71	264	254,174	19.03	249	231,792	17.36	158
1958	558,738	45.98	84	84,339	6.94	224	171,205	14.09	266	255,544	21.03	251	189,016	15.55	129
1959	582,497	44.97	88	101,377	7.83	269	187,142	14.45	291	288,519	22.28	283	196,559	15.18	134
1960	579,130	43.66	87	104,200	7.86	276	193,462	14.58	300	297,662	22.44	292	220,253	16.60	150
1961e	563,360	42.87	85	105,000	7.99	279	195,000	14.84	303	300,000	22.83	294	215,000	16.36	147

TON-MILE DISTRIBUTION AMONG INTERCITY FREIGHT CARRIERS
FOR HIRE AND PRIVATE TRAFFIC: 1947 TO 1961
(IN MILLIONS OF TON-MILES) *Continued*

Year	PIPELINES (OIL) Ton-Miles	% of Total	Index	AIRWAYS Ton-Miles[4]	% of Total	Index	TOTAL Ton-Miles[5]	Index
1947	105,161	10.32	100	158	0.02	100	1,018,651	100
1948	119,597	11.44	114	223	0.02	141	1,044,978	103
1949	114,916	12.55	109	235	0.03	149	915,877	90
1950	129,175	12.16	123	318	0.03	201	1,062,637	104
1951	152,115	12.91	145	379	0.03	240	1,178,075	116
1952	157,502	13.76	150	415	0.04	263	1,144,264	112
1953	169,884	14.11	162	413	0.03	261	1,204,098	118
1954	179,203	15.96	170	397	0.04	251	1,123,061	110
1955	203,244	15.94	193	481	0.04	304	1,274,872	125
1956	229,959	16.97	219	563	0.04	356	1,355,237	133
1957	222,728	16.68	212	572	0.04	362	1,335,488	131
1958	211,289	17.39	201	579	0.05	366	1,215,166	119
1959	226,991	17.53	216	739c	0.06	468	1,295,305	127
1960	228,626	17.24	217	778c	0.06	492	1,326,449	130
1961e	235,000	17.88	223	870	0.06	551	1,314,230	129

[1] Includes mail and express.

[2] Includes operations between cities and between cities and rural areas, but not between rural areas without passing through cities and not city delivery or city movements to and from contiguous suburbs. Includes turnpike movements.

[3] Coastwise and Intercoastal deep sea ton-miles NOT included; however, Great Lakes ton-miles are included.

[4] Domestic revenue service; including express, mail and excess baggage.

[5] When components do not add to total, due to rounding.

* Includes coverage of waterways previously existing but not previously included.

a Intercity ton miles of Class I, II and III intercity common and contract motor carriers of property operating under ICC authority.

b Intercity ton-miles of all private trucks, and for-hire trucks not subject to economic regulation by the ICC, as well as intercity ton-miles of local ICC regulated carriers.

c Include Alaska and Hawaii.

e Estimated.

[fol. 1571]

APPENDIX III

TON MILES AND FREIGHT, EXPRESS AND MAIL REVENUE OF RAILROADS AND CLASS I, II AND III MOTOR CARRIERS - YEARS 1939 THROUGH 1959

Year (1)	Ton Miles			Freight, Express and Mail Revenue		
	Railroads (Billions) (2)	Class I, II & III Motor Carriers (Billions) (3)	Percentage Motor Carriers of Railroads (4)	Railroads (Millions) (5)	Class I, II & III Motor Carriers (Millions) (6)	Percentage Motor Carriers of Railroads (7)
1939	338.850	19.646	5.80	$3,473.1	$ 792.2	22.81
1940	379.201	20.683	5.45	3,765.3	867.0	23.03
1941	481.756	26.835	5.57	4,703.4	1,095.7	23.30
1942	645.422	28.083	4.35	6,268.7	1,212.7	19.35
1943	734.829	28.768	3.91	7,156.3	1,304.7	18.23
1944	746.912	27.253	3.65	7,400.2	1,351.9	18.27
1945	690.809	27.289	3.95	6,927.0	1,406.3	20.30
1946	602.069	30.448	5.06	6,120.2	1,654.5	27.03
1947	664.523	37.693	5.67	7,464.3	2,213.6	29.66
1948	647.267	46.706	7.22	8,445.2	2,698.1	31.95
1949	534.694	47.891	8.96	7,487.4	2,911.2	38.88
1950	596.940	65.648	11.00	8,427.6	3,737.1	44.34
1951	655.353	72.292	11.03	9,211.8	4,169.2	45.26
1952	623.373	70.843	11.36	9,409.4	4,417.5	46.95
1953	614.199	76.510	12.46	9,563.5	4,926.4	51.51
1954	556.557	72.301	12.99	8,373.3	4,737.1	56.57
1955	631.385	82.906	13.13	9,110.5	5,535.2	60.76
1956	655.891	83.015	12.66	9,527.8	5,828.9	61.18
1957	626.222	84.408	13.48	9,483.9	6,165.9	65.01
1958	558.738	84.339	15.09	8,630.1	6,131.2	71.04
1959	582.497	101.377	17.40	8,900.9	7,144.9	80.27

[fol. 1573]

APPENDIX IV

ANALYSIS OF VARIOUS CARRIERS' PARTICIPATION IN TOFC SERVICE

I. RAIL

Western Maryland Railway Company - Western Maryland is a bridge railroad operating between its eastern termini Baltimore, Md., and York, Pa.; and its western terminus Connelsville, Pa. This carrier does not publish any TOFC rates which apply locally but it does publish rates applying on TOFC traffic that is interchanged with connecting railroads. Western Maryland is a part of a fast service route commonly known in the railroad industry as the "Alphabet Route." This route extends between points on the Western Maryland to Chicago and St. Louis. This carrier also participates in TOFC traffic to Louisville, Ky., to destinations in Southern Freight Association Territory, Southwestern Territory, Western Trunk Line Territory and Transcontinental Territory. Over this route Western Maryland is able to make second morning deliveries in Chicago and fifth morning deliveries in San Francisco. At the present time Western Maryland offers only Plans II and III TOFC service.

The Plan II service which was started in January 1955, is offered between Baltimore and Chicago, including points within the Chicago switching district. This plan II service has grown until now the original points have been expanded to include Hagerstown, Cumberland and Hampstead, Md.; Chambersburg, Gettysburg, Hanover, Spring Grove, Waynesboro, Ortanna and York, Pa. to destinations throughout the United States west and south of its line of railroad.

Plan III service which began in August 1959 from Baltimore to Chicago and St. Louis has been expanded to include the origins of Hagerstown and York to numerous destinations in official territory as well as from Baltimore to destinations in Southern Freight Association Territory.

Western Maryland has built its own ramps for loading and unloading of highway trailers and has acquired and operates 41 flatcars, 8 flatbed trailers, and 27 vans. It has under lease for operation in TOFC traffic 49 vans and two open top trailers. This equipment is used in Plan II service and when it becomes idle it is leased to shippers for use in Plan III service.

Atlanta & Saint Andrews Bay Railway Company - This railroad operates between Dothan, Ala., and Panama City, Fla. It has a wholly owned subsidiary motor carrier, Saint Andrews Bay Transportation Company, The motor carrier is authorized to transport general commodities over regular routes which parallel the entire operation of the Railway Company. For some 20 years the Railway Company has performed substituted rail-for-highway service for the Transportation Company and the Transportation Company has performed substituted highway-for-rail service for the Railway Company, both substituted services being performed between Dothan and Panama City and points immediate thereto.

These substituted services are said to be an important facet of the operations of the two companies and they urge the Commission not to disturb them. The Railway Company's business consists primarily of carload traffic. The substitution of highway service for rail on less-than-carload traffic enables the railway to better serve its patrons on carload business because it eliminates the stopping of long freight trains at non-agency stations for LCL traffic. For the period January through June 1962 the railroad transported tonnage in substituted service of 719,475 pounds. In the same period the Transportation Company transported substituted tonnage in the amount of 153,118 pounds.

Atlantic Coast Line Railroad Company - The Coast Line performs TOFC service under all five basic plans. Based upon the traffic originated by the carrier the plans will be discussed in the order of their rank.

Under Plan II, the Coast Line offers a common carrier service for the movement of shippers traffic in rail owned or controlled trailers from door-to-door, with the highway trailers traveling the major portion of the distance on a railroad flatcar. The charges are based on railroad published rates which are equal to or lower than those of motor common carriers. The traffic moves on all rail billing and this plan encompasses a full line of class and commodity rates. The trailers are either owned or leased from Seacoast Transportation Company, its subsidiary, and the flatcars are suplied by Trailer Train Company, of which Coast Line is a member. The Trailer Train Company supplies the railroad with 85-foot flatcars capable of carrying two trailers. The highway movement under this plan is pursuant to certificates of public convenience and necessity issued by this Commission or is confined to terminal areas where no authority is necessary.

Under Plan III, the Coast Line transports shipper-owned or leased trailers between TOFC terminals on railroad-owned flatcars. The Coast Line performs no pickup or delivery service and its rates apply between most of the 55 Coast Line ramp stations and all major cities east of the Mississippi River.

It is contended that the popularity of this plan is due to shippers being able to lease the trailers from the railroads with the right to return said trailers to the railroads at destination.

The first TOFC service to be put in operation on the Coast Line was Plan I service in May 1959 between Alexandria, Va., and Jacksonville, Fla. That service remains in existence and has shown considerable expansion since that time. The Coast Line lists 33 motor common carriers with which it has tariff arrangements. Coast Line is a party to substituted service tariffs under Plan I as reflected in the Substituted Freight

[fol. 1575]

Service Directory of Southern Motor Carriers Rate Conference. Where such arrangements are in effect with individual motor carriers who publish their own tariffs, Coast Line is a party to those tariffs only insofar as the tariff names the railroad as the substituted carrier. Under this Plan there is a movement of motor common carrier trailers in substituted rail service between Coast Lines' TOFC terminals. Charges to the public are based on published motor common carrier rates and minima applied and collected by the motor common carrier. Coast Line collects its share of the charges from the motor common carrier on an agreed amount per trailer, loaded or empty. The trailers are loaded and unloaded at TOFC terminals by the motor carrier under the supervision of Coast Line and charges for this service vary, depending upon the extent of such service.

Plan V covers joint services by motor carriers and Coast Line in tariffs published jointly. Either mode can originate a shipment and interchange with the other for completion of the through haul and delivery to destination. This particular Plan is very limited in its application on the Coast Line.

Under Plan IV both the flatcar and the trailers are provided by the shipper and Coast Line performs only the line haul movement from ramp to ramp. Coast Line has found this Plan to be very limited because a shipper to be interested should have traffic available in both directions. This type of service has had little or no development in the southeast because the preponderance of all rail shipments in that area are in only one direction.

Coast Line states that Plan I is available to all certificated motor carriers subject to the usual managerial discretion as to the individual carriers financial responsibility, public demand and economic necessity for such operations. Plans II, III and IV are not held out to common carriers. Plan V is held out to motor carriers with which Coast Line is able to negotiate joint rates, service and divisions suitable to both. The Coast Line states that no objection is made to contract motor carriers utilizing Plans II or III since for all intents and purposes the movement remains the operation of the motor carrier from primary origin to final destination.

When supply permits, Coast Line trailers are available for leasing by shippers, as well as common motor carriers, for TOFC shipments routed over the Coast Line. Leases are made on the basis of rail transit time between origin and destination at the rate of $10 per day. The only time these charges are varied is in situations where it is necessary to meet competition or where a different charge is applied by a foreign line originating the shipment in which case the same charge applied one way would apply in the reverse direction. Coast Line explains that in the case of a shipper-owned trailer tendered for movement under Plan III the return of that trailer is the shippers responsibility and even though it is returned empty applicable tariff charges

would be made, which in some instances, are lower than the loaded movement and in others the same as the loaded movement. In the case where a shipper leases the trailer from the origin line, however, the trailer is unloaded from the flatcar by the railroad and the consignee takes the trailer to his plant where he unloads the lading. The consignee then returns the trailer to the ramp of the Coast Line. At that point the trailer is accepted by the Coast Line as agent for the origin line, and the lease is terminated. The trailer moves back to the origin line in much the same fashion as foreign line boxcars. The Coast Line would pay per diem but it would also have the right to use the trailer for revenue purposes. In other words the Coast Line may lease the trailer to another customer if so requested.

Louisville and Nashville Railroad Company - This railroad inaugurated TOFC service in August 1955 and it now operates a fleet of 751 trailers in that service of which a substantial number are leased from REA Leasing Corporation. About 350 trailers are leased from that company on a long term lease basis and another 200 are in pools assigned by that company to the L&N at principal points of use. The entire fleet of trailers available to the L&N is utilized almost exclusively in Plans II and III operations. The L&N utilizes foreign line trailers when they are made empty at its terminals in those instances where the L&N has an understanding with the foreign line to do so.

Plan III was instituted in June 1960 and the L&N began trip leasing trailers to shippers in 1961. The L&N has prepared a 6 part trip lease form which is executed by the railroad and the lessee at the time the trailer is leased. The original is retained by the origin agent, the first copy is turned over to the lessee and four copies accompany the shipment to destination. The origin agent, prior to execution by the lessee, fills in the date and time leased, trailer number, trip lease charge and notes any minor damage that might affect safe operation of the trailer. The destination agent indicates on the form the date and time tendered to the shipper, any further minor exceptions as to the condition of the trailer and when the trailer is returned by the shipper this agent notes the date and the time of termination of the lease, detention charges, if any, and any additional exceptions as to the condition of the trailer. The destination agent returns two of the copies to the origin agent, one copy to the L&N's manager of car accounting and retains the remaining copy for his records. The origin agent, upon receipt of the completed trip lease form, renders a bill to the shipper covering the trip lease charge and detention as well as any damage occuring to the trailer while it was in the shippers possession. The copy of the trip lease form returned to the L&N manager of car accounting enables accurate record keeping for the collection of proper trailer per diem due from connecting rail carriers.

[fol. 1577]

For a shipper to lease a trailer from the L&N a request is made to the traffic department or one of the freight agents for the lease of two trailers. The leasing period begins at the time the L&N delivers the trailer to the shipper at the loading ramp. The trip lease is prepared and the shipper must have his own tractor or arrange for local cartage because it is his duty to haul the trailers to the point at which they are to be loaded and returning them to the L&N's loading ramp for loading on to the flatcar. When a shipper picks up trailers prior to 10 a.m. he must return those trailers to the L&N's ramp prior to 6 p.m. to be entitled to a charge of $20 minimum for the trip lease. If the shipper detains the trailer beyond the 6:00 p.m. cut-off time, there is a detention charge of $9 per day. The minimum $20 charge applies whether the trailer is utilized in over the rail movement in either first or second morning delivery. The L&N's longest delivery time in its Plan III service is currently second morning delivery. In the case of a refrigerated trailer the detention charge is $12 per day.

The L&N states that loss and damage claims are less in their Plan II and III services as compared to boxcar service and that Plan III shows less loss and damage than Plan II. Under constant surveillance by the L&N it has been found that trip leasing of trailers has resulted in greater utilization of the trailer fleet. Prior to trip leasing under Plan III service, the ratio of loaded to empty trailers miles was 58.5 to 41.5 percent in August of 1960. Two years later when trip leasing was in effect the ratio had improved to 68.4 percent loaded trailer miles against 31.6 percent empty trailer miles. Moreover, experience has shown that greater utilization is obtained from trailers in TOFC service than from boxcars. The trailer service can account for four loads per month per trailer whereas about two loads per month per boxcar is the average utilization to be expected.

Seaboard Air Line Railroad Company - The Seaboard became active in the field of TOFC service in 1959. It now participates in all five of the commonly known Plans. Plan III is attracting the most traffic to the Seaboard closely followed by Plan II and Plan I.

Under Plan I on the Seaboard the motor carrier or its agent files the necessary tariff defining the extent the substituted rail service may be used together with the required Fourth Section application. The only motor carriers with which the Seaboard has joined in such a tariff publication are those carriers holding authority to perform the entire service from primary origin to final destination. Such motor carriers are solely responsible to the consignors and consignees for the proper assessment of motor carrier rates, schedules and damage claims to the same extent as if those shipments were transported entirely over the road. Seaboard performs an intermediate service between ramp points to the extent desired by the

motor carrier which has been provided in the tariffs. Beyond that the Seaboard takes no responsibility to police the authority of another carrier under the Commission's jurisdiction. The motor carrier is not required nor does it divulge the names of the consignors and consignees or their respective locations. The railroad is responsible only to the motor carriers for damage to the trailer or its contents while in its possession.

Charges between the specified ramp stations as well as the complete set of rules and regulations governing its responsibilities of each class of carrier in this substituted rail service are published by the Seaboard. However, they are not filed with this Commission or any State regulatory body. The charges are stated per trailer load and per flatcar of two trailer loads, without regard to the contents of the loaded trailer. Charges are also provided to cover the transportation of empty trailers. These publications are available, however, to all motor common carriers authorized by the Commission to use the service setforth therein. Seaboard's Plan I charges do not include the cost of placing and removing trailers from flatcars because that service is performed by the motor carrier. The Seaboard currently operates Plan I in conjunction with 55 motor common carriers and it invites all motor common carriers capable of using this Plan I service to do so.

Seaboard provides Plan II service from and to specific points for which it publishes class and commodity rates for local application on its line and also for joint application in connection with other railroads. This plan comprises a door-to-door service. The terminals of both origin and destination points are specifically defined in the railroads tariffs and Seaboard states that it does not use motor common carriers in substituted highway carrier-for-rail service in line-haul transportation along its line. Motor carriers of various classes, including local cartage companies, are employed as Seaboard agents only in the performance of the following terminal services:

(a) load and unload trailers on and off flat cars;
(b) move trailers, loaded and empty, between railroad ramp and consignor' or consignees' place of business; and
(c) load or unload lading into or out of the trailers.

These services are covered by contract between the railroad and the motor carriers involved and in some cases the shippers perform their own service for which allowances are made as provided in the railroads tariff on file with this Commission.

The Seaboard participates extensively in the transportation of shippers trailers, loaded or empty, under Plan III. The only terminal service connected with the Plan III rates is the loading and unloading of trailers on and off flatcars, including tie-down service.

[fol. 1579]

The Seaboard leases trailers to shippers for Plan III service. Trailers that do not require refrigeration are leased by the day or by the trip. When a lease is a trip lease the charge is based on the average length of time the trailer would be used in transporting the shipment. That time is determined by the advertised schedules of the railroad transporting a shipment from the origin to the destination involved, plus one day at origin for loading and one day at destination for unloading; or, if there is no schedule from origin to destination then the charge is based on the time in transit in shipments moving from that origin to destination in trains which handle TOFC traffic. This traffic moves in fast through freight trains. When a trailer is leased on a daily basis the charge is $5 per day with no free time for loading or unloading. The time begins to run from the first 10:00 a.m. following the lease of the trailer and continues until the trailer is returned empty at the ramp of the terminating railroad. The charge is the same to all users.

Plan IV on the Seaboard is used to a very limited extent. No motor carriers are used by Seaboard in this operation and trailers are received only on the railcars upon which they are to move.

Plan V is limited to household appliances from Chicago to Key West, Fla. Seaboard participates in joint rail motor rates only in connection with motor common carriers holding the required authority from this Commission to operate between the point of interchange and the area not served by railroad.

Southern Railway Company - The Southern does not participate in Plan I, of which it is very much opposed, but it participates in Plans II, III, and V. With respect to Plan II Southern does not maintain pickup and delivery tractors of its own. It elects to use either a local cartage carrier or a short-haul motor carrier. In all other respects this service on the Southern is the usual door-to-door rail service.

Plan III service on the Southern compares to the usual Plan III service providing for the movement of shippers trailers between ramp or crane points and the rates are predicated on moving two trailers on a flatcar at one time. The railroad loads and unloads the trailers onto the car at origin or destination as the case may be. In some cases a shipper elects to supplement his own fleet by leasing trailers from the Southern. In other cases a shipper may elect to use his own fleet in local short-haul pickup and delivery distribution and lease trailers for his long haul movement from the Southern. The leasing of equipment is done on the basis of a master lease executed by the railroad and the shipper. Such lease covers the first trip and subsequent shipments thus eliminating the necessity of executing a new agreement for each movement. All lease agreements are kept at the Washington office of the

Southern. Under the lease agreement the shipper or lessee pays a rental for each container or trailer for each 24 hour period or fraction thereof, subject to a maximum trip rate which is shown on the lease agreement. The trip rate begins at the time the container or trailer is delivered to Southern's ramp or crane facility at point of origin and continues until the trailer is unloaded at the Southern facility at destination. The shipper pays rental for any additional days or fractions thereof when the allowable free time at origin or destination is exceeded. On insulated equipment with mechanical heating or refrigeration units there is no free time allowed at either origin or destination. On standard containers or trailers when the trailer is picked up by the shipper before 10:00 a.m. on a given date no rental is assessed if it is returned to the railroad before 6:00 p.m. the same day. When the trailer is picked up after 10:00 a.m. the free time runs until 6:00 p.m. the next day. If the trailer is not returned to the railroad within the free time period additional rental for each day, or fraction thereof, is paid by the shipper. The trip rate is based on the daily rental charge of $10 per day, except that the rental for insulated trailers equipped with mechanical heating or refrigeration units, when requested by the shipper, is $12 per day. The rental charge for additional days, or fraction thereof, is at the same rate of $10 per day for standard trailers and containers and $12 for the refrigerated containers or trailers. The trip rate is based on the time in transit over the fastest route between any two points. If a competing carrier provides a faster service in point of transit time that is the time the trip rate will be based upon. Southern states that this method of charge is necessary in order to be competitive.

The Southern leases trailers on a round trip basis as well as in one direction only. It does not lease any trailer equipment to motor carriers. In connection with Plan III rates, the shipper must pickup the trailer at Southern's ramp and must provide his own motor power for such trailer or trailers.

When Southern's trailers are leased in a Plan III movement to a point located on another railroad and the shipper elects to terminate his lease at the destination point, the connecting line railroad issues a receipt in behalf of Southern terminating the lease at that point and notifying Southern's equipment control center of such action. The connecting line railroad will then either load the trailer back to Southern or return it to Southern paying the normal per diem charge while the trailer is in its possession.

The Southern favors Plan V TOFC service and it is presently negotiating with numerous motor carriers to join in providing a coordinated motor-rail service of joint rates and through routes.

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The New York Central Railroad Company - The New York Central offers Plans II, III, IV and V TOFC service. It has a wholly owned subsidiary, the New York Central Transport Company, which is a motor common carrier with authority over regular routes that parallels the lines of the New York Central. The Transport Company owns a substantial fleet of motor vehicles which it uses in its own motor carrier operations and in addition owns flexi-van equipment which it furnishes its parent railroad for TOFC service. The Transport Company owns all of the flexi-vans used on the New York Central while the latter company owns the flexi-van rail cars on which the vans are transported.

The Transport Company trip leases flexi-van equipment to shippers for use in Plan III service under a master lease which entitles such shipper to procure vans at any given location on the New York Central at prices set forth in the agreement. The Transport Company also provides local cartage service for which it charges $7.75 per hour for a man and a tractor. According to the Commission's report in New York Central Transport Co. - Modification, 89 M.C.C. 389, the operating authority of the Transport Company is subject to the usual conditions imposed on substituted motor for rail operations and the property transported in Flexi-vans leased to shippers is transported, with a few exceptions, wholly for and on the billing of railroads.

All shippers are assessed the same charges per trip and for detention, depending upon the type of equipment. For example, the charge for a standard dry van is $20 per trip between points on the New York Central plus $10 per day for detention at origin and destination. The per-trip charge reflects the second morning service generally offered on flexi-van traffic. Where the lease extends to points on another railroad beyond the lines of the New York Central, another $10 is added to the trip lease charge for each additional schedule day. If the schedule time is 4 days, the per-trip charge would be $40 per van, plus the usual detention charges. Since the van, whether leased or owned, is provided by the shipper, the railroad does not honor claims for defects in the equipment. The shipper is also responsible for any damage occurring beyond the flexi-van sites at origin and destination. The charge for a light refrigerated van is $33 per trip and that charge increases to $44 for a heavy duty van.

In general operations, the Transport Company supplies the New York Central with vans for flexi-van service. Any surplus of vans beyond the railroads requirements are available for leasing by individual shippers for TOFC service. Trailer leasing charges are ordinarily billed within 4 working days after the trailer is returned to the Transport Company and the trip lease is completed.

In Plan II service the Transport Company provides the pickup and delivery, the trailers, the supervision of the yards, the help, and the paper work in behalf of the railroad all under one agreement. The railroad pays the Transport Company for flexi-vans while they are used in Plan II service. To eliminate bookkeeping procedures the railroad retains a flat sum of 50 cents a car mile and the Transport Company gets the balance of the revenue, whatever it is.

The Transport Company leases trailers from the Tynan Company which owns its own trailers and ships out of Chicago to New York in Plan III. At New York the Transport Company leases the Tynan trailers for $1.00 per month. More business moves from west to east than from east to west and in some instances the Tynan trailers leased to the Transport Company move empty from New York to Chicago at the expense of the railroad.

- The Baltimore and Ohio Railroad Company - This railroad offers TOFC service under Plans II, III, IV and V. Plan II is an all inclusive service under which the B&O is responsible beginning with pickup at the shippers place of business and delivery to the consignee at destination. This service was initially offered in July 1954 between Baltimore, Philadelphia, Pittsburgh, Cincinnati, Chicago and East St. Louis. Since that time additional points have been added so that 24 TOFC terminals on the B&O are served. In both the Plan II and Plan III service interchange arrangements with connecting carriers enable the B&O to serve destinations in other territories. All of the equipment in Plan II service is railroad owned or leased or equipment on per diem from other railroads. The origin pickup and the trailer delivery are effected by independent draymen who are under contract to the B&O. The draymen charge by the hour for this service and they may be hired to load and unload freight for the shipper in Plan II service in accordance with published tariff provisions.

The B&O has a few Plan III rates which offer origin to destination ramp service. No pickup and delivery service is provided. Under these rates the shipper and consignee are responsible for drayage to and from the ramp. The trailers are turned over to the shipper or consignee at the ramp and the shipper or consignee, in turn, must execute a trailer use agreement calling for payment of detention charges for the trailer after the expiration of 12 hours' free time. The agreement also places responsibility for damage to the trailer upon the shipper or consignee during the time it is in his possession.

Plan III service was inaugurated in October 1958 and is the ramp-to-ramp transportation of shipper owned or leased trailers on rail flatcars. The B&O will, when equipment is available, trip lease trailers to shippers using Plan III

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service. Trailers are trip leased on a first-come-first-served basis and the charges are standardized as follows:

I - All non-insulated trailers and non-insulated demountable bodies --

$20.00 per trip
$10.00 per day - connecting line rate
$10.00 per day - detention charge

II - All insulated trailers and insulated demountable trailer bodies --

$26.00 per trip
$13.00 per day - connecting line rate
$13.00 per day - detention charge

III - Refrigerator trailers and refrigerator demountable bodies --

$42.00 per trip
$14.00 per day - connecting line rate
$14.00 per day - detention charge

The connecting line rate applies for the period during which a loaded trailer or demountable trailer body is in the possession of a rail carrier other than the B&O, the Reading Company, and The Central Railroad Company of New Jersey for a movement in Plan III service from a point of origin on the B&O to a destination on a connecting line carrier.

Detention charges apply if the trailers are leased prior to 10:00 a.m. and are not tendered by 11.59 p.m. of the day on which the trailers or demountable trailer bodies are leased, or if the trailers are leased after 10:00 a.m. and are not tendered for shipment by 11:59 p.m. of the following day, an additional charge for the trailers is assessed for the time the trailers are held prior to shipment. At destination, when the trailers are available prior to 10:00 a.m. for delivery and are returned to the carrier by 11:59 p.m. of the same day, no detention charge will be made. When trailers are not available until after 10:00 a.m. and are returned by 11:59 p.m. of the succeeding day no detention charge is made. After expiration of the free time as described, the detention charges become operative and are assessed.

The B&O has no master lease with its shippers and all users of the Plan III service are advised of the charges by letter. New shippers are furnished copies of the charges upon request. The shippers may request protective service of their Plan III trailers and the charges therefor are published in a B&O tariff on file with the Commission.

The shipper in connection with Plan III service may have its trailers loaded and unloaded at a charge of $7.50 per ton pursuant to the provisions of a B&O tariff on file with the Commission. Under Plan III, pickup or delivery of trailers either at origin or destination is not provided by the railroad. Shippers must arrange that service on their own. When the loaded trailers are tendered, the B&O may load the trailers on separate flatcars if that meets their operating convenience. Usually, however, the two trailers are loaded on the same flatcar. Plan III trailers tendered by shippers on separate calendar days will not be accepted.

At the present time the B&O does not lease containers or flatcars used in Plan IV service. This equipment is obtained by the shippers from independent leasing companies. The shippers perform their own loading and unloading on and off the flatcars and drayage of the trailers at origin or destination. Protective service for containers or trailers moving on Plan IV service is furnished by the Fruit Growers Express Company which bills the B&O for such service and in turn the shipper is billed for the charge.

Plan V was inaugurated in September 1962 and its operations have been very limited. In connection with Plan V operations, trailers are furnished by the railroad to its connecting motor carrier which pays a per diem of $5.00 per day during the time such trailers are on the line of the connecting motor carrier. Interchange with the connecting motor carrier is presently effected at the B&O's TOFC facility at Philadelphia and the railroad is responsible for the destination delivery of the trailer to the consignee.

The New York, New Haven and Hartford Railroad Company - The New Haven participates in various TOFC plans. In 1937 Plan I was instituted which involves the substitution of rail-for-motor over a portion or all of the line-haul transportation for which the motor carrier has assumed obligation. Plan I service on the New Haven is provided under motor common carrier tariffs through a substituted service arrangement. Under these tariffs, the shipper is given the right to elect all highway transportation if he desires. The participating motor carriers solicit the traffic for movement in their own trailers. The rail compensation is based upon an agreed division of the motor carriers published charges. The New Haven has no direct contact with the shipper or receiver and has no knowledge of the nature of the freight handled. The only requirements made of motor common carriers for their use of the New Haven service is that they be properly certified by this Commission and that they be financially responsible carriers. The New Haven has never refused to accept trailers of any qualified motor common carrier for movement in its Plan I service.

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Plan II service on the New Haven is an all inclusive type of piggyback service whereby the railroad performs the complete transaction from the actual shipping point to the final delivery at the consignees premises. The freight is loaded on railroad owned or leased trailers at the shipper's dock and the trailers are then moved over the city streets or ramps located at the rail termini which serve the particular terminal area. At this point the trailers are loaded on and secured to railroad owned or leased flatcars which are moved in line-haul service to the ramp location which serves the destination terminal area. At destination, the trailers are unloaded from the flatcars and transported over the city streets to consignee's dock for final delivery. This Plan II service represents a coordination of rail and highway transportation performed under the direction, control, and responsibility of the rail carriers. This service was originally established in 1955.

Plan III service offered by the New Haven is operationally similar to Plan I with the shipper tendering his trailer or trailers, loaded or empty, at the rail terminal ready for placement on the car, and taking delivery at the destination terminal when the trailers are grounded by the carrier. Plan III service was established on the New Haven in 1958 and since that time has expanded to substantially every major point east of the Mississippi providing better than a 400 mile line-haul.

Chicago, Burlington & Quincy Railroad Company - The CB&Q has two rail subsidiaries, The Colorado and Southern Railway Company and the Fort Worth and Denver Railway Company. The practices so far as TOFC service is concerned of these two companies are similar to, although not necessarily identical with, those of the CB&Q railroad.

The CB&Q has complete Plan I arrangements with its subsidiary motor carrier, Burlington Truck Lines, Inc., between points reached by the motor carrier. Where the rail service is used by Burlington Truck Lines under Plan I, the CB&Q is compensated on a trailer-mile basis. The CB&Q does not have Plan I arrangements with other truck lines, however, it has several such arrangements in connection with the movement of motor vehicles. Those arrangements are now inactive. Plan II is offered by the CB&Q as a complete service and where the railroad is a terminal carrier the drayage and the handling of the carriers on and off of the flatcars is done by the Burlington Truck Lines at points where they operate. At other points drayage companies have been contacted to perform this service. Drayage companies used by the CB&Q are compensated on an hourly basis whereas Burlington Truck Lines receive flat amounts for handling loaded trailers on and off the flatcars. The CB&Q participates in a number of Plan III rates but not on a widespread basis.

Plan IV service is offered between Chicago and Pacific Coast points, also between official territory and Southwestern territory.

Plan V arrangements have been limited to motor vehicles and those arrangements now are generally inactive.

Chicago and North Western Railway Company - The North Western offers Plan I service in connection with more than 50 motor common carriers and in most cases the railroad is a party to the motor carriers tariffs for the purpose of substituted service. Rules, divisions and regulations governing the movement of trailers or containers in this substituted service are contained in a division sheet. No terminal or over the road services are performed by the North Western under this plan.

Plan II is offered to shippers wherein the complete service is handled by the North Western including pickup and delivery, as well as ramping and deramping.

Plan III service is offered between Chicago, on the one hand, and on the other, Minneapolis-St. Paul and Milwaukee. Under this service the North Western loads and unloads the trailers to and from the flatcar but no road service is performed. The shipper or his agent is required to deliver trailers to a point adjacent to the railroad ramp and consignees or their agents accept the trailers at a point adjacent to the destination ramp.

Under Plan IV the North Western upon request of the shipper or consignee, will load or unload trailers off or on the flatcar at the expense of the shipper or consignee. These charges are published in a North Western tariff filed with the Commission. No road service is performed by the North Western under this plan.

The North Western participates in Plan V with the Kenosha Auto Transport Corporation and a railroad subsidiary truck line.

Chicago, Rock Island and Pacific Railroad Company - The Rock Island has made all five TOFC plans available and where motor carriers are concerned it has limited their participation to only regulated common carriers. In its Plan I operations there are 75 certified motor common carriers participating in the joint operations. In connection with each motor carrier participating in Plan I the Rock Island has verified their operating authority and has determined that any circuity existing is well within the zone of reasonableness. Plans II, III and IV are made available on the Rock Island and in each case they follow the more normal method of operation. Plan II is a full scale operation controlled and directed by the railroad with railroad equipment. Plans III and IV involve only ramp-

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rail service and the rates are not subject to substituted motor carrier service. Joint rail-motor and motor-rail rates have been established under Plan V TOFC with a number of motor carriers serving the Middlewest.

Illinois Central Railroad Company - The first piggyback service with respect to trailer loads was inaugurated on the IC in October 1955. Under this service the railroad performs door-to-door service moving its own trailers loaded with shippers freight on freight cars under all rail rates. This Plan II service has seen a constant growth and now ranks first among the TOFC plans on the IC. Pickup and delivery service under Plan II is performed by contract truckers at points within the switching limits or the commercial zones of the cities served but not beyond the commercial zones. Plan I was inaugurated in May 1959 in which the railroad performs a ramp-to-ramp service and the motor carrier is responsible for placing the trailers on the flatcars at the origin ramp and removing them at the destination ramp. This traffic moves under motor carrier bill of lading at motor carrier rates published in their own tariffs. The railroad becomes a participating carrier in those rates through the medium of a substituted service tariff. The IC receives a division of the motor carrier rate for its portion of the joint transportation set forth in written agreements between the motor carrier and the railroad. In the event the motor carriers decide that the railroad perform the service of placing the trailers on or remove them from the flatcar, a separate charge is assessed by agreement. There is no indication that this agreement is published in any tariff. The IC makes it a practice of checking the operating rights of a motor carrier in order to be assured that it has proper authority to serve the designated points, however, it has never been the practice to attempt any determination of the circuity involved between such points. The IC has Plan I arrangements in effect with some 45 motor common carriers and has never denied this service to any regulated motor common carrier having the proper operating rights. It does not provide Plan I service to contract carriers or to for-hire carriers not subject to economic regulation.

In August 1960 Plan III service was inaugurated which involves the line-haul transportation of trailers loaded or empty of freight forwarders or shippers, between ramps of the railroad at rates based on a flat tariff charge. The Plan III service includes the placing of the trailer on the flatcar at origin and the removal at destination but does not include pickup or delivery service.

The IC has participated to some degree in Plan IV TOFC service where the shipper or freight forwarder furnishes the trailer and flatcar for transportation by the railroad at a flat tariff charge. In this service the railroad receives the trailers loaded on the car from the shipper and at destination delivery is accomplished in the same manner.

Plan V TOFC service was inaugurated in July 1962. So far these arrangements have been very limited, however, the railroad has arranged with a number of motor carriers to publish joint through rates.

Missouri Pacific Railroad Company - The Missouri Pacific offers Plan I to motor common carriers between most of the ramp points on its railroad. The shipments move in motor carrier trailers on motor carrier billing and the charges accruing to the Missouri Pacific are based on a division sheet entered into between the railroad and the motor carrier. This division sheet is uniform with all carriers operating between the same two ramp points. The charge is based on the weight loaded in the trailer and is not related to the commodity. The Missouri Pacific has offered Plan I service to all motor common carriers with certificated rights which parallel those of the railroad. The only terminal service provided by the railroad is the loading and unloading of the trailers on and off of the flat car and the tie down.

The Missouri Pacific is a party to and participates in all rail Plan II TOFC tariffs published by various rail publishing agents. The trailers are furnished by the railroad and the commodities are transported under all rail billing. A subsidiary, Missouri Pacific Truck Lines, Inc. as agent, provides pickup and delivery of trailers within the terminal of the cities served. Over the highway substitute service from and to the ramp points served by Missouri Pacific is also performed by the subsidiary motor carrier to the extent that it is authorized.

Plan III is offered and participated in by the Missouri Pacific by publishing rates on freight, all kinds. This railroad does not participate in any Plan III rates on single commodities. This plan is available to all shippers and receivers and the railroad provides loading, unloading of the trailer on and off the freight car, and tie down service. No over-the-road service is performed. No trailers are trip leased by the railroad nor will it terminate trip leases on its line or participate in a movement which involves trip leasing. Because of this policy of not trip leasing trailers, Plan III traffic has been extremely limited on this railroad.

The only Plan IV service in which the Missouri Pacific participates regularly is a movement between St. Louis and the west coast. No terminal or highway services are performed by the railroad.

This carrier conducts Plan V operations by means of participating in certain motor carrier rates. Participation in the rates published in the tariffs of the motor carrier bureaus is limited to a joint haul in connection with the participating motor carrier. The freight moves at the motor carrier rates

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as published in their tariffs and the Missouri Pacific is a party to the bill of lading contract and appears on the through billing. The revenues are divided between Missouri Pacific and the participating motor carriers on the basis of agreed divisions which are negotiated individually with each motor carrier. Under Plan V, Missouri Pacific provides through its subsidiary, Missouri Pacific Truck Lines, Inc., as agent, pickup and delivery service within terminal areas of the cities served as described in the applicable tariffs.

St. Louis - San Francisco Railway Company - The Frisco participates in all five TOFC plans. Its participation in Plan I is limited to the handling of trailers of its wholly owned motor carrier subsidiary, Frisco Transportation Company. The traffic moves under motor carrier tariffs and billing and the railroad acts only as a substitute carrier for all or part of the line-haul. The Frisco receives a division of the motor carrier rates as compensation for its service.

Plan II provides a complete origin-destination service. The Frisco furnished the equipment and provides pickup and delivery service. Plan II service is also provided in connection with other rail carriers. Where joint through service is maintained the revenue is divided among the carriers.

Under Plan III the Frisco handles the shippers trailers from a location adjacent to a loading ramp at origin to a similar location at destination at a rate or charge published in a rail tariff. Such rates are published on freight, all kinds, and on specific commodities. The shipper must furnish the trailer and provide for service to and from the rail ramps. The railroad loads and unloads the trailers on and from the flatcars. The Frisco does not handle trailers tendered by motor common or motor contract carriers under Plan III rates. It does handle freight forwarders and private shippers trailers under this plan and where joint through service is provided with other railroads the joint through revenue is divided.

In Plan IV the shipper furnishes both the flatcar and trailer and the railroad performs nothing but line-haul service. This type of traffic is handled for freight forwarders and other shippers but not for motor carriers. Just as in Plans II and III joint through revenue with other rail lines is divided. The Frisco is a party to tariffs with a number of motor common carriers providing Plan V TOFC service. This is a joint rail-motor or motor-rail-motor service in which the rail portion utilizes TOFC service. The tariffs covering this service provide a joint through or origin-destination service in which the participating carriers furnish the equipment and provide the service for a stated rate. Tariffs providing this service on general commodities have only recently become effective on the Frisco. The joint through revenue

accruing under this plan is divided among the participating carrier.

Terminal service is only provided under Plan II. When tariffs provide for such service it is performed by local draymen under contract and in some instances the railroads motor carrier subsidiary is used for that purpose. The Frisco provides no over-the-road motor service. That service is left entirely to certificated motor common carriers. It has been the practice of the Frisco to select motor common carriers to perform a joint service that are fully authorized and responsible. The Frisco does not participate in coordinated or substituted service with exempt carriers.

Southern Pacific Company - The Southern Pacific was one of the pioneer railroads to offer Plan II TOFC in the western part of the country. Their service in this regard dates from 1953 and has grown steadily ever since. Under Plan II the Southern Pacific offers a complete service from origin to destination. It has instituted expedited train schedules coupled with a motor pickup and delivery service to and from the rail ramp performed by its highway motor subsidiaries, Pacific Motor Trucking Company in the territory west of El Paso, Texas and Southern Pacific Transport Company in Texas and Louisiana. The service has been expanded to cover a broad group of commodities including not only the usual run of boxed, crated, sacked or packaged articles, but also heavy machinery, bulk liquids in tank trucks, automobiles, fresh meats, frozen foods, and articles of unusual size or length.

Plan I TOFC service is offered to motor common carriers between principal ramp points on the Southern Pacific at a uniform charge between the same points. Only motor carriers with appropriate over-the-road operating authority and otherwise fully responsible are permitted to participate in the plan. Southern Pacific operates regularly scheduled piggyback trains between Los Angeles and Portland; between Los Angeles and San Francisco-Oakland; between Oakland and Portland, and these piggyback trains transport not only Southern Pacific all rail TOFC traffic but are available and are used by motor common carriers with whom joint rail-motor divisional arrangements have been made.

While Plan III is offered by the Southern Pacific its use at the present time is not extensive and is confined principally to movements between Texas points and St. Louis-East St. Louis.

The greater participation in Plan IV by the Southern Pacific is in the transcontinental rate recently considered by the Commission in Docket No. 32543, All Freight from Chicago to Los Angeles and San Francisco, embraced in Eastern Central case, 314 I.C.C. 5.

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Southern Pacific participates in coordinated motor-rail and rail-water tariffs on traffic between, from or to Pacific coast states. Many of the rates apply between Southern Pacific and Pacific Motor Trucking Company, thus providing joint rates for through motor-rail routes maintained by the two companies. In this manner Plan V offers a rail truck service to and from points on Pacific Motor Trucking Company's routes in off-rail territory. Many, if not most, of those points were once branch line rail points on Southern Pacific and are now served by the truck service which replaced the branch line tracks. In addition, the Southern Pacific has Plan V arrangements in southwestern territory in which Southern Pacific lines in Texas and Louisiana participate.

Union Pacific Railroad Company - This carrier participates in TOFC Plans I through V as presently described by the Commission.

Plan I is limited to the substituted rail for highway services provided for the Kenosha Automobile Transport Corporation between Kenosha, Wisconsin and specified stations in Colorado and California. The commodities are restricted to automobiles and automobile parts and the railroad has received no request to extend service on these commodities to any other motor carriers. The railroad receives a flat fee per carload for this substituted service.

Union Pacific provides Plan II service on commodities generally at most all of its stations. The rates published generally compare with those of motor common carriers between the same points. The rates include free pickup and delivery, refrigeration and heating service, stopping in transit to complete loading or partially unload, and distribution service (split delivery). Ramps are provided at 47 stations, and substituted highway service is provided between ramp stations and the origin or destination points. The Union Pacific Motor Freight Company, a wholly owned subsidiary, is the principal motor carrier or terminal draymen, however, other motor carriers are used on occasion. These carriers are reimbursed on a per hundredweight basis.

There is no actual movement under Plan III but rates are in effect and would permit the movement of household goods between Chicago and Denver. The carrier also has published rates on automobiles from specified origins on and east of the Missouri river, to destinations in Colorado, Wyoming, Idaho and Utah.

Plan IV service is very limited on the Union Pacific, however rates are published both west bound and east bound between Chicago and various points in California, Nevada, Oregon and Washington. These rates apply on freight, all kinds, in trailers and/or containers on flatcars and trailers and/or containers empty on flatcars.

Plan V service is also very limited and is presently applicable on automobiles from points in California to points in Utah and Washington.

II. MOTOR

Local and Short Haul Carriers National Conference - The conference is one of twelve conferences of the American Trucking Association, Inc.. Its membership is made up of local and short haul motor carriers from all sections of the United States. Many members are local motor carriers operating wholly within the commercial zones as established by the Commission and have no published rates for their services. The short haul carrier in most cases hold operating authority from the Commission and charge published rates approved by the Commission for their services. Some of the members conduct both local and short haul operations as referred to above. Local carriers perform the following services in connection with the various piggyback plans:

Plan I - Hauling certificated long haul motor common carriers' trailers between the terminals of such motor carriers and the railroads piggyback ramps and between ramps and shippers or receivers place of business. The charges for this service are usually based on an hourly rate and are paid by the certificated motor carrier.

Plan II - Hauling rail owned trailers between ramp and shippers or receivers place of business within the rail terminal area. Charges are paid by the railroad on either an hourly or tonnage rate.

Plan III - Hauling either shipper's or receiver's trailers from the rail ramps to the shippers or receivers place of business within the various metropolitan commercial zones. Charges are on an hourly or tonnage basis paid by either the shipper or the receiver.

Plan IV - Hauling shipper or freight forwarder trailers from and to ramps and loading trailers on and off shipper or freight forwarder rail cars. Charges are paid by the freight forwarder on an hourly or tonnage basis.

Plan V - Local haul between ramp and motor carriers terminal.

Short haul certificated motor carrier members also participate in all five plans as follows:

Plan I - Identical to the local haul carriers.

Plan II - Substituted motor for rail service hourly, tonnage, or mileage charge paid by the railroad.

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Plan III - Hauling shipper or receivers on trailer between railroad terminals and shippers or receivers place of business beyond the commercial zone limits on motor carrier billing. Charges are paid by shipper at published tariff rates.

Plan IV - Identical with the Plan III service except that the motor carrier loads and unloads the flatcar. The carrier also serves freight forwarders either at published tariff rates or on a contract rate under Section 409 of the Act.

Plan V - Hauling of either railroad owned or motor carrier owned trailers between rail terminals and the shippers or receivers place of business beyond the metropolitan commercial zones. This service is performed on a joint tariff agreed upon by the railroad and the motor carriers involved giving the shipper or receiver a through rate with lading moving on a single through rate billing.

Best Way of Indiana, Inc. - This motor common carrier participates to some extent in Plans I, III and V TOFC service. The participation is both as joint line service and substituted service insofar as the substituted service is concerned this carrier has direct underlying operating rights. Plan I is arranged between the railroads and the carrier and are predicated on a division sheet concurred in by this motor carrier and publishing rail carrier.

In the case of Plan III traffic Best Way transports such traffic under rates published in its own individual tariff. The rates are restricted as proportional rates in connection with rail carrier applicable only at certain interchange points. This motor carrier does not act at any time as an agent of the shipper.

Plan V traffic is transported in connection with one rail carrier under joint through rates published by the Western Central Motor Carriers Association, and also the rail carriers individual tariff in which the motor carrier has been granted a concurrence. Negotiations are being conducted with two rail carriers for the performance of Plan V service and Best Way has been refused joint concurrence by certain rail carriers as to Plan V service.

Consolidated Freightway Corporation of Delaware, Missouri Consolidated Freightways Corporation, and New York Consolidated Freightways Corporation - These motor common carriers will be referred to as Consolidated Freightways. These carriers have utilized both Plans I and V TOFC service of various railroads for more than six years, however, little traffic has moved under Plan V arrangements. At the present time it has Plan I arrangements with twenty-one railroads and substituted service tariff provisions are published effective between

approximately 320 pairs of points. All points involved are ones which Consolidated Freightways holds authority to secure as a regular route common carrier. Where Plan I arrangements are in effect reimbursement to any railroad is based on a division of the revenue according to Consolidated Freightways. Under such arrangements there is no particular uniformity regarding loading, tie down, and unloading trailers to and from the flatcars. Some railroads perform this service and the charge is made a part of the overall charge according to the railroad. In other instances the railroads perform this service at a flat charge in addition to the charge assessed for the movement of the trailer between the points involved. In still other instances the railroads do not perform this service at all leaving it up to the motor carrier to provide the service or as is the usual practice arrange for a third party to perform the service. When a third party is involved in loading, tie down, and unloading, said party may be acting either on behalf of the motor carrier or the rail carrier. In some instances a fourth party is engaged to perform the unloading at destination. At no time under any Plan I arrangement does Consolidated Freightway act as a shipper in its relationship with any railroad.

Delta Motor Line, Inc. - This is a motor common carrier operating over regular routes and it has entered into arrangements with two rail carriers to utilize Plan I TOFC service. Under these arrangements the rail carriers transport loaded or empty trailers owned or operated by Delta on rail flatcars. Loading and unloading of the trailers onto and off the flatcar is performed by the railroads. The rail revenues are specific per trailer charges agreed to by both Delta and the railroads.

Tariff provisions authorizing Delta to substitute rail service for its highway service are published in Substituted Freight Service Directories issued by its publishing agents. Participation in said directories is required of both Delta and the rail carriers. By virtue of this publication, Delta is authorized, unless otherwise directed by the shipper, to utilize rail transportation. The service to the shipper is motor carrier service on motor carrier billing issued by Delta and charges are arrived at by use of applicable rates published for Delta in the substituted freight service directory. The rail carriers participate in Delta tariffs to the extent that they provide substituted service but they do not participate jointly in the Delta tariffs, there being a recognized distinction between substituted service arrangements and joint line service arrangements.

Razor Express, Inc. - This is a regular and irregular route common carrier of general commodities. It utilizes Plan I TOFC service with nine railroads. This motor line has authority to serve all points involved in the use of Plan I substituted service.

[fol. 1595]

Gordons Transports, Inc. - This is a motor common carrier of general commodities and it participates in both Plans I and V. It holds authority to operate over a direct route between the points where rail service is substituted. The degree of circuity between authorized all motor route and either the short line highway route or the rail route used is less than 3 percent. This carrier does not act as shipper or agent of a shipper in its relationship with the rail carrier. The revenue paid by the motor carrier to the railroads under its Plan I operations is a contractural arrangement agreed upon by the parties and is not published in a tariff.

Hires Trucking Co., Inc., - This motor common carrier participates in joint line Plan V TOFC service. It does not hold any motor carrier operating rights between the points where the rails perform their service. It has no tariff arrangements or agreements with the railroads and the rates applicable for the transportation of TOFC freight from Danville, Ill. to Chicago are filed by the freight forwarders or freight consolidators with whom the carrier has contracts. This carrier at no time acts as either a shipper or agent of a shipper. The trailers or containers move consistently on through rates. The trailers are furnished by car loading firms. These trailers are loaded with miscellaneous freight and after unloading, the trailer is dropped at the shippers loading dock. Upon completion of loading, Hires is notified and the trailer is dispatched to Chicago for delivery to the freight forwarder or freight consolidator.

Houff Transfer, Inc. - This is a motor common carrier having a substantial participation in Plan I TOFC service. The service is confined to movements between Charleston, West Va. and Staunton, Va., and to some degree shipments are made between Chicago and Baltimore and Philadelphia. This motor carrier originates the traffic and delivers it to the rail loading ramps accepting the trailers at the destination and of the rail haul and makes delivery of freight in loaded trailers to either the consignee or connecting carrier. Receipt for the delivered freight is taken on Houff's freight bill. The motor carrier collects the transportation charges and i does not disclose the identity of either the shipper or the consignee. The railroad bills the motor carrier for the transportation of each trailer whether loaded or empty in accordance with its own established rates. The rail charge for empty trailers is one half the amount charged for loaded trailers. Houff Transfer never acts as a shipper or agent of a shipper in connection with any shipments moved in Plan I TOFC service.

McLean Trucking Company and Hayes Freight Lines, Inc.- McLean and its wholly owned subsidiary Hayes Freight Lines, Inc. are motor common carriers which are utilizing Plan I TOFC service in various tariffs on file with the Interstate Commerce Commission. The railroads are paid fixed amounts as agreed between the rail carriers and the motor carriers and such charges are published in division sheets issued by the rail carriers. These motor carriers do not act as shippers nor as agents for

a shipper. Plan I service has been used for the most part by these motor carriers to supplement their line-haul operations where a serious inbalance of traffic was involved rather than as a substitute therefor.

Transamerican Freight Lines, Inc. - Substituted service operations, Plan I TOFC, of this motor carrier are conducted with the Pennsylvania Railroad between Cleveland, Ohio and Pittsburgh, Pa. on the one hand, Kearny, New Jersey and Philadelphia, Pa. on the other. The trailers used are exclusively operated by the motor carrier. The traffic involved is moved between points that Transamerican is authorized to serve. The Plan I serves a bridge operation covering in most instances only a portion of the distance between the points involved and in all instances the shipments are originated and delivered by Transamerican in motor carrier service. In its use of this Plan I service with the Pennsylvania Railroad, Transamerican has the exclusive use of a complete train. The rates charged the shipper are motor carrier rates applicable to the traffic involved. The operation involves little if any circuity since the motor carrier routes of Transamerican are generally the same or less in mileage than the distance covered when shipments move over the rail route. Plan I is the only TOFC arrangement in which Transamerican has participated.

III. WATER

Sea-Land Service, Inc. - Sea-Land is a common carrier by water authorized to transport general commodities between the principal Atlantic and Gulf ports, and between such points on the one hand, and on the other, the principal Pacific Coast ports. Sea-Land operates in coast-wide trade three specially designed vessels, each capable of carrying 226 loaded 35-foot trailer vans. It also operates three similar vessels in Puerto Rican trade and our jumbo-type trailer ships in intercoastal trade. These trailer boxed are loaded to and from the shipper by means of ship mounted cranes. While ashore, Sea-Land's trailers ride on chassis designed for and owned by Sea-Land. With this equipment Sea-Land offers, at through single-factor joint rates, coordinated truck-water-truck service to and from internal points as well as port terminal areas. Sea-Land also participates in a substituted service arrangement whereby both loaded and empty trailers are handled for Sea-Land, between Jacksonville and Miami by the Florida East Coast Railroad. The railroad performs only line-haul flatcar transportation between ramps. In connection with this service Sea-Land has obtained fourth section relief from this Commission.

APPENDIX V

List of cases wherein it is specifically stated that the conclusions therein are without prejudice to the adoption of any different findings or conclusions which may be indicated as a result of the findings or conclusions which may be made in Ex Parte No. 230.

Docket No.	Title
I & S 7764	Iron and Steel Articles Between Atlanta, Ga., and St. Louis, Mo. (decided August 17, 1962--318 I.C.C. 80)
I & S 7269	Motor Vehicles - Kansas City to Ark., La. & Tex. (decided September 21, 1962,--318 I.C.C. 301)
MC-C-3024	National Automobile Transporters Association Petition for Declaratory Order (decided October 15, 1962--91 M.C.C. 395)
I & S M-15074	Substituted Rail Service Between Jackson, Miss., and New Orleans, La. (decided December 27, 1962)
MC-66900 (Sub-No. 24)	Houff Transfer, Incorporated, Extension - Staunton (decided April 3, 1963)
34113	Foodstuffs, Macon, Ga. to Florida, Indiana, Kentucky, Ohio (Report and recommended order served April 30, 1963)

[fol. 1598] Service Date (omitted in printing)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

NOTICE OF ORAL ARGUMENT—November 8, 1963

The above-entitled proceeding is assigned for oral argument limited to the issues listed below on December 10, 1963, at 10:00 o'clock a.m., United States Standard Time, at the Office of the Interstate Commerce Commission, Washington, D. C., before the Commission.

The rules circulated at the prehearing conference held in this proceeding reflected the concept of equal charges for the same service for all using TOFC service. All such rules were predicated upon this basic idea and were designed to promote and foster coordinated TOFC service throughout the Nation by all concerned.

The examiners' report in the proceeding rejects this concept for reasons set forth therein. Also, certain of the rules are the subject of strong opposition which fails to recognize the objective underlying the rules as a whole. Examination of the exceptions to the examiners' report and the replies thereto discloses the need for further development of the basic concept embraced in those rules to determine whether it is desirable or possible of implementation. [fol. 1599] The issues upon which the Commission desires to hear oral argument are:

Whether, and under what circumstances or requirements, TOFC service provided under an "open tariff" can and should be made available to everyone (including freight forwarders, express companies, and common and contract motor and water carriers, exempt or regulated).

Specific issues and operational areas related to and inherent in this total problem are:

(a) Whether the use of such service by a regulated motor or water carrier should be limited to a reasonable relationship to its authorized routes and gateways (circuity provision);

(b) Whether the use of such service should be restricted against intercity shipments in connection with which the regulated motor or water carrier performs only terminal area service;

(c) Whether the use of such service by a regulated motor or water carrier should be permitted at other than authorized common points of service;

(d) Whether a regulated motor or water carrier should be permitted to use the above-described service to serve points beyond the scope of its operating authority;

[fol. 1600] (e) Whether all ramp-to-ramp TOFC service should be provided at the same published rate or charge, with all rates and charges for any other service published separately.

Parties to this proceeding desiring to participate in the oral argument must request an allotment of time at least ten days before the assigned date. (Rule 98, paragraph b, of the General Rules of Practice.) Such request should be directed to the Secretary.

By the Commission,

Harold D. McCoy, Secretary.

[fol. 1601]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

In the Matter of

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

Hearing Room B,
Interstate Commerce Commission,
Washington, D. C.

Transcript of Oral Argument—December 10 and 11, 1963 (Excerpt)

[fol. 1602] Commissioner Webb: Mr. Carpenter, if your argument respecting tariff publication requirements were accepted, could a motor carrier use a so-called open tariff published on your suggested basis?

Mr. Carpenter: Mr. Sigmon yesterday stated the policy of the American Trucking Association with respect to that. I feel it incumbent upon me to state that the regular common carrier conference which I speak for also is of the view that the motor carrier cannot use an open tariff.

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[fol. 1603]

REPORT AND ORDER OF THE COMMISSION

(See opposite) ☞

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS

(PIGGYBACK SERVICE)

Decided March 16, 1964

Upon notice of proposed rulemaking, rules and regulations governing the practices of for-hire carriers of property, operating in interstate or foreign commerce and providing or participating in trailer-on-flatcar service, prescribed.

A table of contents to this report is contained in appendix V.

Harry C. Ames, S. S. Eisen, James L. Givan, George H. Leonard, F. N. Melius, Jr., Giles Morrow, Theo. R. Schneider, Leonard Stelzer, D. Robert Thomas, and *Martin Whitten* for various freight forwarders and freight forwarder associations.

Peter T. Beardsley, Albert F. Beasley, James L. Beatty, Walter N. Bieneman, W. H. Borghesani, Jr., Ferdinand Born, Robert E. Born, R. Edwin Brady, Le Grand A. Carlston, Homer S. Carpenter, Eldon R. Clawson, James I. Collier, W. Wilson Corroum, Ray M. Cream, Paul M. Daniell, Francis P. Desmond, George S. Dixon, Robert C. Dryden, J. P. Edell, Howell Ellis, Marion M. Emery, W. B. Ewers, John S. Fessenden, F. H. Floyd, F. G. Freund, Robert Gawley, Harry L. Grubbs, Marvin Handler, James E. Haydon, Richard A. Heilprin, Harold G. Hemly, Thomas J. Houser, Earl Hummer, Harry J. Jordan, S. Harrison Kahn, Joseph E. Keller, James K. Knudson, Houston Lynch, Jr., Carney D. Matheson, Herman Matthei, Francis W. McInerny, George D. Michalson, M. Bruce Morgan, Glenn F. Morgan, Arlus G. Morris, Lloyd Ownbey, Jr., Guy H. Postell, Bryce Rea, Jr., G. M. Redman, Roland Rice, Floyd M. Roach, William R. Rubbert, Reagan Sayers, Richard R. Sigmon, Louis E. Smith, R. P. Sohan, Hugh M. Steinberger, Glenn W. Stephens, C. Austin Sutherland, Clarence D. Todd, Edward G. Villalon, William M. Watt, Harvey A. Welty, Gene F. West, James J. Williams, James E. Wilson, James W. Wrape, and *Chester A. Zyblut* for various motor carriers and motor carrier associations.

John W. Adams, Jr., Margaret P. Allen, Curtis H. Berg, Harry N. Babcock, John J. Burchell, James A. Bistline, R. G. Bleakney, Jr., Benson T. Buck, Charles W. Burkett, Jr., J. T. Clark, J. L. Connor, Richard E. Costello, Robert W. Cronon, John A. Daily, John C. Danielson, Robert S. Davis, William E. Davis, C. H. Dickman, Kemper A. Dobbins, John H. Doeringer, Robert H. Duesenberg, Paul R. Duke, J. H. Durkin, Urchie B. Ellis, J. D. Feeney, James A. Gillen, E. D. Grinnell, Jr., Rene J. Gunning, Carl P. Greeley, John W. Hanifin, L. W. Hobbs, Bryce Hamilton, Louis A. Harris, William P. Higgins, James W. Hoeland, Richard A. Hollander, Eugene E. Hunt, J. H. Jester, Edmund J. Kenivy, Jess Larson, Harry B. LaTourette, Roland J. Lehman, E. R. Leigh, George M. Mariner, C. E. Martin, Amos M. Mathews, John E. McCullough, W. D. McLean, Thormond A. Miller, William M. Moloney, P. G. Mullen, Robert F. Munsell, Walter J. Myskowski, James W. Nisbet, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Earnest Porter, Gregory S. Prince, C. C. Rettberg, Jr., Wade M. Richards, Albert B. Russ, Jr., John F. Smith, John MacDonald Smith, Robert H. Stahlheber, William A. Thie, Robert A. Thompson, L. E. Torinus, Walter G. Treanor, Ray M. Van Hook, Harold Vikoren, Archie T. Walters, Philip F. Welsh, Edward K. Wheeler, Robert J. Williams, D. N. Zirkle, and *Erle J. Zoll, Jr.*, for various railroads and railroad associations.

Paul J. Coughlin, John Mason, Andrew A. Normandeau, and *Hugh H. Shull, Jr.*, for water carriers.

Theo. F. Behler, Harry Bradt, John M. Cleary, Ronald N. Cobert, Paul Coyle, John F. Donelan, Lester J. Door, Samuel W. Earnshaw, Donald W. Fisher, Walter R. Frizzell, Benjamin G. Habberton, Dan F. Hart, John B. Hedges, Leonard A. Jaskiewicz, Jess Larson, John C. Lincoln, Dickson R. Loos, Sumner J. McCollester, Clarence M. Mulholland, Clarke Munn, Jr., A. E. Norrbom, James E. O'Boyle, F. S. Partridge, Warren Price, Jr., Frederick M. Porter, Philip H. Porter, Aloysius F. Power, Theo. R. Schneider, William R. Settgas, Louis R. Simpson, Charles W. Singer, Harold E. Spencer, James E. Steffarud, Warren H. Wagner, Charles A. Washer, M. W. Wells, John C. White, and *Sidney Zagri* for shippers or other interested parties.

John M. Agrey for Public Service Commission of North Dakota.

Harold C. Heublein for Public Service Commission of Wisconsin.

Charles W. Bucy, Carl R. Bullock, Joseph E. Quin, George A. Robertson, and *Clarence H. Williams* for Department of Agriculture.

John E. Faulk, R. M. Hartsock, and *Clement T. Mayo* for Department of Defense.

William R. Pierce for General Services Administration.

John H. Fallon, Harvey Gobetz, and *Asa J. Merrill* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

This proceeding, instituted on June 29, 1962, on our own motion under the authority of parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act, constitutes this Commission's first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service. The notice of proposed rulemaking made it known that we intended this investigation to be broad in scope, encompassing every aspect of TOFC operations, and that we intended to explore new approaches to piggyback service. Among the matters specifically mentioned in the notice as a subject for consideration was:

> The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] rail rates and service in their operations.

It was also made clear that we intended to reexamine existing precedents and practices, and that consideration would be given to the adoption of rules and regulations which might be found necessary to regulate coordinated and substituted service transportation in the public interest.

The order instituting this proceeding named as respondents all railroads, motor carriers, and water carriers of property, freight forwarders, and express companies operating in interstate commerce, and authorized and directed our Bureau of Inquiry and Compliance to participate. It also assigned the matter for a prehearing conference, which was held October 9, 1962, and at which proposed rules, reproduced as appendix II hereto, were distributed. Oral hearings have not been held, but representations, verified statements, and reply statements have been received from numerous interested parties. The proceeding was assigned to two hearing examiners who recommended adoption of the regulations contained in appendix III hereto. Exceptions to the

examiners' recommended order and replies thereto have been filed by the parties listed in appendix I, and we have heard oral argument. Two issues, the practices of for-hire motor carriers of automobiles and the practices of for-hire water carriers providing "fishyback" service, were severed from the remainder of the proceeding by order of November 12, 1963, for oral hearing and separate handling.

The southern railroads have included in their exceptions motions to strike certain portions of the verified statements filed by the Bureau of Inquiry and Compliance and certain other parties. They argue that the Bureau has overstepped its authorization, contained in the order instituting this proceeding, to participate in this proceeding "for the purpose of developing the evidence and the issues," and that the other matter objected to is irrelevant or incompetent as evidence. Also pending is a motion filed by the same carriers on April 2, 1963, for cross-examination of the Director of the Bureau of Inquiry and Compliance. The southern railroads have obviously misunderstood the position of the Bureau in this proceeding. It is a party like any other, and it was free to introduce any evidence it saw fit. The Director of the Bureau did not sponsor a verified statement, and has appeared in this proceeding only as counsel. There is no more reason to subject him to cross-examination than any other attorney appearing in a solely representative capacity. The other verified statements objected to should, in our opinion, remain in the record. The motions will be denied.

TRAILER-ON-FLATCAR OPERATIONS

If the subsequent discussion is to be understandable, a word must be said at the outset about the nomenclature of TOFC services. The varieties of services available are commonly referred to in terms of five numbered plans. These designations have attained general use in the transportation industry, and for the sake of convenience we are using them in this report. They will be discussed in greater detail later, but the following capsule definitions were contained in the appendix to the order instituting this proceeding:

PLAN I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

PLAN II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

PLAN III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

PLAN IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

PLAN V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

The development and effect of TOFC service.—Transportation of loaded highway trailers on railroad flatcars is not a new development, although its growth has been explosive in the past 5 years. Nearly 40 years ago the Chicago, North Shore and Milwaukee Railroad Company pioneered a "ferry truck" service that was essentailly similar to today's plan II piggybacking by the railroads. Pressed by increasing independent motor carrier competition, the North Shore in May 1926 inaugurated a new service for merchandise traffic between Chicago and Milwaukee; using carrier-owned 16-foot trailers and specially constructed flatcars, it would provide a door-to-door delivery of less-than-carload freight in trailer units requiring no transfer of lading en route from shipper to consignee. This was a complete railroad service at rail rates on rail bills of lading. At the outset this service was performed at the same rates and charges previously applicable to the various classes of merchandise transported, but in February 1928 this rate structure was modified and a flat all-merchandise rate, subject to a minimum weight and excepting livestock and perishables, was published.

The prototypes of today's plan I and plan III TOFC service were developed on an experimental basis by several other railroads in the early 1930's. In these years the railroads were competing

with aggressive, rapidly expanding, if unorganized, independent motortruck operators who were not subject to route or rate regulation and who were able to provide extremely flexible pickup, delivery, and accessorial services. TOFC service at this early date was designed to induce trucking companies to ship their vehicles by rail instead of operating them over the highways. Private shippers were free to use this service, but there is no indication that they did so in any substantial volume at this stage of TOFC development. The rail rates that were charged for this service reflected substantially the average direct line-haul expense of operating a truck over the shortest available highway routes between the points served.

By tariff schedules filed to become effective in March 1936, the Chicago Great Western Railway Company offered to transport highway trailers between Chicago and St. Paul at a flat charge of $42.50 per loaded trailer, with a maximum lading of 20,000 pounds per trailer and a minimum charge of $85 if fewer than two trailers were tendered for shipment in a single day. This was an "open-tariff service" intended to attract traffic from all highway carriers, including for-hire motor carriers as well as private shippers operating their own trucks, and from freight forwarders. This service was substantially different from existing less-than-carload transportation because it did not include pickup, delivery, loading, or unloading, and it was essentially a ramp-to-ramp operation. When part II of the Interstate Commerce Act became effective in 1935, thus making for-hire interstate motor carrier operations subject to route and rate regulation, new tariff arrangements were proposed to provide for joint rates between the Great Western and the participating motor common carriers. The new schedules named motor-rail-motor rates between certain authorized "grandfather" service points of the motor carriers which were located beyond the Chicago and St. Paul ramp points. The railroad would act only as an intermediate or "bridge" carrier; the motor carrier would originate and deliver the traffic. The railroad would receive as its division of revenue substantially the same per-trailer amount previously published in the open tariff. These joint rates were allowed to become effective.

The New York, New Haven and Hartford Railroad Company instituted TOFC operations in 1937, offering an open-tariff service to private shippers and motor contract carriers, and a "substituted service" to motor common carriers. These TOFC

services were used almost exclusively by motor common carriers under the latter arrangement, which was essentially the same as present-day plan I service. In 1953 approximately 50,000 trailers were transported by the New Haven in this type of service.

The experience, however, of most railroads in TOFC operations was very limited until 1954, the year in which this Commission gave approval to a number of practices that were then slowly developing. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, the so-called *New Haven* case. Almost immediately a number of railroads inaugurated or expanded their plan I and plan II TOFC operations. The Pennsylvania Railroad Company, for example, began its plan II type of service in 1954 and it handled approximately 15,000 trailers in plan II during the last 6 months of that year. Its estimated total for plan II in 1962 was 55,000 trailers. In 1955, the Pennsylvania transported about 17,000 trailers in plan I service, and that amount has grown to an estimated 80,000 trailers in 1962. Its first full year of plan III was 1959 when 10,500 trailers were handled. By 1961 that total had grown to 43,000 trailers, and its estimate for 1962 was 65,000 trailers.

The Louisville and Nashville Railroad Company started its plan II service in 1955, and handled 193 trailers for total revenue of $33,790. In 1962 these totals for plan II operations had increased to 6,712 trailers and $1.3 million in revenue. In 1960 it handled 46 trailers in plan I service for a revenue of $3,468. In 1961 these totals for plan I had increased to 1,771 trailers and $150,388 in revenue. Plan III was inaugurated in 1960 when 181 trailers were moved for $24,271 revenue. In 2 years its plan III totals increased to 8,618 trailers and approximately $1 million revenue.

There can be little doubt that piggybacking has been a decisive factor in returning to the railroads a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire. The growth of plan I has meant a direct growth in railroad participation in motor common carrier highway traffic. For example, Consolidated Freightways, a motor common carrier, has plan I arrangements with 23 railroads providing for service between 340 pairs of points. During 1961 it paid approximately $1 million to these railroads for their plan I TOFC services. In the first 10 months of 1962, Consolidated Freightways moved 7,878 trailers in plan I operations, and paid more than $1.8 million to the railroads for their piggyback services, nearly doubling the 1961 payment.

The growth of plan III and plan IV TOFC service has also meant diversion of highway traffic both from the for-hire motor carrier industry and from individual companies either engaging in private carriage or planning to do so. The Eastman Kodak Company markets a large volume of miscellaneous chemicals as packaged freight from Rochester, N. Y., through seven sales divisions throughout the country. It began use of plan III from Rochester to its midwestern division at Chicago in 1959; to its South Dakota division and to Chamblee, Ga., in 1960; and then as a return movement from a Midland, Mich., supply point to Rochester in 1960. During 1961 its traffic between these cities totaled 24.5 millon pounds in plan III, and its 1962 tonnage was expected to reach 40 million pounds. Before its use of plan III, all of this traffic was shipped by motor common carrier. Its Chicago plant, for example, which accounts for the largest share, is an off-track facility. Rail service to this branch house previously was impractical because it involved local cartage and transfer of lading, but plan III rail service has turned out to be practical and efficient.

A few years ago the Monsanto Chemical Company had completed an exhaustive survey of private carriage for its St. Louis plants, and it was on the verge of going heavily into private motor carrier operations. Its projected motor operating costs were expected to be 35 cents a trailer-mile. One eastern railroad offered its plan III service at 50 cents a flatcar-mile, or 25 cents per trailer-mile. Consequently Monsanto turned to plan III, and it has since been shipping approximately 50 million pounds of package freight annually in plan III from its three St. Louis plants to its eastern territory between Philadelphia and Boston. About 15 years ago all of this package freight went by rail. Starting at that time there was a gradual shift to motor carriage and ultimately motor common carriers handled essentially all the traffic. This trend was reversed decisively with Monsanto's use of plan III which now has become the primary method of movement of this traffic.

At the present time the available statistical data on TOFC operations and services throughout the Nation is not sufficiently refined or reliable to demonstrate authoritatively the precise extent to which railroad successes with piggybacking have meant actual diversions of traffic from competitive modes of transport. But the examples of Consolidated Freightways, Monsanto, and Eastman Kodak are typical of many others around the Nation, and

the railroads generally are enthusiastically attempting to duplicate experiences like these. In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963 there were 100 class I roads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings, for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 loaded TOFC cars, a weekly rate of approximately 12,700 loadings.

It is apparent, however, that substantial investments have been made by the railroads and others in TOFC equipment. The New York Central has invested a total of almost $30 million, not including its investment in Flexi-van[1] terminals. The Seaboard Air Line Railroad Company has invested $1,147,000 in 55 ramps; The Chesapeake and Ohio Railway Company shows $2,800,000 invested in TOFC equipment and ramps; The Atchison, Topeka and Santa Fe Railway Company shows $2.1 million invested in piggyback facilities at Chicago, Los Angeles, and Oakland; The Baltimore and Ohio Railroad Company shows $2.6 million invested in TOFC trailers and freight cars, $670,000 in ramps, and $186,559 in cranes; the Pacific Fruit Express Company has $6,579,600 invested in TOFC equipment and in addition its leased equipment represents an investment of $2.8 million. It has placed orders for 200 additional 40-foot refrigerated trailers at a cost of $2,470,000 making a total investment of approximately $12 million.

This record does not show how extensively commercial shippers have invested in TOFC equipment but the investment of freight forwarders is set forth. As of January 1, 1963, the freight forwarders, represented in this proceeding, had an investment amounting to $10.5 million in trailers, tractors, and freight cars. They also have annual obligations in long-term leases on freight cars and trailers amounting to $1.6 million.

The five piggyback plans.– Plan I TOFC service involves the movement by railroad of loaded trailers or similar containers of motor carriers, with the contents thereof moving on one bill of lading issued by the trucker. This substituted rail service is

[1] "Flexi-van" is a specialized type of TOFC equipment, developed primarily by the New York Central, and used by only a few railroads. Its principal characteristics are a trailer with a demountable body and a specially built, light-weight rail car which is designed to carry only Flexi-van trailers and which may be side-loaded without the use of the normal circus-type ramp.

available only between points where there is actually available service by the motor carrier which substitutes rail for motor service. The traffic moves on rates which are the same as the trucker applies on its all-highway service. The motor carriers solicit the traffic for movement in their own trailers, which, in the absence of the shipper's forbidding the use of substituted rail service, is tendered to the railroad for line-haul transportation. The trailer is brought to the railroad ramp by the motor carrier where it is placed onto the flatcar. The trailer is sealed and the railroad has no knowledge of the traffic being transported, except for the total weight of lading in each trailer. The railroad's compensation in such a move is based upon a division of the charges arrived at through negotiations between the two carriers. This division of charges is published as a division sheet but is not customarily made available to the shipping public nor is it filed with the Commission. At destination the trailers are unloaded from the flatcars and delivered over-the-road to destination by the motor carrier. So long as the motor common carrier meets the financial responsibility and route authority requirements, the participating railroads are generally willing to share plan I arrangements with any such motor carrier.

As previously noted, the *New Haven* case provided the framework of legal principles that has governed the renewed growth and interest in piggyback operations which began in 1953. There the Commission defined the relationships of motor carriers, railroads, and shippers involved in these trailer-on-flatcar services. For several years following the *New Haven* decision there were few controversies within the industry about the scope of plan I TOFC services permissible under the various operating authorities of the motor carriers. More recently, however, with the vastly accelerated utilization of TOFC services, the whole concept of plan I TOFC has anew been brought into question, both on the point of its essential legality under the controlling statutes and on the point of its economic desirability under regulation. At the same time there have arisen a number of related questions concerning the authority of motor carriers to engage in plan I piggyback in specific circumstances, such as the following: whether motor carriers may interchange plan I piggyback traffic at the point of origin of the traffic, with the railroad performing the entire line-haul movement; whether a motor carrier needs specific operating authority to provide service *to* or *from* the ramp points at which it will interchange plan I traffic with the railroad

performing the piggyback operation; whether the relative circuity of the authorized service route of a motor carrier should be considered as a factor in allowing that motor carrier to use railroad TOFC service between such points; and whether motor contract carriers may participate in plan I TOFC to the same extent as motor common carriers.

Under plan II, the railroad holds out to provide a complete door-to-door service under a single bill of lading. Neither the shipper nor the consignee intervenes in any way in the overall transportation activities or does anything beyond tendering the shipment to the railroad at origin or at the shipper's loading dock. The railroad assumes full responsibility in the following respects: providing the shipper with a trailer; moving the trailer to, and placing it at, the shipper's door for pickup; loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the rail TOFC ramp, furnishing a tractor and driver; supplying the rail flatcar; placing and securing the trailer onto the flatcar; providing the line-haul transportation from origin ramp to destination ramp; unloading the trailer from the flatcar at destination; moving the loaded trailer from the destination ramp to consignee's store door, again furnishing a tractor and driver; unloading the freight from the trailer; and finally removing the empty trailer.

The published rate which includes all of the above-mentioned services to be performed by the railroad generally applies (*a*) to a specific commodity or a group of specific commodities; (*b*) in straight or mixed carloads without mixture limitations; (*c*) in a single trailer; and (*d*) subject to a rate per 100 pounds and a minimum rate tailored to the specific commodity involved.

Under plan III, the railroad furnishes only a transportation service between its TOFC ramps. The only additional service the railroad performs in accordance with its tariff is placing and securing the trailers onto the flatcars at the origin ramp and the unloading of the trailers from the flatcars at the destination ramp. This service is offered to private shippers and freight forwarders. The shipper using plan III must assume the full responsibility for the following: supplying its own trailer either by ownership or through a lease arrangement; moving or arranging to move the trailer to the shipper's dock for loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the railroad TOFC ramp, which means that the shipper must arrange for the furnishing of a tractor and driver; arranging

for the issuance of an appropriate bill of lading from the railroad origin ramp to the railroad destination ramp; receiving the loaded trailer at the destination ramp; furnishing or arranging for the furnishing of the physical facilities for removing the trailer from the destination TOFC ramp to the consignee's store door; unloading the freight from the trailer; and finally returning the trailer, where leased, to the lessor.

Under plan III the published rate generally applies (*a*) to freight, all kinds; (*b*) in mixed carloads; (c) subject to specific mixing rules and regulations; (*d*) in two-trailer lots; and (*e*) further subject to a maximum load of 70,000 pounds at the flat charge per carload and irrespective of the mixture of freight involved.

Trip leasing of trailers from the railroads or their subsidiary leasing companies has become commonplace with many shippers and freight forwarders. At the present time the tariffs offering plan III service do not include, in most instances, the leasing charges, a statement of the amount of free time allowed for loading or unloading, detention charges, or protective service charges.

Plan IV is comparable to plan III except that the shipper has the additional responsibility of furnishing the railroad flatcar, including the loading and unloading of the trailers onto and off the flatcar.

Plan V involves through motor-rail or motor-rail-motor services at joint rates applicable only over the through route or routes. Either mode may originate or deliver a plan V shipment, and the traffic will move on either a rail or motor bill of lading depending upon which carrier originates the shipment. In particular contrast to plan I operations, there need not be available to the shipper an alternative all-highway motor carrier service between the points where the plan V joint rate is applicable. Plan V coordination therefore is used either (1) where the rail and motor carriers serve different areas and are combining their services to perform a new service between origin and destination; or (2) where they are performing service over parallel routings and are in effect, at least, substituting one mode of transportation for the other for a portion of the line-haul.

Equipment leasing practices.— Many forms of leasing arrangements have burgeoned forth in the past few years as part of the accelerated growth of plans III and IV TOFC service. As seen, these plans contemplate use of trailers or flatcar-trailer combinations owned or provided by shippers, rather than the railroads. Although some shippers own such equipment, most do not; more-

over, those who do find it difficult or impossible to balance their traffic so as to secure maximum economic use of equipment in TOFC service. Consequently, as TOFC service has grown there has arisen the practice of trip leasing trailers and flatcars by individual shippers wishing to take advantage of the available, minimal-service, ramp-to-ramp rail rates, and of the fact that their responsibility for the trailer ceases at the end of a one-way trip, thus eliminating the cost of deadheading an empty vehicle back home.

But it is not only the shippers who depend on leased equipment. Most of the class I railroads participating in TOFC supplement use of their own flatcars by leasing specially designed piggyback cars from car companies, such as Trailer Train Company, North American Car Corporation, or General American Transportation Co. In 1959 railroads themselves owned two-thirds of the 6,835 railroad flatcars equipped for use in piggyback service. By June 1963 this figure had dropped to less than 40 percent of the total of 16,708 TOFC flatcars then in use. In its first full year of TOFC operations, 1955, the Baltimore & Ohio operated a total of 75 piggyback flatcars. At the end of 1962 it has assigned approximately 450 flatcars to piggyback operations, about 175 of which were leased from the Trailer Train Company.

Some railroads lease or sublease their TOFC flatcars to freight forwarders and private shippers. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for example, leased a Flexi-van rail car and two trailers to an association of shippers in Seattle on an experimental basis for 6 months in 1959. The association thereafter used the railroad's plan IV service between Seattle and Chicago with such satisfactory results that it has itself directly purchased, or leased from manufacturers, a total of 5 Flexi-van rail cars and 10 trailers. The Milwaukee also occasionally leases TOFC flatcars to freight forwarders, on a round trip lease basis, when the forwarders need to supplement their own equipment during peak periods of traffic.

The Pacific Fruit Express Company is a carline company, owned jointly by the Union Pacific Railroad Company and the Southern Pacific Company, supplying a fleet of refrigerator cars to certain railroads for movement of perishables. As of September 30, 1962, it owned 421 40-foot refrigerated trailers and 50 85-foot flatcars for use in TOFC operations. It also was operating an additional 200 85-foot flatcars under lease, and as previously mentioned, it had ordered 200 more refrigerated

trailers. This equipment was designed for transportation of either perishable or dry commodities, and was acquired in contemplation of its being trip leased to shippers and freight forwarders on westbound shipments of dry freight as a return movement for perishable traffic eastbound by piggyback from west coast origins.

The Pennsylvania Railroad does not directly own the trailers that it uses in its plan II operations, or that it makes available to its shippers for plan III service. A wholly owned subsidiary corporation, Excelsior Truck Leasing Company, Inc., supplies all such automotive equipment in a flexible leasing arrangement. Trailers to be used in plan II TOFC service are leased to the railroad on a long-term basis in which pools of trailers are made available at strategic plan II terminals. Because inbound plan II traffic to certain terminals substantially exceeded the outbound traffic and in order to make trailers available to individual plan III shippers, the original arrangement was modified in 1958 so that "surplus" trailers at plan II terminals would be returned to the control of Excelsior. In turn, Excelsior would make these trailers available to plan III patrons for one-way trip leases on a first come, first served basis. In these situations ordinarily the trip-lease forms are executed by employees of the railroad acting as agents for Excelsior. The railroad in turn is given a credit against its monthly leasing expense for the shipper rentals from Excelsior.

These trailers are trip leased to individual shippers only on condition that they be used for specific plan III TOFC shipments either to destinations on the Pennsylvania or to destinations on certain other railroads which have agreed with it to specific interline arrangements. As far as home-line destinations are concerned, an effort is made to limit plan III trip rentals to destinations where trailers are needed by the Pennsylvania for plan II loadings.

The written lease agreement between Excelsior and an individual shipper does not specify the per-shipment charge, the free detention time, or the schedule of charges applicable at the end of the free time. These charges and practices are ordinarily explained to a shipper on its first inquiry, and are thereafter followed as a part of a general understanding governing subsequent shipments.

Excelsior charges a flat rental of $20 for conventional trailers for plan III shipments to destinations local to the Pennsylvania, and a graduated scale of rentals to destinations on certain foreign

lines. For example, a shipment to Atlanta from a Pennsylvania Railroad origin point would mean a trailer rental charge of approximately $30. At the foreign line destination, the trip lease would terminate when the responsible shipper or consignee returned the empty trailer to the Atlanta rail ramp. With termination of the trip lease, responsibility for the trailer would revert to the Pennsylvania, as between it and Excelsior, and the terminating railroad in turn would be responsible to it for a per diem rental of the trailer. The terminating railroad, accordingly, would be free to use the trailer in any arrangment it wished, paying the Pennsylvania the agreed per diem rate.

The Louisville & Nashville operates a fleet of about 775 trailers in its plan II and plan III piggyback operations. Of the number about 350 are leased on an 8-year term from REA Leasing Corporation, and another 200 are available in pools assigned by REALCO to the L & N at principal points of use. It leases 24 refrigerated trailers from the Fruit Growers Express. L & N also uses foreign line trailers which are unloaded on its line, provided that there is a specific understanding with the other railroad regarding use of the trailers for new loadings. L & N instituted plan III service in June 1960, and began its practice of trip leasing trailers to individual shippers in February 1961. It attributes to the development of trip leasing a great increase in its plan III traffic volume.

In practice, a shipper desiring to use L & N trailers in plan III service approaches the road's traffic department or one of its freight agents with a request to lease two trailers. A trip lease is prepared when the trailers are picked up at the rail ramp either by the shipper with his own tractor or with that of a local cartage company employed by him. The L & N does not use any affiliated trucking companies to perform this operation, but it will recommend independent local operators to any shipper.

The L & N has been charging a minimum $20 rental for plan III shipments to destinations local to its lines, with either a first morning or second morning delivery. The time and date of start and termination of the trip lease are shown on the lease form. The lease itself does not specify the detention privileges and limitations, but they are verbally described to shippers. When a shipper picks up the trailers prior to 10 a.m. he must return the loaded trailers to the L & N ramp prior to 6 p.m. the same day or else be subject to a $9 per day charge for ordinary trailers or $12 per day for refrigerated trailers. At the destination

point the shipper is allowed free detention also until 6 p.m. on the date of delivery, at which time the daily detention charges begin to run. An individual shipper wishing to transport its own trailers in L & N's plan III service is free to do so, but then is faced with the necessity of either paying for an empty return shipment of his trailers or acquiring a return load of owned commodities.

One practice engaged in by the L & N provides an interesting example of how a TOFC movement can change in midcourse from one plan to another. At East St. Louis the L & N receives some piggyback traffic — usually fresh meats and packinghouse products — which has originated in *plan II* service on the lines of western trunkline railroads. At East St. Louis, the trailers come under the control of the L & N which becomes responsible to the connecting western railroad for per diem charges for the foreign trailers, trip leases the foreign trailers to the shipper, and moves the trailers in *plan III* service generally to Atlanta or to Florida destinations.

Perhaps the ultimate in advantages to be gained from short-term equipment leasing is to be found in the "return" trip lease. The ordinary trailer trip lease involves a railroad, railroad affiliate, or independent company renting a vehicle to a shipper for a one-way movement. It has already been pointed out that this arrangement carries with it the understanding that the shipper's responsibility for the vehicle terminates at the destination point so that it need not bear the cost of an unproductive empty return movement. Under the return trip-lease arrangement, however, the railroad provides transportation under a published plan III TOFC rate of a loaded *shipper-owned* trailer at the published rate from a given origin to destination; then leases the trailer from the shipper after it has been unloaded at destination; and then assumes responsibility for the return of the trailer to the shipper at the origin point. The railroad, of course, is free to use the empty trailer which it has leased for any legitimate purpose, but in normal practice it does not do so, simply returning it empty to the shipper. The shipper, then, has in effect had his trailer shipped back to him at something better than no cost at all, for he has also received from the railroad some nominal sum as "lessor." Although this provision of free transportation does not seem to be widespread, it does occur in connection with certain types of TOFC operations.

Accessorial services.—A fundamental concept of plan III service and plan III pricing is that a shipper receives only basic ramp-to-ramp rail transportation and must provide for himself all other required facilities and services. Many railroads, however, supply a labor force to load or unload plan III trailers, either at no cost to the shipper or at a negotiated price. Some TOFC tariffs provide for the railroad's performance of such accessorial services, but others do not. As pertinent here, the Elkins Act (49 U.S.C. 41) requires regulated common carriers to file and publish all rates and charges and strictly to observe them until changed according to law. It accordingly is unlawful for any person to give or receive any rebate or concession as a result of which any property — by any device whatever — will be transported at a lesser rate or will provide any other special advantage than that named in the published tariff.

During 1961 criminal proceedings were instituted under the Elkins Act against a number of railroads performing questionable loading services. Essentially, in each case the defendant railroad was performing the loading of freight for particular shippers into those shippers' trailers, with the apparent understanding that these trailers were to be shipped under plan III-type tariff arrangements. The applicable plan III tariffs provided that the loading of freight into and the unloading of freight from the trailers had to be performed by the shipper, consignee, or their agents, at the shipper's expense. In fact, the railroads were performing the loading or unloading functions, purportedly as the agents for the shippers. The railroads' tariffs did not provide for performance of the loading or unloading functions or the agency relationship.

In December 1961, the Baltimore and Ohio Railroad and the Erie-Lackawanna Railroad Company were each fined $1,000 on pleas of *nolo contendere* to criminal informations alleging that they loaded trailers for plan III shippers in circumstances such as those just described. However, in a similar, stipulated factual situation the Pennsylvania Railroad Company, on June 8, 1962, was found not guilty of the Elkins Act violations charged. Subsequently, similar criminal charges against the Santa Fe and the Burlington railroads were dismissed at the request of the United States attorney. The extent to which a railroad may contract privately with a TOFC shipper for these and similar services incidental to TOFC transportation has thus remained unsettled.

Billing and assessment of charges.—Although all-rail TOFC services held out by the railroads throughout the country have been formed into relatively standardized tariff descriptions, there is evidence of considerable confusion and disagreement within the transportation industry as to the precise application of tariff rules, as well as evidence that published charges are not always collected. For example, as the applicable plan III rate is often based on a weight factor, it would seem that the participating railroad would assume responsibility for ascertaining the weights of the shipments tendered, either by actual weighing or through some system of certification by the shippers. In fact the class I railroads in the western district have devised procedures for certification of weights of TOFC loadings, as part of their long established bureau system of weighing and inspection. But it has become clear in this proceeding that a number of major railroads participating in TOFC operations have not been determining TOFC shipment weights by any reasonably reliable method or procedure, and therefore cannot know whether proper charges are being assessed.

Many plan III tariffs provide a rate applicable to the total weight of two trailers moving from one shipper to one consignee on one day on one bill of lading. This rule is often loosely applied, with the result that it has no consistent meaning which can be relied upon as a certainty by all potential shippers. In some instances the railroads will consider that the "tender" of two trailers in a given 24-hour period by a plan III shipper satisfies the tariff requirement. In any event it is a frequent practice for the railroads to dispatch loaded plan III trailers whenever received at the rail ramp, with the result that trailers which are paired for billing and rate purposes as single-day shipments actually are shipped on separate days for arrival at destination on different days. We have also been informed of the practice in certain types of TOFC movements (particularly in those where there has been a conversion from plan II to plan III en route from original consignor to ultimate consignee) for the railroad which is taking up the plan III segment of the shipment to neglect to issue a receipt or bill of lading until the day or so after it has forwarded the shipment. This type of delayed issuance of a required shipping document may constitute a violation of section 20(11) of the act, and can open the door to improper preferences to favored shippers, in violation of the Elkins Act.

A similar, perplexing problem for shippers and carriers has been interpretation of the "mixture" tariff rule applicable to plan III transportation of "all-commodity" traffic. Ordinarily this type of rule will provide that not more than 60 percent of the weight of a total, two-trailer shipment may consist of any one commodity or article. One frequent variation of this tariff rule provides the alternative test; not more than 60 percent of the total shipment or not more than 60 percent of 70,000 pounds. The carriers do not seem to be applying any consistent approach in determining whether commodities being shipped are the "same" commodity or article. In general, neither commodity classifications nor other published listings are used to determine whether the articles included in a single shipment are sufficiently dissimilar to constitute different commodities for the purposes of mixture rules. This state of affairs leaves a railroad free to haul straight truckloads of high-rated commodities at hidden bargain rates should it choose to do so for a favored shipper.

Bearing in mind the historical development of piggyback transportation and its present-day problems—as well as its appealing advantages—we shall now proceed to an examination of the issues raised directly by the instant investigation.

THE PROPOSED RULES

At the prehearing conference held in this proceeding on October 9, 1962, a series of proposed rules, reproduced as appendix II hereto, was distributed. As noted at that time, they were designed to serve as a framework upon which rules ultimately to be adopted, if any, could be developed. The proposed rules represented something of a new approach to TOFC terminology as they attempted to separate TOFC service, without regard to the five numbered plans now in common use, into two more basic classes: "joint intermodal" TOFC service which would include any piggyback service performed jointly by a rail carrier and a motor or water common carrier; and "all-rail" TOFC service which would include any piggyback service in which traffic moves exclusively at rail rates and on rail billing.

The proposed rules were predicated upon the basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers. The proposed rules B-4, B-5, C-1, and C-2 in

particular were designed to implement this concept. Other impor tant aspects of the proposed rules included a requirement that rail carrier providing all-rail TOFC service make specifi provision in its tariffs for all incidental and accessorial service offered by it in connection therewith (rules C-1 and C-2); a pro hibition against the publication of joint intermodal TOFC tarif covering commodities the transportation of which is not subje to economic regulation for their entire movement (rules B-2 ar C-7); a requirement that rail carriers providing joint intermod TOFC service ascertain whether their connecting motor or wate carriers hold appropriate operating authority (rule B-5); a require ment that where joint intermodal service is provided, the distanc over an intermodal route used by a railroad and a motor carrie be not less than 90 percent of the distance over the authorize motor carrier route from origin to destination (rule B-3); a pro vision permitting joint intermodal TOFC service for the enti line-haul movement (rule B-7); and a prohibition against th leasing, directly or indirectly, by railroads or persons und common control with railroads of highway trucks, trailers, semitrailers and rail cars to and from shippers or freig forwarders (rule C-3).

Section D of the proposed rules contained certain billing a notification requirements. These would have included a requir ment that TOFC service be provided only when the movement w covered by a bill of lading and manifest with appropriate certific tion of weights and contents of trailers (rules D-1 and D-2); regulation providing that two trailers would have to be tendered the same day in order to qualify for a rate covering the tran portation of multiple vehicles (rule D-3); and a rule which effect permitted rail carriers to restrict the application of a commodity rates to shipments containing no more than a designat percentage of a single commodity (rule D-5).

THE EXAMINERS' RECOMMENDATIONS

The examiners, in their report and recommended order, f a general need for the promulgation of rules and regulatio which would have the effect of fostering the orderly develop of TOFC service. The rules which they recommend be adop are set forth in appendix III to this report. The examiners rec nize the same general divisions of TOFC service into its "jo intermodal" and "all-rail" aspects as do the proposed rules,

they find the plan-number terminology useful and retain it. Plans I and V are defined specifically, and are grouped together as "joint intermodal" service.

The examiners recommend that railroads performing all-rail TOFC service be required to publish in their tariffs all the rates, charges, and rules connected with such service, including charges for leasing of equipment, detention of trailers, accessorial services, and pickup and delivery service if any such services are offered. The ban on leasing of equipment by rail carriers and their subsidiaries to or from shippers contained in the rules as originally proposed would not be retained by the examiners. They would, however, require that all charges for the leasing and return of equipment be included in the rail carrier's tariff publications. Also recommended for adoption were a number of rules consisting largely of modifications of and improvements on those originally proposed, all of which will be discussed later in more detail.

Exceptions to the examiners' recommended order and replies to these exceptions have been filed by representative groups or associations of, or by individual, rail, motor, and water carriers, freight forwarders, and shippers, and by our Bureau of Inquiry and Compliance. In large part, the positions taken by the parties in their exceptions, or in replying to the exceptions of others, reflect those expressed in their representations and considered at length by the examiners. Like the examiners' recommendations, their arguments can best be discussed in relation to the specific topics treated below.

THE NEED FOR TOFC REGULATIONS

If there is one predominant theme that has run through the vast majority of the many representations and pleadings filed in this proceeding, and stressed by those participating in the oral argument, it is the desire for flexibility. Carriers and shippers alike agree that TOFC has already established itself as an extraordinarily significant and valuable innovation on the transportation scene and that it has an almost unlimited future ahead of it. Many of the parties have urged that we take no action here which might have the effect of restricting the growth of piggyback, of forcing it into any fixed mold, or of limiting in any way the inauguration and development by the transportation industry—and particularly the railroads—of new types of TOFC services and of new variations on or applications of present services.

There can be no doubt of the benefit which TOFC service has already rendered the railroads in allowing them to recapture traffic lost to competing modes of transportation, and especially to private motor carriage. Also benefiting have been the motor carriers, which have been provided with an opportunity, through the use of plan I TOFC service, to obtain efficient line-haul transportation and thus to help themselves even while their business helps their rail competitors; the freight forwarders, which have been afforded an economical means for transporting the small shipments which they consolidate; and—most important—the shippers and the general public which ultimately reap the benefits of the increased efficiency and economy that are invariably the result of the combination of competing forces so that each operates in the area where it functions best.

It is our purpose and our hope to encourage the growth of this transportation phenomenon. Large-scale piggyback has had a short history, but it is obviously no longer an infant. Perhaps we might characterize it as a fast-developing teenager, healthy but not without some growing pains. Looking back on some of our past decisions—decisions which must necessarily affect the future of TOFC service because they contain definitions or restrictions which could hamper its logical development—it is apparent that most of them were rendered during the infancy of this transportation prodigy, and some, like *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, might almost be said to have predated its birth. The fact that these decisions were handed down before anyone could have realized the important place TOFC service was destined to attain does not mean that they reached erroneous results, but it does mean that their pronouncements need to be reexamined in the light of modern developments.

The assembling of the information necessary for such a reevaluation was one of the principal reasons for our embarking on a general investigation of piggyback operations, and the factual material which has been introduced into this record, and which will be of great value to us in the future administration of the act, alone amply justifies this proceeding. The need for information relating to TOFC service will, of course, be a continuing one if we are to remain properly informed for the future, and to keep it flowing we have recently revised certain of our reporting requirements in docket No. 34364, *Piggyback Traffic Statistics*, to call for the quarterly reporting of TOFC traffic data by railroads, motor

and water carriers, freight forwarders, and the Railway Express Agency.

In addition to our desire to fill the gaps in our available knowledge about TOFC operations, there had arisen, shortly before this proceeding was begun, certain immediate and pressing problems which required solutions. For example, *National Auto. Transporters Assn.—Declaratory Order*, 91 M.C.C 395 (the *NATA* case), had presented anew the questions whether contract carriers should be allowed to use TOFC service—a question answered in the negative in the *New Haven* case, *supra;* whether interchange of TOFC traffic between rail and motor carriers should be allowed at other than common points of service—an issue which had been treated earlier in *Gilbert Carrier Corp. Extension—Kearny, N. J.*, 72 M.C.C. 204; and how the certificates, peculiar to carriers of motor vehicles, limiting service to initial or secondary movements should be interpreted vis-a-vis piggyback operations. *Gordons Transports, Inc.*, v. *Strickland Transp. Co.*, 318 I.C.C. 395, had raised again the problem, first considered in *Substituted Rail Service by Red Ball Transfer Co.*, 52 M.C.C. 75 and 303 I.C.C. 421, of the use by a circuitous motor carrier of a more direct rail TOFC service between authorized points. The propriety of the extensive practice of leasing trailers for use in TOFC service between rail carriers or their affiliates and shippers, and the apparent opportunities for rebates and discrimination afforded by this practice, had been called to our attention by our field employees. The need to deal consistently with the problems presented in each of these situations was instrumental in persuading us that a proceeding such as the instant one was necessary.

The information that we have received from the parties and the arguments which we have read and heard make it apparent that there are many differences of opinion as to the wisdom and the correct application of some of our past decisions. This proceeding affords the opportunity to explore the areas in which the differences exist. Also, there have been revealed some abuses in the performance of piggyback service. To cite a single example, it is clear that some railroads, in spite of the fact that their rates for transporting loaded trailers in TOFC service are based on maximum weights, make no attempt to ascertain the actual weight of the shipments tendered to them and are failing to collect their published charges.

We think that the record clearly supports the conclusion that it would be in the public interest to lay down, through formal rules,

certain guidelines for TOFC service and practices. We visualize these rules as an aid in furthering, not restricting, the growth of piggyback, as providing some standardization of industry practices, and as a means of insuring that this recent and valuable transportation development is made available to all persons who are able to make effective use of it. Some of the rules to be adopted here are simply interpretive, but we think it well to have summarized and assembled in convenient form the various requirements of the Interstate Commerce Act as they relate to piggyback operations. Other rules take the form of tariff and billing requirements. Still others may be said to implement the broad provisions of existing legislation. A few of the parties challenge the legality of our prescribing rules—particularly of the last-mentioned kind—but we think we have ample authority to take such action. Under parts II, III, and IV of the act, we are given a general rulemaking power by sections 204(a)(6), 304(a), and 403(a), respectively; and in section 12 we are "authorized and directed to execute and enforce" the provisions of part I. The Courts have recognized our rule-making authority. See, for example, *Assigned Car Cases*, 274 U.S. 564, 575 et seq. (1927), which arose under what is now part I of the act; *American Trucking Assns.* v. *United States*, 344 U.S. 298, 308-13 (1953), which arose under part II; and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945) in which the Supreme Court pointed out that the act, since its inception—

> has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system.

The proposed rules distributed to the parties at the prehearing conference contained several ideas which appeared to many to be both radical in approach and stultifying in net effect. Particularly criticized have been rule C-3 which would have flatly prohibited the leasing of trailers for use in TOFC service; rule B-4 which would have required that the charges received by a rail carrier under a division of revenues for performing part of a joint intermodal TOFC movement could be no greater than its compensation for performing all-rail service between the same points; and the statement in the material accompanying the draft of the proposed rules to the effect that they did not contemplate the use

of TOFC service by motor contract carriers. Proposed rules such as these were largely designed to draw as much comment as possible from various components of the transportation industry to the end that we might obtain as much assistance as possible from every faction in making our final determinations. The response has demonstrated that they have served this purpose well.

We cannot help but be aware that the development of TOFC transportation is not at a standstill, and that whatever we do here will not be the final and definitive word on all the ramifications of piggyback service. If any of the regulations to be adopted here should prove in practice to have the unwanted effect of in any way hampering the flexible development and free use of TOFC service, we feel sure that this fact will promptly be called to our attention by the affected carriers or shippers so that appropriate remedial steps can be taken.

DEFINITIONS

Part A of the proposed rules contains suggested definitions for three terms: "Trailer-on-flatcar (TOFC) service," "Joint intermodal TOFC service," and "All-rail TOFC service." The plan-number terminology is not used at all in the proposed rules, but it is immediately apparent to those accustomed to thinking of piggyback services in this way that "joint intermodal" TOFC service includes what has come to be called in the industry plans I and V, while all-rail TOFC service includes plans II, III, and IV and variations thereof. The examiners used the plan-number terminology throughout their report, and in their recommended rules they provided definitions for plans I and V.

We agree with the examiners, and with virtually all the parties, that the five numbered plans have become firmly ensconced in transportation language, and we are certain that the various TOFC services will continue to be referred to in such terms regardless of what we do here. At the same time, we think that the grouping of these different services into two major classifications—intermodal service, in which traffic moves pursuant to a negotiated agreement for the division of revenue between carriers of different modes, and all-rail, or open-tariff, TOFC service, in which only a rail rate is involved—represents a genuine and useful distinction. In the rules which we are adopting here, this distinction is retained, but we see it as one which simply exists as a necessary element of TOFC service, not as one which has to be, or should be, imposed by definition.

Moreover, we do not think it advisable to attempt a formal definition of plan I or plan V TOFC service. Again the distinction between them is a real one, and it is convenient to refer to the different types of intermodal service by these handy and well-recognized terms. We are, obviously, using them in this report. But while they represent a convenient form of shorthand, their use is not essential to the explication of TOFC regulations. One of the few parties commenting on the proposed definitions in its exceptions, the Southern Railway System, takes the position that the definitions contained in the examiners' recommended rules 2 through 5 are unnecessary and could lead to confusion. We are inclined to agree. The attempt specifically to define certain types of TOFC operations could well prove futile, as well as unnecessarily restrictive, in view of the industry's demonstrated capacity to develop new services and variations on old ones. The rules to be adopted, then, will contain a formal definition only of TOFC service itself.

TOFC service would have been defined in proposed rule A-1 as follows:

> "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

The examiners pointed out that the meaning of "return transportation" might be subject to more than one interpretation, and they recommended the following modification of the definition, in their rule 1:

> "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car.

On exceptions, the Western Railroads contend that this form of the definition might also create interpretive problems as it could be construed to include the transportation of new trucks and trailers shipped by a manufacturer and not actually being used in performing piggyback service. They propose an alternative form of the definition which, we believe, meets this objection and clearly and adequately defines TOFC service. We shall, therefore, adopt it, with minor modifications, as our rule 1:

1 *Definition of TOFC service.*– Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

Several of the parties object that the examiners' recommended rules as a whole, and particularly the definitions contained in rules 2, 3, and 4, fail to provide for the use of TOFC service by water carriers subject to part III of the act. There is now some use by such carriers of TOFC service in lieu of authorized water service between certain Florida ports. It was certainly not our intention in instituting this proceeding to preclude the continuance of such operations, and the rules to be adopted will make provision for the use by water carriers of piggyback service. Operations of this kind should not be confused with those in which water carriers transport their own or other carriers' or shippers' trailers or containers by water in so-called fishyback service. That portion of the instant proceeding involving the latter type of service has been separated from the other issues involved herein for individual treatment and oral hearing by order entered November 12, 1963.

OPEN-TARIFF TOFC SERVICE

Every TOFC service necessarily involves the participation of a railroad which performs certain line-haul transportation. This fact, so obvious that it may seem banal to draw attention to it, is of fundamental importance in any consideration of either the practical or legal aspects of piggyback operations. So too is the further proposition that because TOFC operations involve the rendering of a rail service, they also involve the earning of some compensation by a rail carrier and the provision, through some form of tariff publication, for transportation charges, at least a portion of which will ultimately be received by a rail carrier.

There are only two ways in which a rail carrier can provide for receiving compensation for its transportation services. It can through tariff publication establish charges, which must be just and reasonable, for a particular service to be rendered, or it can enter into joint-rate arrangements with other carriers and estab-

lish divisions, which must also be just and reasonable, of the charge established jointly for the through service. The proposed rules, in attempting to achieve the end that TOFC service be made available to all at equal charges, took an approach which would have required that the divisions received by a rail carrier providing joint intermodal service could not exceed any all-rail TOFC rate maintained by the rail carrier for like services. Proposed rule B-4 would provide:

> The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

Also, proposed rule B-5 would have required any rail carrier providing joint intermodal TOFC service with any motor or water carrier to do so indiscriminately with other such carriers. This rule reads as follows:

> Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

The hearing examiners rejected both these proposed rules,[2] and we think that they were correct in doing so. We do not believe that it would be practical to attempt to control by a rule of general applicability the level of compensation to be received under division agreements which are, by nature, private contracts negotiated by individual carriers. We are, nevertheless, still concerned with the concept of equal TOFC charges for all underlying the proposed rules. For this reason, in the notice setting this proceeding for oral argument, another approach was suggested, and the parties were asked to discuss "Whether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight for-

[2] They did, however, recommend adoption, in their rule 9, of the substance of the second portion of proposed rule B-5 requiring rail carriers to ascertain whether connecting motor carriers hold appropriate authority to join in TOFC service. This matter will be discussed subsequently.

warders, express companies, and common and contract motor and water carriers, exempt or regulated)."

It is the concern of the rail carriers that should motor carriers be given the opportunity to utilize TOFC service at the open-tariff rate for their line-haul movements, they will be in a position to divert traffic from all-rail TOFC service. Those supporting the extension of open-tariff TOFC service to other carriers point, on the other hand, to the obvious fact that whenever such service is used, whether by private shipper, freight forwarder, or competing carrier, the immediate result is revenue for the railroad. Why, they ask, should a railroad object to receiving additional business? The only concrete, practical answer to this query by any railroad party to this proceeding is that there may be situations in which a TOFC open-tariff rate between two given points is established, for competitive reasons, at a particularly low level, and that by using TOFC service between two such points a motor carrier could take advantage of the favorable rate in the performance of part of its line-haul transportation and thus provide service at points beyond those named in the TOFC tariff at a lower rate than, and thus to the ultimate detriment of, the railroad.

It is argued by some that the use of open-tariff TOFC service by carriers would be in contravention of the stated national transportation policy "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each * * *." The Western Railroads, for example, in their reply to exceptions argue that motor carriers would thus be able to "exploit" the railroads' "acknowledged inherent advantage as the nation's low-cost line-haul carrier of goods for great distances," and that this "inherent advantage would be submerged, to be used as a means by which motor carriers could establish their primacy in surface transportation." What they overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery. TOFC could even be said to be *trimodal*, because added to the two factors already mentioned is its ability to combine in a type of container service many small shipments—a

type of service which has become associated with the business of the freight forwarder.

It should not be forgotten in considering the arguments advanced here that all three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail. The railroad does this under its plan II TOFC tariff; the trucker does it under plan I, in which it is encouraged by the railroads (all railroads participating in this proceeding except the Southern Railway System favor continuation of plan I); and the freight forwarder does it through use of plans III and IV rail tariffs.

We think that the rail carriers' fear that the free use of open-tariff piggyback service by motor carriers would end in the elimination of the inherent advantage of rail transportation is misplaced. On the contrary, it seems obvious to us that the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination, and that encouragement of such coordination is in the public interest. We might also note that the presidential transportation message of 1962 asked that all carriers be assured the "right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to non-carrier shippers," so that the various carriers would be placed "in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques."

Those protesting against the legality of the use by a carrier of open-tariff TOFC service point to a line of our decisions in which we concluded that it was "repugnant to the act" for a person to act as both a carrier and a shipper which respect to the same service. That such was stated in a number of cases cannot be disputed, but it should also be noted that when this proceeding was instituted, one of its stated goals was the "reexamination of existing Commission precedents and pronouncements governing coordinated and substituted service transportation." It is argued, however, that this longstanding and consistent administrative interpretation of the act must be deemed to have received the effect of law and that we are precluded from changing it. Cited as supporting this general rule are *United*

States v. *Leslie Salt Co.*, 350 U.S. 383 (1956); *Helvering* v. *Winmill*, 305 U.S. 79 (1938); and *Atchison, T. & S. F. Ry. Co.* v. *United States*, 209 F. Supp. 35 (1962). Certainly, were we summarily to reject past Commission holdings and attempt somehow to penalize some individual party subject to our jurisdiction for engaging in a course of conduct in which he had followed those holdings, the principle enunciated in the cited cases would be applicable. We do not, however, understand the courts to have taken the inflexible position that an administrative agency, even if it has followed a consistent line for some time, cannot, when faced with new developments or an appreciably changed factual picture in the segment of the national life which it is charged with regulating, alter its past interpretation in a formal proceeding such as this where rules having future effect are to be issued. When cogent reasons and the public interest compel it, even a consistent and generally unchallenged administrative practice may be overturned. Compare *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933).

So far as we have been able to determine, the first time the Commission made the definite statement that a person could not act as both carrier and shipper as to the same service was in the 1939 decision in *Substituted Freight Service*, 232 I.C.C. 683. That proceeding arose soon after the beginning of Federal regulation of interstate motor carriage and was directed toward determining whether certain special permissions granted as a temporary measure to permit continuance of substituted service arrangements of a type prevalent prior to the effective date of part II of the act should be renewed. The special permissions allowed publication of tariff rules which in turn provided for the substitution of motor for rail, water for rail, and rail for water service. They did not require motor common carrier operating authority as a prerequisite for the substitution of motor service for rail or water service; they permitted substitution at the carrier's option, without giving the shipper a negative option; and they did not call for the identification of the parties participating in the substituted service or of the routes to be used therein. The Commission concluded that the special permissions should not be renewed, and in doing so made three specific findings: (1) that the service substituted for common carrier service is itself common carriage and cannot be performed by motor vehicle in the absence of appropriate motor common carrier authority, (2) that the substitution of one form of transportation for another

where the shipper otherwise directs would be a breach of the contract of carriage, and (3) that the routes over which substituted service is performed and the parties performing it must be fully set forth in lawfully filed tariffs. Certainly, we would not dispute any of these findings; in fact, we shall incorporate them in the rules to be adopted.

The statement that a person may not act as both carrier and shipper as to the same service appears first at page 688 of the report in *Substituted Freight Service, supra.* The Commission there noted that the substituted service practices of the eastern rail carriers differed from most others in that these railroads utilized "so-called contract carriers" in such service, and that they "argue that neither they nor such contract carriers are or should be required to act as common carriers by motor vehicle in their relation to the public." The report then states, without explanation or supporting precedent: "But they cannot act as common carriers by rail and shippers by motor vehicle as to identically the same service." Later, on page 690, in discussing an arrangement whereby Consolidated Freight Lines, Incorporated, substituted rail service for its authorized motor service between Minneapolis, Minn., and Terry, Mont., the Commission said:

> It appears that between these points it acts as a forwarder or shipper and assembles the traffic tendered by the individual shippers into carload lots, paying the railroad the carload rate between Minneapolis and Terry and assessing the individual shipper or consignee its less-than-truckload rate between primary origin and destination. But for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it appears that it actually has common-carrier rights between Minneapolis and Terry.

Considering the limited nature of the ultimate findings in *Substituted Freight Service, supra*—that is, that service substituted for common carriage must itself be common carriage and that the tariff publications allowed under the special permissions were legally insufficient—it is not clear to us why the underlying conclusion that a person may not be both shipper and carrier with respect to the same service was necessary to the determination of the case. A contrary result had previously been reached in 1936 in *Trucks on Flat Cars between Chicago and Twin Cities*, 216 I.C.C. 435. There the Chicago Great Western Railroad had

published, prior to the passage of part II of the act, an open-tariff TOFC rate which was primarily designed to attract the traffic of a motor common carrier, Keeshin Motor Express Company. The rate was approved, and the Commission commented, at page 444, "We have here a published tariff, and a motor carrier would have the same right to make shipments thereunder as any other member of the body politic." Later, when motor transportation was made subject to our regulation, thus making possible the filing of joint motor-rail rates, the Great Western and Keeshin joined in publishing such rates, which were approved in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245. The Great Western stated at that time that its intention was to withdraw the open-tariff rates previously approved, but the Commission in no way indicated that such a tariff could not be used as originally proposed; that is, by motor common carriers. Nor did it in *Substituted Freight Service, supra*, either specifically overrule or attempt to distinguish *Trucks on Flat Cars between Chicago and Twin Cities, supra*.

These considerations lead us to the conclusion that the Commission in *Substituted Freight Service*, in saying that a person could not be shipper and carrier as to the same service, did not intend to proscribe the kind of substituted service originally intended by the Great Western and Keeshin in which one common carrier service is substituted for another through the use of an open-tariff rate of the carrier performing the substituted service—provided that proper notice is given in the tariff publication of the carrier using the substituted service. What this language was directed at, as we understand it, was the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. Such a situation might occur were a carrier to tender a shipment to another carrier for transportation to a point it cannot serve or over a route it cannot use, or without providing in its tariffs for the substitution. Consistent with this interpretation is the fact that the report characterizes Consolidated's operation between Minneapolis and Terry as that of a *forwarder* or *shipper*. Presumably, had Consolidated, through an appropriate tariff publication of the kind described in *Substituted Freight Service*, held out its service as a *motor carrier*, through the use of substituted service, the arrangement would have received the same approval as did the original Great Western-Keeshin proposal.

We think that certain other language in the report in *Substituted Freight Service, supra,* also tends to support this conclusion. At page 688 it is said:

> In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act.

Again it should be noted that the emphasis is placed upon the proper publication and notice to the shipping public, and that there is no requirement that what is called a "joint service" can only be performed under joint rates and not pursuant to a properly published substitution arrangement using the open-tariff rates of the underlying carrier. Admittedly, certain of our decisions, including *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 139, 141, *Savage Application*, 265 I.C.C. 157, 167, and the *New Haven* case, *supra*, have followed a contrary interpretation of the *Substituted Freight Service* case. We are now of the opinion, however, that these decisions, although we do not doubt that when made they represented sound conclusions, are incorrect in the light of this record and current conditions. Two other decisions cited by those opposing the use of open-tariff TOFC service by motor carriers, *Greer Broker Application*, 23 M.C.C. 417, and *Stone's Exp. Inc., Common Carrier Application*, 32 M.C.C. 525, are consistent with our present interpretation of *Substituted Freight Service, supra.*

Another argument which is advanced by a number of the parties is that any intermodal operation in which transportation services are performed by two or more carriers will necessarily result in the creation of a *de facto* through route. Because we are without statutory power directly to require the establishment of through motor or motor-rail routes, this argument continues, we are also without power indirectly to require their establishment by compelling rail carriers to provide open-tariff TOFC service to other carriers. It is, of course, well established that what is a through route is a matter of fact, and that a through route may be found to exist in the absence of a joint rate or any other express arrangement between the carriers involved. *Den-*

ver & R. G. W. R. Co., v. *Union Pac. R. Co.*, 351 U.S. 321 (1956); *Thompson* v. *United States*, 343 U.S. 549 (1952); and *Hausman Steel Co.* v. *Seaboard Freight Lines, Inc.*, 32 M.C.C. 31, 37, and cases cited therein. However, to say that we would be requiring the establishment of through routes merely by finding that it is lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it. We find this argument to be without merit.

We can see no justification, either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariffs, it can substitute another's service for its own in this way. Of course, should the first carrier hold out to perform what may amount only to assembly and distribution services at points, and should it use the underlying transportation of the second carrier between points, which it cannot itself serve in a practicable manner, it would no doubt be found to be operating not as a carrier but as a freight forwarder as defined in section 402(a)(5) of the act. Where it does have the requisite authority, it may perform such service not as a forwarder but as a carrier because section 402(a)(5) defines a freight forwarder as any person performing forwarding services *other than as a carrier subject to parts I, II, or III of the act.* We are aware of no other legal impediment to the use of an open-tariff service by any carrier, whether common or contract, and whether or not subject to our regulatory jurisdiction.

Section 2 of the act requires rail carriers subject to part I to make "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" available to any person at a charge no greater and no less than that received from any other person. It might be argued, however, that service provided for a competitor could not be said to be performed "under substantially similar circumstances and conditions" as that provided for private shippers.

Whether two or more transportation services were performed "under substantially similar circumstances and conditions" would be a matter of fact to be determined in each individual case as it arose, but we see no reason why the fact that the user

of a service was another carrier rather than a private shipper would compel the conclusion that dissimilar circumstances and conditions were present. In *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 753 (1931) the Supreme Court, in upholding a finding of the Commission that transportation by railroads of private passenger cars owned by other railroads at other than published tariff rates was unlawful, refused to recognize any distinction between the transportation of cars owned by railroads and private shippers. The Court noted that all such cars are hauled between the same points, on the same line, in the same or like trains, and in the same manner. This is equally true of the transportation of loaded highway trailers in TOFC service. See also *Warehouse Co.* v. *United States*, 283 U.S. 501, 511-12 (1931).

Some rail carriers are apprehensive lest they be forced to offer TOFC service to possibly financially irresponsible motor carriers, thus running the risk that they would not be paid for their services or that they would be required to handle unsafe motor vehicles. Obviously, a railroad would be free to deal with a motor carrier wishing to use open-tariff TOFC service just as it deals with any private shipper. Thus, the rail carrier, through a tariff rule such as Rule 9 of the Uniform Freight Classification, can require that an insolvent or financially unreliable motor carrier prepay freight charges, or it can provide that shipments not be surrendered until such charges are paid. Also, it is clear that it would not be in the public interest to allow, much less to require, any carrier to utilize unsafe equipment. Rule 6(b), adopted subsequently in this report, will deal with this matter.

We conclude that when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers, in lieu of their all-highway operations in the performance of authorized transportation between authorized service points, or by for-hire carriers engaged in transportation which is exempt from economic regulation. To the extent that this conclusion differs from that expressed in any of our previous decisions, including the *New Haven* case, *supra*, such decisions are hereby overruled. The following rules will be adopted to reflect this conclusion:

2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the

transportation of a like kind of traffic under substantially similar circumstances and conditions.

3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*

(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(b) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(c) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(d) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

JOINT INTERMODAL SERVICE

Having concluded that there is neither legal nor policy bar to the use by motor and water carriers of open-tariff TOFC service proffered by rail carriers generally, and that such use should be allowed in the public interest, we come next to a consideration of the proper status and scope which joint intermodal TOFC service should possess in the broad pattern of piggyback regulation and service. Initially, it must be noted that no one questions that voluntary coordination between the several modes of transport should be encouraged and promoted to the fullest extent possible in the interests of both the carriers and the shipping public. Nor does anyone assert that there is anything improper or unlawful with respect to properly published, through-route and joint-rate arrangements among the various modes of carriage. Rather, what is challenged by certain of the parties herein is whether certain operations and services, and the tariffs embracing rates and charges therefor, properly fall within that class of coordinated intermodal service which is allowable under the act. In order to examine this issue in its proper perspective, it is necessary to review briefly the legal growth and development of that kind of piggyback service which embraces the participation of both rail and motor common carriers.

Prior to August 1935, when part II of the Interstate Commerce Act became law, the motor carrier industry was not subject to Federal regulation and such carriers, therefore, could utilize the services of railroads as could any shipper. *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435. Part II of the act, however, subjected motor carriers to economic regulation by this Commission, and section 216(c) thereof provided in specific terms that motor common carriers may establish reasonable through routes and joint rates with rail carriers. Shortly thereafter, the Chicago Great Western Railroad Company and certain motor common carriers proposed motor-rail-motor rates between Chicago and various points east thereof, on the one hand, and, on the other, Minneapolis-St. Paul, Minn., and certain points in contiguous territory. The proposed rates were of the same amount as the corresponding all-highway rates published by the participating motor carriers, and the rail service of the Great Western was to be performed (substituted) between Chicago and St. Paul. These rates were approved by the Commission in November 1936, in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, the first reported Commission decision dealing with the subject of coordinated service by rail and regulated motor common carriers. The Commission stated, at pages 272-73:

One of the protestants contends that the proposed routes are inconsistent with the provisions of section 217(a), which impose a duty upon a common carrier by motor vehicle to publish rates between points on its own route, and whenever it enters into a through-route and joint-rate arrangement with a common carrier by railroad to publish rates between points on its own route and points on the route of such railroad. This protestant claims * * * that joint rates are authorized only between a point on the route of a motor carrier, on the one hand, and a point on a rail line, on the other. We have frequently approved through routes and joint rates in connection with a rail carrier serving the points of origin and destination and another rail carrier participating only as an intermediate carrier in the transportation.

Section 216(c) does not define the particular type of through routes therein authorized to be established, the only requirement being that they shall be reasonable. * * *

As many considerations bear upon the feasibility and practicability of such arrangements, we cannot conclude that the proposed through routes are unlawful because similar routes are not provided from and to all points on the line of the participating rail carrier. Nor can we accept the contention that because the haul which a motor common carrier might receive on some traffic would be short, or terminal in character, that it may not participate in such a joint rail-motor route.

In finally approving the motor-rail-motor rates proposed, the Commission conclusively found such rates to be valid joint rates, saying, at page 274:

> One of the protestants argues with great insistence that it is unlawful for a motor carrier having authority to operate over particular routes to "substitute transportation of its motor vehicles on flat cars over a totally different route for its highway operations." This argument assumes that under the proposed arrangement the status of respondent motor carrier with respect to the rail portion of the transportation would be that of a shipper. Nothing in the evidence warrants that assumption. *The motor carrier's status is that of a connecting carrier under a joint-rate arrangement which, as previously indicated, is specifically authorized by law.* The novel way in which the traffic is handled does not affect the status of the participating carriers in that agreement. It does not appear that any portion of the transportation which the motor carrier would perform under the arrangement would be over routes other than those over which it may lawfully operate. [Emphasis supplied.]

About 2 years following this decision, the Commission instituted an investigation into the lawfulness of certain special permission tariff rules and other practices of common carriers by rail and water subject to part I of the act and of common and contract carriers by motor vehicle subject to part II, in connection with the substitution of motor-vehicle service for rail or water service and of rail or water service for motor-vehicle service. After extensive consideration of the background of substituted service generally, the Commission in *Substituted Freight Service*, 232 I.C.C. 683 (decided July 25, 1939) found, as relevant to the issues presented here, that where a common carrier by one transport medium substitutes another form of transportation therefor, it breaches its bill-of-lading contract with the shipper unless the shipper is apprised of such optional substitution of service by appropriate tariff provisions; and that so-called substituted service may not lawfully be furnished without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs. In arriving at these conclusions, the Commission remarked, at pages 687-88:

> There can be no doubt that the interstate transportation service here under consideration is common-carrier service and that either the rail carrier must have authority to engage in common carriage by motor vehicle in its own right, or the motor carriers joining in such service must be authorized to act as such carriers in their individual capacities. [Footnote omitted.] In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is

fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act.

Noting the contentions of certain respondents in that proceeding to the effect that the maintenance of ordinary joint rates covering the considered service would be "rigid, inflexible, cumbersome, uneconomical, unexpeditious, expensive, and impractical," the Commission approved a suggestion of certain of the southern and western rail carriers under which the substituted service could be covered by a tariff rule and directory containing a list of participating rail, motor, and water carriers, and showing between what points the substituted service is performed. In thus sanctioning a form of tariff publication now known as a "Substituted Freight Service Directory," the Commission stated, 232 I.C.C. at page 689:

It appears that this substituted service, confined as it is to on-line points served by the originating or destination carrier, is of such a nature as readily to lend itself to such method of tariff publication. Any possible breach of contract could be avoided by inserting the words "unless otherwise directed by the shipper" or a phrase of similar import in an appropriate place in the tariff rule. It appears that such publication in the form of a tariff rule and directory could be devised so as to preserve the benefits of the substituted service without subjecting the carriers to undue expense or contravening the specific provisions of the act, and thus to protect the rights of competing carriers and the general public.

While limited TOFC operations had been conducted at various times during the 1930's and 1940's by a few railroads and motor common carriers, there was a notable resurgence of interest in this type of service during 1953. Late in that year, The New York, New Haven, and Hartford Railroad Company presented to the Commission for its consideration 20 questions concerning the legal relations, limitations, and obligations incident to the transportation of highway trailers on railroad flatcars. In response to such questions, the Commission, in *Movement of Highway Trailers By Rail*, 293 I.C.C. 93 (decided July 30, 1954), referred to its past decisions in the coordinated and substituted service field, and confirmed the holdings of those cases. It stated, beginning at page 106:

we are of the opinion that trailer-on-flatcar transportation is in fact transportation by railroad. And this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.

A joint rate is one that applies to transportation extending over the lines of two or more carriers, and which is made by arrangement or agreement between such carriers and is evidenced by concurrence or power of attorney. 49 CFR 141.0 (b)(3). In *Substituted Freight Service, supra,* we said that " where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated." We recognized that substituted freight service presented certain problems in the publication of tariffs, and indicated that interested carriers might confer with representatives of our Bureau of Traffic to work out a simplified form of tariff publication. * * * We stated that if publication takes the form of a directory, it should be published with appropriate concurrences of the rail and motor carriers listed therein. * * * In these circumstances, *this substituted freight service directory, and the related rate tariffs which make reference thereto, may be said to conform to the requirements as to the publication of joint motor-rail rates,* [Emphasis added.]

Subsequently, in *Substituted Rail Service by Red Ball Transfer Co.*, 303 I.C.C. 421 and *Substituted Service – Consolidated Freightways, Inc.*, 305 I.C.C. 301, *aff'd. Consolidated Freightways, Inc., v. United States*, 176 F. Supp. 559 (N. D. Cal. 1959), other substituted rail-for-motor service proposals were approved and authorized. In the last-cited proceeding, the court noted the contention that the disputed rates were not in fact "joint rates," since Consolidated Freightways, Inc., was required to point to its motor carrier rights to justify the substituted service arrangments proposed. That the court did not fully accept this view is evident from the following language taken from pages 562 and 563 of its decision:

The conflicting contentions can best be dealt with in the light of the language of the service which plaintiff proposed to render, the pertinent parts of which read as follows:

"Application of this Tariff:

"Unless the shipper directs that rail service shall not be performed, the motor carriers parties to this tariff may, at their option, substitute rail service between the points and via the rail carriers shown herein, *for their actually available services via highways for which such motor carriers have lawful operating rights* as common carriers via motor vehicle." [Emphasis supplied by the court.]

This language clearly indicates that plaintiff, when filing these rates, operated under the assumption that the proposed service was to function between points which it could service under lawful motor carrier operating rights. The fact that plaintiff expressly reserved for itself the option to perform the proposed service by motor carrier is further evidence that it deemed the proposed tariff

to be an integral part of its motor carrier operations. Under these circumstances a determination of whether the proposed service is to be labeled railway or motor carrier service is superfluous since plaintiff must be found to have designated it as the latter. It appears that the legality of the proposed substituted trailer-on-flatcar service depends on the legality of the motor carrier service which plaintiff offers to provide at its option. Consolidated's contention in the instant case that the trailer-on-flatcar service should be dealt with as distinct from its operating authority as [a] motor carrier is thus without merit.

There thus came into existence two fundamental types of coordinated motor-rail piggyback services and arrangements, both of which have been sanctioned by this Commission as lawful joint-rate and through-route arrangements. One form of operation—which has come to be known as plan I TOFC service—provides for the "substitution" of rail for motor service at rates which are the equivalent of corresponding all-highway rates published by the participating motor carrier. A motor Substituted Freight Service Directory provides reference to the concurrence of the rail carrier and the points between which the substitution may be made, and such information is incorporated into the governing rate tariff by an appropriate tariff rule which preserves the shipper's right to direct that such substitution not take place. The other type of coordinated motor-rail TOFC operations has come to be known as plan V TOFC service. As here pertinent, under plan V, rail-motor, motor-rail, or motor-rail-motor services are provided under joint rates which are generally published in a tariff separate and distinct from other tariffs maintained by the participating regulated common carriers and which are applicable only over the through route or routes. There is no question but that a motor common carrier may, under an appropriate plan V tariff, interchange traffic with the participating railroad at an authorized service point short of the full length of its authorized operations, and later receive such traffic back again for movement between other of its authorized points of service. In such an operation, of course, the rail carrier's physical participation in the through movement is as a "bridge" carrier and is substantially similar to that present in a plan I operation.

None of the parties herein challenge the lawfulness or propriety of plan V TOFC service. And predicated upon the foregoing Commission precedents as well as their own independent analysis of the relevant statutory provisions in the light of the contrary

arguments of the regulated freight forwarders, Southern Railway System, and Helm's Express, Inc., the examiners concluded that plan I TOFC service is a lawful through-route and joint-rate arrangment specifically authorized by section 216(c) of the act; that the arguments of those attacking the legality of plan I operations are without merit; and that the continuation of plan I service is in the public interest and in harmony with the national transportation policy. With this position we agree.

In the *New Haven* case, *supra*, it was found, properly we think, that "trailer-on-flatcar transportation is in fact transportation by railroad," and that "this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers." We have also noted previously that a railroad lawfully may receive as compensation for its services only such rates and charges as are published in tariffs open to the shipping public generally or such reasonable divisions of joint rates as may be negotiated with the other carriers participating in the through service. See, for example, *Louisiana, A. & T. Ry. Co. Operation*, 170 I.C.C. 602. Since the rail portion of plan I service is not as such available for use by the general shipping public, it necessarily follows that such an operation, if it is to be sustained at all, must be sustained as a joint-rate arrangement under section 216(c), the only statutory provision authorizing the maintenance of through routes and joint rates between a railroad and a motor carrier. Stated somewhat differently, we think the examiners were correct in concluding that motor and rail carriers may participate in plan I TOFC service only as connecting carriers under through-route and joint-rate arrangements specifically authorized by section 216(c). This, as seen, is not because of any specific legal restriction upon motor carriers as such, but because of the statutory limitations on the manner in which a railroad may be compensated for its service.

Whether plan I TOFC service qualifies as a lawful joint rate under section 216(c) of the act is, as has been noted, the subject of considerable controversy among certain of the parties hereto. Thus, on exceptions the regulated freight forwarding companies and Southern Railway System renew their contentions made throughout this proceeding that plan I TOFC service is unlawful under the act. Their arguments in this respect are stated in full in the examiners' report, have been considered by us, and need not be repeated here. We shall instead confine our attention to the more essential aspects of this dispute.

Section 216(c) of the act reads as follows:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

This section does not denote the particular type of through routes and joint rates therein authorized to be established, and nowhere else in the act are the terms "through routes" and "joint rates" specifically defined. The freight forwarders, however, assert that section 216(c) must be read in conjunction with the provisions of section 217(a) of the act, and that when this is done it is clear that a lawful through-route and joint-rate arrangement must represent a joint undertaking by two or more connecting carriers to transport property from a point on the line of the originating carrier to a point on the line of the delivering carrier. We do not so read section 217(a).

That section, as here material, provides the following:

Every common carrier by motor vehicle shall file with the Commission * * * tariffs showing all the rates * * * and charges for transportation, and all services in connection therewith, of * * * property in interstate or foreign commerce between points on its own route and *between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad * * * when a through route and joint rate shall have been established.* [Emphasis supplied.]

We think it clear that the italicized portion of section 217(a) quoted above was not intended to be, and is not, a limitation upon the general permission which section 216(c) grants to motor common carriers to establish through routes and joint rates with rail carriers. Instead, such language is a necessary adjunct to the statutory requirement that motor common carriers shall file tariffs showing their rates and charges between points on their own routes, and but for the inclusion of that language in the statute, tariffs providing for joint rates and through routes would not be required to be filed. And because it is not lawful for a motor common carrier individually to publish rates to or from points it is not authorized to serve, tariffs containing such rates must be predicated upon previously established through routes and joint

rates. To put it another way, section 217(a), as we read it, provides that a motor common carrier shall file tariffs applicable to or from points it itself is not authorized to serve only when a through route and joint rate shall have been established; but the converse—that a through route and joint rate may be established only to or from points the motor carrier is not authorized to serve—is simply not true. We conclude, as was concluded in the *Traffic in East and Midwest* case, *supra*, that the permission granted motor common carriers by section 216(c) of the act to establish through routes and joint rates is not limited by anything contained in that section or in section 217(a), except that the through routes and joint rates must be reasonable. See also *Lubbock-El Paso Motor Frt., Inc., Com. Car. Application*, 27 M.C.C. 585, *Lubbock-El Paso Motor Freight, Inc., Extension*, 29 M.C.C. 281, and *Daniels* v. *Rose*, 43 M.C.C. 726.

The freight forwarders further argue that plan I services do not comply with the requirements of a through joint rate in that (1) the rates charged for such service do not apply on a given shipment, as such, throughout the entire movement, because the contract of carriage between the motor carrier and the shipper calls for the transportation of less-than-truckload shipments, whereas the arrangement between the motor carrier and the railroad covers the transportation of freight in carloads only, consisting of loaded or empty trailers; and (2) the rates charged for plan I service are not divided on a just and reasonable basis between the carriers participating therein. These arguments, we think, lack merit. Under a plan I arrangement, the motor carrier and railroad do, in fact, agree to transport, at a single through rate, any given shipment of freight falling within the scope of their tariff publication, and no rates are charged or tariffs published with respect to such plan I operations on any other basis. The arrangement between the railroad and the motor carriers, under which the railroad is to be compensated for its portion of the through service, is thus a division agreement specifically authorized by section 216(c), and not a separate rate or charge. With respect to the second argument of the forwarders, section 216(c) requires only that the carriers, parties to the joint rates, establish "just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers." The question of what constitutes just, reasonable, and equitable divisions necessarily involves many considerations, both factual and

legal, but plainly the maintenance of divisions computed on exactly the same basis as is the overall joint rate, to the exclusion of all other factors and considerations, is not required by the statute and may, in fact, be in violation thereof. The argument of the freight forwarders that "It is highly probable that in some instances the 'division' is greater than the whole," is not supported by the record. For these reasons, we reject the considered arguments of the freight forwarders.

Yet another argument raised by the freight forwarders is that plan I service is not a lawful joint-rate arrangement because the railroad assertedly is not a party to the bill of lading given to the shipper by the motor carrier; that is, that before there can be a through route and joint rate, all participating carriers must be bound by, and jointly and severally responsible under, the original bill of lading. This argument, however, begs the ultimate question as to the status of the carriers participating in plan I service, and, in our view, assumes matters which are simply not true. If, as we hold, plan I operations are, in fact, valid through-route and joint-rate arrangements between connecting carriers, it necessarily follows that the respective liabilities of the participating carriers are to be governed by sections 20(11) and 20(12) of the act. Compare *Pacific Purchasing Co.* v. *Chicago & N. W. Ry Co.*, 12 I.C.C. 549, 552, and *Savage Application*, 265 I.C.C. 157, 167. Under section 20(11), the initial carrier is liable to the shipper for all damage or loss, whether caused by it or not, on the theory that in accepting the shipment under the through joint rate it becomes a principal and all its connecting carriers agents for the transportation of the goods; and section 20(12) provides a "right over" in order to insure that the ultimate burden falls upon the carrier responsible for the loss. Nor can we accept as seriously made the contentions of the freight forwarders to the effect that a railroad cannot assume responsibility to an unknown shipper. Prior to enactment of part IV of the act, shippers by freight forwarder had for many years been allowed to sue the underlying carriers for loss or damage occasioned by the latter. Such actions were based upon the fundamental theory that the shipper was the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier. See *Chicago, M. St. P. & Pac. R. Co.* v. *Acme Fast Freight* 336 U.S. 465 (1948) at page 488 (footnote 27). The contrary contention of the freight forwarders is without foundation.

At this point, it might be well to mention that our conclusion with respect to the applicability of sections 20(11) and 20(12) in

determining the liability of the carriers participating in plan I TOFC service is not new and appears to have been generally accepted by the industry for many years. This is indicated not only by the statements and representations filed by those carriers favoring the continuation of plan I service, but also by an exhibit appended to the exceptions of Clipper Carloading Company, which contains representative items from a division sheet of the Pennsylvania Railroad Company, which are said to limit the liability of the railroad. Even a cursory examination of these items, however, makes it plain that they do not limit the rail carrier's liability to the public, but instead merely constitute indemnification agreements which govern the allocation of responsibility in disputes between the participating carriers. If the railroad were to have no liability to the shipper in a plan I arrangement, or if it were to believe that it had no such liability, there would be no reason for the inclusion of these provisions in the division sheet.

By far the argument most strenuously urged by the freight forwarding companies is that plan I TOFC operations allow motor carriers to depart from their statutory role as highway carriers and to function in a manner reserved for freight forwarders. The equivalent of plan I service was first approved in 1936 in *Motor-Rail-Motor Traffic in East and Midwest, supra,* and the directory form of tariff publication received Commission sanction in 1939 in the *Substituted Freight Service* case, *supra,* approximately 6 and 3 years, respectively, prior to the advent of Federal regulation of the freight forwarder industry. What the forwarders here seek to eliminate, then, is a coordinated service, the lawfulness of which had been confirmed prior to congressional recognition of their own activities. There is nothing in part IV of the act, under which freight forwarders are regulated, or in its legislative history which suggests that Congress intended to curtail existing coordinated transportation services. Rather, part IV, in defining those services and persons subject to its scope, specifically excludes from its purview persons who, as carriers subject to parts I, II, or III of the act, hold themselves out to the general public as common carriers to transport, or to provide transportation, of property for compensation.

In their final attack upon plan I operations generally, the freight forwarders maintain, as they have on brief and in their petition for separation of the issues filed April 2, 1963, and denied by the examiners in their report, that the record herein does not contain sufficient evidence to support the lawfulness of plan I

service as practiced, even if the plan should be found to be lawful per se. They argue, in effect, that, unlike the Commission-approved plans II, III, and IV which involved exhaustive hearings at which were explored all questions relating to the lawfulness of such plans, including the justness and reasonableness of the rates and their economic and competitive effect, proceedings involving plan I operations have dealt solely with an exploration of various legal theories concerning the statutory basis for the plan; that we should not promulgate rules to perpetuate a service about which we lack any precise knowledge; that such evidence as the present record contains about plan I operations is incomplete and has not been tested by cross-examination of witnesses; that generally plan I charges are materially lower than plan III charges, and if the latter are just and reasonable, the plan I charges become suspect; that they have not been afforded a full and fair hearing with respect to the issues involved; and that, therefore, their petition for separation of the issues and for oral hearing regarding plan I TOFC service, as practiced, should be granted. We find these arguments to be without merit and, accordingly, affirm the examiners' denial of the freight forwarders' petition. The following quotation, taken from page 686 of the *Substituted Freight Service* case, *supra*, best sums up our views in this regard:

> * * * The issuance of a report setting forth our interpretation of the law, after briefs and oral argument, is consistent with our practice in a number of important proceedings [citations omitted]. The principal issue in the instant proceeding is one of law***. On this issue we think the procedure outlined above has constituted a full hearing within the meaning of the act, all parties having been given full opportunity to be heard as to the step proposed to be taken.*** It may also be that*** mixed questions of law and fact [may] arise whether the practices in connection therewith are reasonable, nondiscriminatory, or otherwise lawful, which will require oral hearings for the taking of testimony. If so, requests for such hearings will receive proper consideration. In the meantime, at this stage of the proceeding, such oral hearings would not be in the interest of justice nor serve any useful purpose.

The views so stated apply with equal force to the present proceeding, and we see little that can be added thereto. It should be noted, however, that we have, from the outset, said that the level or reasonableness of TOFC rates was not in issue in this case. We adhere to that position.

The freight forwarders have raised additional arguments which call for brief comment. One which is also urged by the Local and Short Haul Carriers National Conference involves the legality

of plan I TOFC service wherein rail service is provided or substituted by a motor common carrier for the entire line-haul movement, and will be taken up at a later point in this report. The forwarders also argue that we have been inconsistent in dealing with plan I service in that we have termed it "in legal effect" a joint service, but have regulated it as if it entailed operation over an alternate route or a deviation route within the meaning of section 208(b) of the act. This view appears to be the result of a misconception of the rationale underlying the imposition of so-called circuity limitations, to be discussed fully below, upon a regulated motor carrier's participation in TOFC service.

In summary, we conclude, as did the examiners and the Commission decisions prior to the *NATA* case, that when a motor common carrier participates in plan I TOFC operations, paying the railroad compensation other than that set forth in the railroad's regularly published tariff, the motor carrier's status is that of a connecting carrier in a joint service provided voluntarily by the participating rail and motor common carriers; and that plan I TOFC operations thus constitute a valid through-route and joint-rate arrangement within the contemplation of section 216(c) of the act. A fact which we have referred to before in this report is the general lack of opposition to the provision of a through joint intermodal TOFC service under what are known generally as plan V tariffs and arrangements. Plan I and plan V, however, share in common the important features of a through-route and joint-rate arrangement: both entail the voluntary cooperation and agreement of the participating carriers; both involve the payment by the shipper of a single through rate which is divided among the carrier participants on a negotiated basis; and both may involve the rendition of joint service between points the motor carrier is authorized to serve in all-highway service. The fundamental distinction between plan I and plan V operations, as we see it, is that rail and motor carriers serving different areas may combine their service in plan V operations to perform a through service between origin and destination. Another difference is that the tariff rules covering the rendition of plan I service specifically embrace a holding out by the motor carrier to perform an all-highway service at the election of the shipper, whereas the rates provided in plan V joint tariffs are applicable only over the joint intermodal route. In substance, then, plan I merely embraces a simplified form of tariff publication, which combines a joint motor-rail-motor rate applicable over the intermodal route with

11. Railroads participating in joint intermodal TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

C. Rules governing all-rail TOFC service.

1. Rates or charges for all-rail TOFC line-haul service, and for any transportation or auxiliary service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent, in either of the following ways:

(*a*) Publish rates or charges which specifically include pickup from shipper and/or delivery to consignee by the railroad or railroads.

(*b*) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when all service and equipment is provided by the railroad.

2. (*a*) Each carrier performing or holding out to perform all-rail TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and rules governing storage, demurrage, detention of highway vehicles, cartage, switching, floating, literage, wharfage, weighing, diversion, reconsignment, icing, refrigeration, heat, c.o.d. services, transit services, absorptions, allowances, and other special or accessorial services or practices, and an explicit statement of all other charges and rules which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of the service to the shipper.

(*b*) All tariffs containing rates for the all-rail TOFC transportation of property shall specify whether such rates do or do not include pickup or delivery services.

(*c*) When charges for pickup or delivery service are in addition to line-haul TOFC transportation charges, they shall be published in tariffs as provided in paragraph (*a*) of this rule.

(*d*) The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in tariffs as provided in paragraph (*a*) of this rule. It will be sufficient to state that pickup and delivery service will be performed at all places or locations within the limits of the incorporated cities, towns, or villages, from, to, or between which the rates apply, if that is the only application intended. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*e*) All tariffs containing rates for the all-rail TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of the property from the highway vehicle by the carrier (including the number of laborers to be used). When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in tariffs as provided in paragraph (*a*) of this rule.

(*f*) If the shipper, freight forwarder, and/or consignee directly or indirectly renders any service connected with such transportation (such as

ramping, deramping, and tiedown of trailers on cars), or furnishes any equipment or other instrumentality used therein (such as a trailer, semitrailer or car), the charge or allowance paid to the shipper, freight forwarder, and/or consignee therefor shall be published as provided in paragraph (a) of this rule.

3. Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

4. A railroad providing all-rail TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

5. Railroads providing all-rail TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

6. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges provided for in rule C-2 above.

7. The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible under all-rail TOFC tariffs.

D. Billing and notification rules.

1. No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a bill of lading therefor and received from the shipper or freight forwarder any manifest used in connection therewith.

2. Certification as to the weight and contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) shall be made by the shippers or carriers at the time of its tender to a railroad or connecting carrier.

3. Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

4. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement.

5. All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

> Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:
>
> "Not more than ___ percent of the articles (or commodities) in this shipment consists of an article or articles embraced

by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity) rates do not apply; and the applicable rate on the shipment will be_____.

(In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds.")

APPENDIX III

The hearing examiners' recommended rules

1. "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer or semitrailer having a demountable chassis) on a rail car.

2. "Plan I TOFC service" is service performed by a railroad in substitution for motor common carrier service to, from, and between named points over the motor carrier's route, at the option of the motor carrier, unless otherwise directed by the shipper, the traffic moving from initial origin to final destination at all-motor rates and on motor carrier bills of lading under an arrangement or an agreement between the two modes of transportation.

3. "Plan V TOFC service" is that performed under published joint rail-motor rates over through routes with certificated motor common carriers.

4. "Joint intermodal TOFC service" includes Plan I and Plan V TOFC services as defined above.

5. "All-rail TOFC service" means any transportation, other than transportation embraced in Plans I and V above, provided by a railroad or railroads subject to Part I of the Interstate Commerce Act, which transportation includes the performance of TOFC service.

6. Tariffs embracing joint intermodal TOFC rates or charges, or Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the routes over which such service will be performed or the origin, destination, points of interchange between modes of transportation and rail routes; and the names of the carriers participating therein.

7. Tariffs setting forth rates or charges for joint intermodal TOFC transportation may be published only by rail, motor, or water common carriers, or their agents, on commodities the transportation of which is subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

8A. Motor common carriers shall not participate in Plan I TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 85 percent of the distance between such points computed

(1) if a regular-route carrier, over its authorized regular route, or (2) if an irregular-route carrier, through any gateway point which it is required to use; except as may be permitted by the Interstate Commerce Commission upon consideration of an appropriate application filed by a motor common carrier or a railroad in which relief is sought from the percentage provisions of this rule.

8B. Motor common carriers participating in Plan I TOFC service which comes within the 85-percent circuity provision provided in part (A) of this rule, shall file with the Interstate Commerce Commission, on the same date that tariffs or substituted service directories are filed, information showing the name of the rail carrier to be used, the total mileage from origin to destination over its all-motor route, the points between which TOFC service of the rail carrier is to be used, and the total mileage from origin to destination over the joint motor-rail-motor route to be used.

9. Any railroad or railroads may provide TOFC service jointly with any motor or water common carriers; *provided* that the common carriers by railroad, motor, and/or water shall have the duty of ascertaining whether it or its connecting common carrier hold appropriate authority from the Interstate Commerce Commission to render the service contemplated before the effective date of such joint arrangements. If the origin or connecting common carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

10. Tariffs providing for Plan I TOFC rates or charges, or Substituted Service Directories, if used, may provide for plan I TOFC service for the entire line-haul movement, *except* to the extent such service may be prohibited under rule 8A above.

11. Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

12A. Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff or agreement between the parties, shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof,) on rail cars and for removing them from rail cars.

12B. Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portion thereof) which do not conform to the motor carrier safety regulations prescribed by the Interstate Commerce Commission.

13. No allowance shall be payable to any shipper, freight forwarder, and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

14. Each railroad performing, or holding itself out to perform, TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the loading of equipment to or from shippers, freight

forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges.

15. The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Interstate Commerce Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Interstate Commerce Commission in a formal proceeding.

16. All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

17. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

18. The handling by a railroad of a motor or water carrier's trailer, loaded with commodities the motor transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible only under all-rail TOFC tariffs.

19. No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor, and where a manifest is used by the shipper or freight forwarder, such manifest shall be delivered to the originating carrier not later than 24 hours after the shipment reaches the destination ramp.

20A. Certification as to the weight of a highway truck, trailer, semitrailer (or demountable container portion thereof) shall be made by the shipper at the time of its tender to the originating carrier.

20B. Shippers shall certify at the time of tendering a shipment to the originating carrier, whether or not the contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) consists of (1) any commodity which is prohibited from movement in TOFC service by the carrier's tariff, and (2) explosives or other dangerous articles.

21. In order to qualify for a rate applicable on the movement of multiple highway vehicles (or the demountable container portion thereof), two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered to the carrier within the time period, not to exceed one calendar day, specified in tariffs on file with the Interstate Commerce Commission.

22. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail car used for the movement; *except* that shipments containing explosives or other dangerous articles shall *not* be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment com-

plies with the Interstate Commerce Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

23. All freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms the conditions under which such rates apply.

APPENDIX IV

49 CFR 500. *Practices of for-hire carriers participating in trailer-on-flatcar service*

500.1 *Definition of TOFC service.* – Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

500.2 *Availability to all of TOFC service.* – TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.* –

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

500.4 *Joint intermodal TOFC service.* –

(a) Except as otherwise may be prohibited by these rules, any rail carrier or carriers subject to part I of the act may enter into through-route and joint-rate arrangements with any motor common carrier subject to part II of the act or any water common carrier subject to part III of the act, wherein TOFC service is to be provided either in lieu of, or in addition to, the authorized all-highway or all-water service of such motor or water common carrier.

(b) Motor or water common carriers may participate in joint intermodal TOFC service in lieu of their authorized all-highway or all-water service only if their tariff publications give notice that such service may be provided at their option, but that the right is reserved to the user of their services to direct that in any particular instance such TOFC service not be provided.

(c) Tariffs embracing joint intermodal TOFC rates or charges, including Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the points of interchange between modes of transportation; and the names of the carriers participating therein.

(d) Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

(e) Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement.

(f) Tariffs setting forth through rates or charges for joint intermodal TOFC transportation may be published only with respect to commodities the transportation of which is subject to economic regulation throughout the entire movement provided for in such tariffs.

500.5 *Circuity limitations.* –

(a) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route; *provided, however,* that the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

(b) For the purpose of paragraph (a) of this part the distance from origin to destination over the motor or water carrier's authorized route shall be computed (1) if a motor carrier operating over regular routes, over its authorized regular service route, (2) if a motor carrier operating over irregular or a combination of regular and irregular routes, through any gateway point which it is required to observe, and (3) if a water carrier, over the most direct available all-water route.

500.6 *Responsibility for placing and securing trailers.* –

(a) Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portions thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff, or in the case of connecting common carriers by agreement, railroads shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

(*b*) Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portions thereof) which do not conform to the motor carrier safety regulations prescribed by the Commission.

500.7 *Tariff publication regulations.*—

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service or instrumentality is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to provide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

500.8 *Billing and notification rules.*—

(*a*) No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor.

(*b*) Carriers by tariff publication shall require that where a manifest or a statement of the weight or nature of a TOFC shipment is needed to determine the TOFC freight charges, such manifest or a certification by the shipper as to the weight or the nature of the shipment shall be delivered to the originating carrier within 24 hours after the shipment reaches its destination; *provided, however*, that where the weight of a loaded highway truck, trailer, or semitrailer (or the demountable container portion thereof) or the weight of the contents

thereof is needed to determine rail TOFC charges, the rail carrier shall not relinquish possession of the shipment until it has received certification from the shipper as to such weights or has itself ascertained them.

(c) Unless a rail carrier by appropriate tariff publication specifically provides otherwise, in clear and unequivocal terms, two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered within one calendar day in order to qualify for any rate for the movement of multiple highway vehicles (or for the demountable container portions thereof).

(d) Carriers by tariff publication shall require that arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portions thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement and that shipments containing explosives or other dangerous articles shall not be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Interstate Commerce Commission's regulations governing explosives, and other dangerous articles as described in 49 C F R 71-78.

(e) All-freight (all-commodity) rates that are restricted to apply only when not more than a designated proportion of a shipment consists of a single article shall be made subject to tariff provisions which (1) shall describe in clear and explicit terms the conditions under which such rates apply, (2) shall contain or refer to a commodity classification, such as the current Uniform Freight Classification or a designated tariff, from which it can be determined what constitutes a "single article" for purposes of the all-freight rate, (3) shall require certification by the shipper of the percentage which the weight of a given article bears to the weight of the entire shipment, and (4) shall specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate because it contains more than the designated proportion of one article.

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TITLE 49 — TRANSPORTATION
CHAPTER 1 — INTERSTATE COMMERCE COMMISSION
SUBCHAPTER E — INTERMODAL TRANSPORTATION
PART 500 — PRACTICES OF FOR-HIRE CARRIERS OF PROPERTY PARTICIPATING IN TRAILER-ON-FLATCAR SERVICE

EX PARTE NO. 230

SUBSTITUTED SERVICE — CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS
(Piggyback Service)

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 16th day of March A. D. 1964.

It appearing, That the Commission, by notice and order entered June 29, 1962, instituted the above-entitled proceeding under Parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act for the purpose of investigating the manner and methods of performance and use of coordinated or substituted trailer-on-flatcar (piggyback) service; of ascertaining the desirability, feasibility, and lawfulness of the operational practices and facilities of rail, motor, and water carriers, freight forwarders, and express companies subject to the Interstate Commerce Act; and of determining what rules and regulations, if any, should be adopted;

It further appearing, That the said notice and order entered June 29, 1962, invited the participation of all interested parties to submit representations setting forth the extent of their participation in trailer-on-flatcar service and their practices connected therewith; and that notice to all interested parties was given through publication of the said notice in the Federal Register of July 7, 1962 (27 F.R. 6434);

It further appearing, That the Railroads Operating in the Southern Freight Association Territory, except the Southern Railway System and the St. Louis-San Francisco Railway Company,

have included in their exceptions to the examiner's recommended order motions to strike certain portions of the verified statements of the Bureau of Inquiry and Compliance, Interstate Commerce Commission, and certain other parties, and also filed a request, on April 2, 1963, to cross-examine the Director of the Bureau of Inquiry and Compliance;

And it further appearing, That the Commission, on the date hereof, has made and filed its report on oral argument herein, setting forth its conclusions and findings and its reasons therefor, which report is hereby referred to and made a part hereof:

It is ordered, That the motions and request described in the third appearing paragraph hereof be, and they are hereby, denied for the reasons set forth in the said report;

It is further ordered, That title 49 CFR be, and it is hereby, amended by adding to chapter I thereof subchapter E, Intermodal Transportation, part 500, Practices of For-Hire Carriers of Property Participating in Trailer-on-flatcar Service, containing the regulations set forth in Appendix IV to the said report;

It is further ordered, That this order shall become effective on July 6, 1964, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the office of the Secretary of the Interstate Commerce Commission, Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

[24 Stat. 383 as amended, 49 U.S.C. 12(1); 52 Stat. 1237, 49 U.S.C. 304(a)(6); 54 Stat. 933, 49 U.S.C. 904(a); 56 Stat. 285, 49 U.S.C. 1003(a); 60 Stat. 237, 5 U.S.C. 1003.]

By the Commission.

HAROLD D. McCOY,

(SEAL)

Secretary.

[fol. 1604] Service Date (omitted in printing)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)

In the Matter of Postponement of the Effective Date

Present: Abe McGregor Goff, Chairman, to whom the matter which is the subject of this order has been assigned for action thereon.

ORDER POSTPONING EFFECTIVE DATE OF MARCH 16, 1964

ORDER—June 29, 1964

Upon consideration of the record in the above-entitled proceeding; and good cause appearing therefor:

It is ordered, That the effective date of the order of the Commission entered herein on March 16, 1964, be, and it is hereby, postponed pending further order of the Commission.

Dated at Washington, D. C., this 29th day of June, A. D. 1964.

By the Commission, Chairman Goff.

Harold D. McCoy, Secretary.

(Seal.)

[fol. 1605]

BEFORE THE INTERSTATE COMMERCE COMMISSION

ABE MCGREGOR GOFF, CHARLES A. WEBB, HOWARD G. FREAS, KENNETH H. TUGGLE, EVERETT HUTCHINSON, RUPERT L. MURPHY, LAURENCE K. WALRATH, JOHN W. BUSH, WILLIAM H. TUCKER, PAUL J. TIERNEY, VIRGINIA MAE BROWN, Commissioners.

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (Piggyback Service)

Ex Parte No. 230

MINUTES OF GENERAL SESSION OF INTERSTATE COMMERCE COMMISSION—July 22, 1964

On petitions for reconsideration in the above-entitled proceeding, and for various other relief as more specifically set forth in said petitions, filed by (1) Association of American Railroads, (2) Eastern Railroads, (3) Class I Railroads of the Western District, except the Illinois Central Railroad Company and the Gulf Mobile and Ohio Railroad, (4) Railroads operating in the Southern Freight Association Territory, except the Southern Railway System and the St. Louis-San Francisco Railway Company, (5) New York Central Railroad Company, (6) Southern Railway System, (7) American Trucking Associations, Inc., and affiliated associations and member motor carriers, (8) Spector Freight System, Inc., (9) Freight Forwarders Institute and individual freight forwarders, and (10) Sea-Land Service, Inc.:

Voted to deny the petitions; Commissioners Tierney and [fol. 1606] Brown voting to reopen the proceeding to modify Rule 500.5(a) and to deny the petitions in all other respects; Vice Chairman Webb and Commissioner Hutchinson voting to grant reconsideration on the present record.

[fol. 1607] Service Date (omitted in printing)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (Piggyback Service)

ORDER DENYING PETITIONS FOR RECONSIDERATION, AND SETTING EFFECTIVE DATE OF MARCH 16, 1964 ORDER,—July 22, 1964

Upon consideration of the record in the above-entitled proceeding, and of:

1. Petition filed May 18, 1964, by the Association of American Railroads for reconsideration.
2. Petition filed May 18, 1964, by the Eastern Railroads for reconsideration.
3. Petition filed May 18, 1964, by the Class I Railroads of the Western District, except the Illinois Central Railroad Company and the Gulf Mobile and Ohio Railroad Company, for reconsideration.
4. Petition filed May 18, 1964, by the Railroads operating in the Southern Freight Association Territory, except the Southern Railway System and the St. Louis-San Francisco Railway Company, for reconsideration.
5. Petition filed May 18, 1964, by the New York Central Railroad Company for reconsideration.
6. Petition filed May 18, 1964, by the Southern Railway System for reconsideration.
7. Petition filed May 18, 1964, by American Trucking Associations, Inc., and affiliated associations and member motor carriers for reconsideration.
8. Petition filed May 18, 1964, by Specto[illegible]ght System, Inc., for reconsideration.

9. Petition filed May 18, 1964, by the Freight Forwarders Institute and individual freight forwarders for reconsideration.

10. Petition filed May 18, 1964, by Sea-Land Service, Inc., for reconsideration.

[fol. 1608] 11. Reply filed June 8, 1964, by the Eastern Railroads to the petitions in (6), (7), and (9) above.

12. Reply filed June 8, 1964, by Class I Railroads of the Western District, except the Illinois Central Railroad Company and the Gulf Mobile and Ohio Railroad Company, to the petitions in (6), (7), and (9) above.

13. Reply filed June 8, 1964, by the Railroads operating in the Southern Freight Association Territory, except the Southern Railway System and the St. Louis-San Francisco Railway Company, to the petition in (7) above.

14. Reply filed June 8, 1964, by the New York Central Railroad Company to the petition in (7) above.

15. Reply filed June 8, 1964, by the Southern Railway System to the petitions in (2) and (7) above.

16. Reply filed June 8, 1964, by the American Trucking Associations, Inc., and affiliated associations member motor carriers to the petitions in (1) through (10), except the petition in (7) above.

17. Reply filed June 8, 1964, by the Contract Carrier Conference of the American Trucking Associations, Inc., to the petitions in (1) through (9), except those in (5) and (8) above.

18. Reply filed June 8, 1964, by the National Automobile Transporters Association to the petitions in (1) through (6) and (9) above.

19. Reply filed June 8, 1964, by the Freight Forwarders Institute and individual freight forwarders to the petitions in (7) and (8) above.

20. Reply filed June 8, 1964, by the National Industrial Traffic League to the petition in (7) above.

21. Reply filed June 8, 1964, by the Manufacturing Chemists' Association, Inc., to the petition in (7) above.

22. Reply filed June 5, 1964, by Swift & Company to the petition in (7) above.

[fol. 1609] and good cause appearing therefor:

We find, That the arguments made and the matters raised in the above-described pleadings do not warrant modification of the findings made or the conclusions reached in the report, 322 I.C.C. 301, and order entered herein on March 16, 1964; and,

It is ordered, That the above-described petitions be, and they are hereby, denied, for the reasons that the findings of the said report and order herein of March 16, 1964, are in accordance with the evidence and the applicable law and that the regulations, 49 CFR 500, prescribed in the said report are reasonable and necessary.

And it is further ordered, That the effective date of the said order of March 16, 1964, be, and it is hereby, fixed as September 11, 1964.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 1610] Service Date (omitted in printing).

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS (Piggyback Service)

In the Matter of Postponing the Effective Date of Order

Present: Abe McGregor Goff, Chairman, to whom the above-captioned matter which is the subject of this order is assigned for action thereon.

ORDER POSTPONING EFFECTIVE DATE OF MARCH 16, 1964

ORDER—August 26, 1964

Upon consideration of the record in the above-entitled proceeding, and the filing of a suit styled *Atchison, Topeka and Santa Fe Railway Company, et al.* v. *United States*, Civil Action No. 64 C 1442, in the United States District Court for the Northern District of Illinois, Eastern Division, in which suit plaintiffs seek to enjoin, annul and set aside the orders of the Commission previously entered herein on March 16, 1964 and July 22, 1964, and good cause appearing therefor:

It is ordered, That the effective date of the order heretofore entered on March 16, 1964, as subsequently amended by the order entered on July 22, 1964, be, and it is hereby, postponed until further order of the Commission.

Dated at Washington, D. C., this 26th day of August, A. D. 1964.

By the Commission, Chairman Goff.

Harold D. McCoy, Secretary.

(Seal)

90/14

No. 90857

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

GEORGE D. MICHALSON
P. O. Drawer 647
Kansas City 41, Missouri

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
411 San Jacinto Street
Dallas, Texas

Attorneys for Appellants

OF COUNSEL:

CARL L. STEINER, Esquire
AXELROD, GOODMAN & STEINER
39 South LaSalle Street
Chicago, Illinois

PETER T. BEARDSLEY
HARRY J. JORDAN
WILLIAM R. RUBBERT
PAUL D. BORGHESANI
F. G. FREUND
R. EDWIN BRADY
1616 P Street, N. W.
Washington, D. C. 20036

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C. 20004

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN
RICHARD R. SIGMON
1111 E Street, N. W.
Washington, D. C. 20004

JAMES E. WILSON
Continental Building
Washington, D. C. 20005

GUY H. POSTELL
1375 Peachtree Street, N. E.
Atlanta 9, Georgia

FERDINAND BORN
708 Chamber of Commerce Bldg.
Indianapolis, Indiana

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

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JURISDICTIONAL STATEMENT

Appellants, American Trucking Associations, Inc.; National Motor Freight Traffic Association, Inc.; Regular Common Carrier Conference; Common Carrier Conference-Irregular Route; National Tank Truck Carriers, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau; The Eastern Central Motor Carriers Association, Inc.; Eastern Tank Truck Carriers, Inc.; Indiana Motor Rate & Tariff Bureau; Middle Atlantic Conference; Middlewest Motor Freight Bureau; The New England Motor Rate Bureau; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland

Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference; Southwestern Motor Freight Bureau, Inc.; Cooper-Jarrett, Inc.; Eastern Motor Dispatch, Inc.; Kramer Bros. Freight Lines, Inc.; and Eastern Express, Inc., appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1965, reversing in part a report and order of the Interstate Commerce Commission, dated March 16 and served April 3, 1964, to the extent that the Commission concluded that motor and water common and contract carriers may utilize trailer-on-flatcar (TOFC) service in performing all or any portion of their authorized service through the use of open-tariff rates published by rail carriers, and prescribed rules governing such use. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 244 F. Supp. 955 (adv. sheets), and copies of the opinion and judgment are attached hereto as Appendix A. A copy of the Interstate Commerce Commission's report and order in *Substituted Service—Piggyback*, 322 I.C.C. 301, is attached hereto as Appendix C. In that Appendix and in references herein, the pagination of the official Commission report is used.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to enjoin and set aside in part the report and order of the Commission. (Appendix C) The judgment of the District Court was entered on August 20, 1965, and notice of appeal was filed in that court on October 15, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101

(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceeding §§ 1, 301, 901 and 1001; and Sections 2, 3(1) and 216(c) of the Interstate Commerce Act, 49 U.S.C. §§ 2, 3(1), 316(c), are set forth verbatim in Appendix B hereto.

QUESTIONS PRESENTED

1. Did the District Court err in holding that Rules 2 and 3, and Rule 5 insofar as it relates to open-tariff TOFC service, prescribed by the Interstate Commerce Commission in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, are not authorized by Sections 2 and 3 of the Act?

2. Did the District Court err in holding that Rules 2 and 3, and Rule 5 insofar as it relates to open-tariff TOFC service, violate the provisions of Section 216(c) and Part IV of the Act, respectively?

3. Did the District Court err in setting aside the Commission report and order insofar as it prescribed Rules 2 and 3?

STATEMENT

On June 29, 1962, the Interstate Commerce Commission, on its own motion, issued a notice of proposed rulemaking instituting an investigation into trailer-on-flatcar

or piggyback service. The stated purposes of the investigation were:

> ". . . ascertaining and determining, in the light of the national transportation policy, and the provisions of the Interstate Commerce Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided and utilized by or for rail, motor, and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers, and of taking such other and further action as the facts and circumstances may justify or require."

The notice listed certain specific issues, among others, to be considered and determined, and named all railroads, motor carriers, water carriers, express companies, and freight forwarders of property operating in interstate or foreign commerce, subject to the Interstate Commerce Act, as respondents. A pre-hearing conference was held October 9, 1962, at which proposed rules (reproduced at 322 I.C.C. pp. 406-10, Appendix C hereto) were distributed. No oral hearings were held, but opportunity was given to all parties to file representations, verified statements, and reply statements, which numerous parties did.

In a report and recommended order served August 23, 1963, two hearing examiners proposed the adoption of certain rules (reproduced at 322 I.C.C. 410-13, Appendix C hereto). Exceptions and replies to exceptions were filed and the Commission heard oral argument. The report and order of the Commission was filed March 16 and served April 3, 1964. (322 I.C.C. 301, Appendix C hereto) In its report and order, the Commission promulgated eight rules intended to regulate trailer-on-flatcar service. (322 I.C.C. 413-16; 49 C.F.R. 500.1 to 500.8) For convenience, the rules were referred to simply as Rules 1 through 8 in the District Court's opinion and will be so designated here.

On complaint, the District Court set aside the Commission's report and order insofar as it prescribed Rules 2 and 3, the "open-tariff" rules, and entered its judgment on August 20, 1965.

THE QUESTIONS ARE SUBSTANTIAL

1. As a preliminary matter, it is important to place this controversy in its factual context. Although the idea of transporting loaded highway vehicles on railroad flatcars is not new, the actual use of this combination of railroad-highway service was sporadic and relatively insignificant in our national transportation system until the latter half of the 1950's. Since approximately 1955, the expansion of this combination service has exceeded anything seen in transportation before. The opinion of the majority of the Commission described the growth of TOFC service in the five years proceeding the report as "explosive" (322 I.C.C. at 305); the dissenting Commissioner referred to piggybacking as "the brightest star in the transportation firmament." (322 I.C.C. at 386) The report (322 I.C.C. at 307-309) cites various statistics indicating the rapid growth of trailer-on-flatcar service, which are summarized as follows:

> "In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963, there were 100 class I railroads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 TOFC cars, a weekly rate of approximately 12,700 loadings."

There is nothing in the report to suggest a diminishing of this growth in the foreseeable future.

TOFC transportation has not suddenly flowered because of any dramatic infusion of new traffic into the transportation system. Its development has been at the expense of the other, conventional methods of transportation. The Commission recognized that TOFC service has benefited the railroads using it by diverting to them "a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." (322 I.C.C. at 307, 322).

Because the use of TOFC transportation has increased so dramatically and so recently, the instant proceeding is the first one in which the Commission has considered the entire scope of this combination of railroad-motor service on a factual record. The only prior consideration given by the Commission to the entire field of TOFC transportation, *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954), was a decision rendered without a factual record. For this reason, the Commission noted that one of the purposes of the instant investigation was a re-examination of the pronouncements of prior decisions in the light of modern developments. (322 I.C.C. at 322) Recognizing also that the development of TOFC transportation is not at a standstill, the Commission noted that what it has done in the prescribed rules will not be the final and definitive word on all of the ramifications of piggyback service and indicated its readiness to review the effect of these rules in practice so that "the flexible development and free use of TOFC service" may continue. (322 I.C.C. at 325)

TOFC service has developed in terms of 5 different "plans" of service, although there have been many offshoots and modifications of these plans. For the convenience of the Court, these are described below: [1]

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[1] The five basic plans as set out in the Commission's report. (322 I.C.C. at 304-305)

Plan I. Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

Plan II. Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

Plan III. Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

Plan IV. Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

Plan V. Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

The primary issue before the District Court and the primary issue on this appeal is the lawfulness of Rules 2 and 3, the so-called "open-tariff" rules, promulgated by the Commission.[2] Rules 2, which does not mention motor

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[2] The text of Rules 2 and 3(a) (the essential portion) is as follows:

500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

or water carriers, is nothing more than a statement of the common-carrier obligation of rail carriers as it relates to trailer-on-flatcar service. Rule 3, briefly stated, provides that motor and water common and contract carriers and freight forwarders may utilize trailer-on-flatcar service in the performance of their authorized service under open-tariff railroad rates.

The Court below concluded that both rules must fall because under the Interstate Commerce Act, railroads may exclude motor carriers[3] from the public they are required, as common carriers, to serve, and because motor carriers are not authorized to use trailer-on-flatcar service without the railroads' consent. The Court also held that the rules must be rejected because of conflict with part IV, the freight forwarder provisions of the Act, an argument we will deal with below. In reaching its conclusion that the "open-tariff" rules are not authorized, but rather are prohibited by the Interstate Commerce Act, the District Court failed to recognize and give consideration to the basic premise underlying the Commission's decision. As a result, the Court's decision does not come to grips with the fundamental problem which the Commission sought to deal with in its prescription of Rules 2 and 3.

2. The Commission's attempt to regulate the relationship between rail and motor carriers in the utilization of trailer-on-flatcar service was based on the recognition that *all* trailer-on-flatcar service is inherently bimodal in that its basic characteristic is the wedding of the inherent advantages of both rail and motor transportation. It combines the railroads' ability to provide efficient line-

[3] Rule 3 also covers the use of open-tariff TOFC rates by common and contract water carriers, as well as freight forwarders. However, since the issues as to motor and water carrier use of open-tariff rates are largely identical, we will adopt the convention of the District Court of specifically referring only to motor carriers.

haul transportation of huge volumes of freight over long distances at high speeds with the motor carriers' ability to provide door-to-door, and even job- and farm-site, pick-up and delivery. (322 I.C.C. at 329)[4] The highway trailer is the key to the success of the trailer-on-flatcar service because trailer-on-flatcar transportation does not begin and end at the railroad ramps. The freight must be transported from the shipper to the consignee and, in trailer-on-flatcar service, this means that the freight-laden trailer must be transported partly on a flatcar over steel rails and partly over the streets and highways drawn by a highway power unit. It is the ability to perform this door-to-door movement in the same vehicle without reloading which has produced the phenomenal growth of this service. Without it, the economy and efficiency of long-distance volume movement by railroad are dissipated by the necessary time and expense of terminal handling and transfer between train and highway vehicle.

The lower Court failed to recognize the inherent bimodal nature of trailer-on-flatcar service when it considered the question:

> "whether the motor carriers could lawfully avail themselves of that service without violating their contracts with customers or exceeding the rights conferred by the certificate of public convenience and necessity which authorizes their operations." (Appendix A, p. 40)

The Court referred to the compartmentalization of transportation under separate formal parts of the Act and

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[4] The Commission noted that TOFC service may even be viewed as *trimodal*, in that it also employs the ability to consolidate many small shipments in a type of container service, a type of service which has become associated with freight forwarders. (322 I.C.C. at 329-30) While the consolidation of small shipments into volume lots for transportation is an identifying characteristic of freight-forwarding, it is not unique to forwarding since motor carriers have been consolidating small lot shipments since long before forwarders were given legislative recognition.

sought to deal with trailer-on-flatcar service in terms of these rigid modal divisions. (Appendix A, p. 41) It treated trailer-on-flatcar service as a rail service which Rules 2 and 3 would "require" the railroads to offer to motor carriers. (Appendix A, pp. 29, 51). The Court's view of trailer-on-flatcar service in the context of the transportation law is summarized by its reference to "the underlying statutory scheme that limits the carrier in each mode to transportation within and by that mode, absent special exception." (Appendix A, p. 41)

Trailer-on-flatcar service, being essentially bimodal, is not an exclusive rail service or an exclusive motor service, and it cannot be shaped to fit the measure of any one part of the Act. In trailer-on-flatcar service, the clear distinction between the inherent advantages of the various modes has been eliminated and a combination rail-motor service has sprung up. This coordination of the motor and railroad inherent advantages is an established fact. It is late in the day to turn back the clock, even if the desire to do so were present. The dual advantages of this bimodal service are today being exploited by the rail carriers, not just to serve traffic now being transported in other rail service, but to capture "a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." (322 I.C.C. 307, 322)

It is no more anomolous to permit motor carriers to utilize this bimodal service than it is to permit railroads to do so. The lower Court said that the certificate issued to a motor carrier "authorizes the holder to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highways'." (Appendix A, p. 41) By the same token, railroads are authorized to engage in for-hire transportation by "railroad," not by motor vehicle or other modes, but when a railroad engages in trailer-on-flatcar service, utilizing a highway vehicle to achieve a door-to-door movement without the transfer of

the lading, it is not confining itself to "railroad transportation."

If technological development is to be ignored and railroads and motor carriers are to be strictly confined to historical pre-piggyback concepts of discrete modal operations, then there is no place in the transportation system for trailer-on-flatcar service. This is the real fault of the decision below: by insisting that transportation development must conform to the framework of the law, rather than permitting the Commission to implement the law to meet developing transportation needs, the District Court would preclude any adaptation or innovation in transportation technology. The whole purpose of Congress in creating administrative agencies was to permit flexibility in the adaptation of regulation to meet the needs of a developing society and commerce.

The lower Court's view of trailer-on-flatcar service as essentially a rail service led it to conclude that the open-tariff rules also conflict with the permissive aspects of Section 216(c), 49 U.S.C. § 316(c), relating to through-routes and joint rates. Viewing this service as a rail service, it concluded that motor carrier use of it would be "shipment by other modes," which is only authorized under Section 216(c) and only on a voluntary basis. (Appendix A, p. 41) The Court below assumed that the provision by a motor carrier of trailer-on-flatcar service utilizing in part a rail movement under an open-tariff rate results in a *de facto* through route. (Appendix A, p. 42)

A through route has been defined as "a continuous line of railway formed by an arrangement, express or implied, between connecting carriers." *Through Routes and Through Rates*, 12 I.C.C. 163, 166 (1907) This Court stated it in slightly different form in *Thompson* v. *United States*, 343 U.S. 549, 556 (1952), and *St. Louis Southwestern R. Co.* v. *United States*, 245 U.S. 136, 139 (1917): "A 'through route' is an arrangement, express or implied,

between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another . . . ." When a motor carrier tenders a shipment under a rail open tariff, the railroad does not participate in offering a through transportation service. Its holding out and its bill of lading contract cover only the portion of the movement under the open-tariff provision. It has no contact with and is subject to no contractual or statutory liability to the original shipper. All that is involved under the open-tariff rules is the unilateral substitution by the motor carrier of a trailer-on-flatcar movement for a portion or all of the highway movement: the shipper's bill of lading contract is only with the motor carrier; and the service is that of the motor carrier. This does not meet the test of the existence of a through route stated in the *Thompson* case, *supra*, (at 343 U.S. 557): "whether the participating carriers hold themselves out as offering through transportation service."

The District Court assumed a through route and devoted its discussion to the question of "compulsion." (Appendix A, p. 42) As there is no through route involved, the question is not whether there is compulsion under Section 216(c), but whether a common carrier may be compelled to hold out its service to all of the public on equal terms or whether it may select only that segment of the public it chooses to serve. An open tariff, by definition, holds out a service to the public without qualification except that users must meet the lawful tariff requirements. By striking down Rule 2, which admittedly is substantially a paraphrase of Section 2, and Rule 3, which implements it as to motor carrier use of open-rail tariffs, the District Court has opened the door to common carrier selection of its patrons.

3. In looking to the Interstate Commerce Act for either specific authorization or specific condemnation of the

"open-tariff" rules, the District Court was also guided by its consideration of trailer-on-flatcar service as essentially a single-mode railroad service.

The second part of the question considered by the District Court was whether the Commission correctly construed the Act to forbid railroad discrimination against motor carriers in the services afforded or if the Act rather excuses the railroads from a duty to serve motor carriers equally with "ordinary shippers." (Appendix A, p. 34) It concluded that neither Section 2, 49 U.S.C. § 2, discussed in the Commission report, nor Section 3, 49 U.S.C. § 3, affirmatively authorizes the open-tariff rules. In its persistence in treating this matter as a modal contest, the District Court seemingly went too far, because it declared unlawful Rule 2 which requires railroads to carry for all on equal terms and without discrimination under their open-tariff TOFC publications. The court below acknowledged that "in considerable part the Commission's Rule 2 is merely a paraphrase of" Section 2 (Appendix A, p. 35), but because of the juxtaposition of Rules 2 and 3 and their logical connection, the District Court apparently felt constrained to declare Rule 2 unlawful.

Because railroads are common carriers under a duty to serve all of the public on equal terms—a concept which permeates the Act[5]—there is no need to find support for Rules 2 and 3 in the explicit command of any single section of the Act. Rather, the burden is on the carriers claiming the right to discriminate against certain segments of the public in derogation of that duty, to point to the specific statutory exemption from their common-carrier duty to serve.

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[5] E.g., section 1(4) requires common carriers to provide and furnish service upon reasonable request; section 2 prohibits unjust discrimination; section 3(1) prohibits undue preference or prejudice, etc.

In another proceeding involving the claimed right of a common carrier to discriminate in its holding out to the public, *Interstate Commerce Commission* v. *Delaware, L. & W.R. Co.*, 220 U.S. 235 (1911), this Court noted the common-carrier duty to serve (at page 252):

> "The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently whether with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation."

This was the approach taken by the Commission. It stated that the proposed rules (322 I.C.C. at 406 et seq.) were framed to achieve the end "that TOFC service be made available to all at equal charges." (322 I.C.C. at 328) While it agreed with the examiners that proposed rules in this regard should not be published because they would have the effect of controlling by general rule the divisions of revenue which should be left, at least initially, to private negotiation, nevertheless, the Commission was "still concerned with the concept of equal TOFC charges for all underlying the proposed rules." (322 I.C.C. at 328) It therefore determined to publish a basic rule

embodying that concept and a rule which relates that concept of equal charges to motor carrier use of open-tariff rates.

The District Court concluded that the Commission was resting its prescription of Rules 2 and 3 on Section 2 of the Act, which was discussed in the Commission report. (Appendix A, p. 35) This resulted from a consideration of only that section of the report treating Rules 2 and 3. Because of the size and scope of the investigation and the necessary length of its report, the Commission discussed different aspects of the regulation of trailer-on-flatcar transportation, and the rules relating to those aspects, in different sections of the report. It did not set out, in each section, the statutory authority for the particular rules discussed in that section.[6] The statutory authority for all of the prescribed rules is set out in 322 I.C.C. at 324. Referring specifically to rules "to implement the broad provisions of existing legislation"—of which the open-tariff rules are prime examples—the Commission specifically relied on its broad rule-making power and the provision of section 12 wherein it is "authorized and directed to execute and enforce" the provisions of Part I of the Act. It noted past judicial recognition of this rule-making authority, citing *Assigned Car Cases*, 274 U.S. 564, 575 et seq. (1927); *American Trucking Assns.* v. *United States*, 344 U.S. 298, 308-13 (1953); and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945); in the last of which it noted that this Court pointed out that the Act since its inception—

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[6] E.g., at 322 I.C.C. 372-80, the Commission discusses the prescription of "billing and notification" rules without referring to specific statutory authority to do so; and at 322 I.C.C. 367-72, it discusses the prescription of the tariff publication rules without citing specific statutory authority for such rules. In rejecting the attack on the tariff publishing rule (Rule 7), the court below found support for it in Sections 6(1) and 1(3)(a) of the Act.

> "has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of those terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system."

The Commission discussed various provisions of the Act[7] as well as a line of prior decisions which various parties claimed were in conflict with the open-tariff rules (322 I.C.C. at 329-36), but this discussion was directed to answering specific arguments on exceptions, it was not designed to set out specific statutory justification for the rules.

The District Court, on the other hand, looked for specific statutory language as support for the rules in either Section 2 or Section 3(1). In doing so, however, the court failed to note the full scope of the rules:

> ". . . the ostensible object and effect of those Rules [Rules 2 and 3] is not to eliminate discrimination in rates under Section 2, but rather to compel the railroads to afford TOFC service to motor carriers if it is provided for others. The provision relevant to this purpose, Section 3, is nowhere cited in the Commission Report." (Appendix A, p. 36)

The Court did note that Sections 2 and 3 are complementary and to be read in *pari materia*, but it did not note that they must also be read in the context of other provisions of the Act relating to the common carrier obligation, nor did it recognize that Rules 2 and 3 do more than

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[7] The provision in the national transportation policy for "fair and impartial regulation of all modes of transportation" (322 I.C.C. 329); the through-route provision of Section 216(c) (322 I.C.C. at 334-35); the non-discrimination provisions of Section 2. (322 I.C.C. at 335-36)

"to compel the railroads to afford TOFC service to motor carriers if it is provided for others." They are designed to eliminate discrimination in both rates and service. Rule 2 says not only that all may utilize trailer-on-flatcar service, but that they may use it at the same charge for substantially the same service.

This Court has also recognized the close interrelation between the duty to carry and non-discrimination in charges in *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, *supra*, 220 U.S. 235, 252 (1911). Likewise in *Wight* v. *United States*, 167 U.S. 512, 517 (1897), the Court described Section 2 of the Act as "designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another." The argument that differential pricing between different shippers for the same service may be forbidden by Section 2, but that refusal to allow certain shippers to use published tariff rates is not, was answered by the Commission in the first year of the Interstate Commerce Act in *Smith* v. *Northern Pacific R. Co.*, 1 I.C.C. 208, 212 (1887). There the railroad sold tickets to prospective land purchasers not available to the public at large. The Commission found: "This course of dealing is in direct contravention of the second section of the Act to Regulate Commerce." And in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 111 (1954), the Commission held that a railroad may not, by a tariff provision, make its trailer-on-flatcar service available to private carriers but not to freight forwarders since this Court had held (in *Delaware L. & W.R. Co.* case, *supra*) "that a railroad may not make the ownership of goods tendered to it for carriage the test of its duty to receive and carry." Rate discrimination and service discrimination are but two faces of the same evil. It is small comfort to a shipper barred from using a common-carrier transportation service available to others

to know that his exclusion results from a flat refusal of service rather than from the rate being discriminatorily set so high as to him as to bar its utilization.

Contrary to the conclusion of the District Court, Section 2 of the Act does support the prescription of the open-tariff rules as they are designed to prevent rate discrimination between persons, etc., utilizing trailer-on-flatcar service under substantially similar circumstances and conditions. Likewise, Section 3 of the Act which prohibits undue or unreasonable preference or prejudice also supports the open-tariff rules. The District Court rejected Section 3 as support for the rules because of the proviso excluding from its coverage "discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (Appendix A, p. 36) It rejected the legislative history of this proviso, adopted in 1940, which shows that it was intended to safeguard the *rates* of other carriers against claims that they were unduly prejudicial to the traffic of the rail carrier. The section 3(1) proviso was based on a similar proviso in section 216(d) of the Act, 49 U.S.C. § 316(d), enacted in 1935. In discussing the purpose of the proviso language, Senator Wheeler said:

> "Paragraph (b) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The Committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.
>
> "In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.
>
> "This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a

> rail carrier or any other carrier at a disadvantage. *This contention is not well founded in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons.* However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5656 (Emphasis supplied).[8]

Despite the clear statement of the purpose of the proviso in Senator Wheeler's explanation, the District Court found the legislative material inconclusive, in part, at least, because of its unwillingness to include carriers in the term "patrons" used in those remarks. (Appendix A, p. 37) From the nature of the remarks, it is apparent that Senator Wheeler used the term "patrons" as a shorthand designation of those within the protection of Section 3(1): "person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic." The term "person" is defined in Sections 1(3)(a), 203(a)(1), 302(a), and 402(a)(1) in substantially similar terms and neither expressly nor by implication are carriers excluded.[9]

As support for its conclusion that the open-tariff rules are not authorized by the affirmative commands of Sections 2 and 3 of the Act, the District Court pointed to certain "anomalies" which would arise under Section 2. (Appendix A, p. 37) The first of these is that the rules

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[8] See also, Oppenheim, The National Transportation Policy and Inter-Carrier Competitive Rates, 50-51, 58-59 (1945), and legislative material cited therein.

[9] The use of the phrase "a person which is not a carrier" at places in the Act—e.g., in section 5(2)(a) and (3)—indicates that except as excluded expressly or by necessary implication, "carrier" is included in the term, "person".

are not limited to plan III trailer-on-flatcar service, or even to trailer-on-flatcar service and that "a motor carrier in using it would abandon any pretense of performing service as a carrier . . . ." (Appendix A, p. 38) Of course, the Commission has the power to control abuses under the Act, including the failure of common carriers by motor vehicle to render continuous and adequate service as required in Section 204(a)(1) of the Act, 49 U.S.C. § 304(a)(1), and in the individual certificates of public convenience and necessity, and under Section 212(a), 49 U.S.C. § 312(a) it has the power to suspend, change, or revoke certificates, under appropriate procedure, for failure to comply with the provisions of the Act, the Commission's orders, rules, and regulations, or terms or conditions of certificates. In its decision here, the Commission specifically noted that the prescribed rules are not the "final and definitive word" and left open the door to future modification of the rules as found necessary. (322 I.C.C. 325) The remote possible abuses forecast by the lower court are effectively guarded against and do not support the rejection of Rules 2 and 3.

The other "anomalies" suggested by the lower court (Appendix A, p. 39) result from its failure to distinguish between a person (including a carrier) using trailer-on-flatcar service under an open tariff and a rail and motor carrier joining together to offer a joint service. These are not services "under substantially similar circumstances and conditions," as required for the anti-discrimination provisions of Sections 2 and 3 to come into play. The divisions between carriers participating in joint service have no relation to the rates and charges under open tariffs. Shippers cannot participate in joint-service divisions, not because of anything in Rules 2 and 3, but because they are not carriers authorized under the Act to enter into joint-service arrangements.

Similarly, the "discrimination" against motor carriers in the limits on their use of open tariff service comes about because of the limitations in their certificates. They may only perform carrier service within the limits of their certificates and, therefore, they may only use open-tariff TOFC service in the performance of their authorized service within the limits of their certificates. This is a discrimination, but it is not an unjust, undue, or unreasonable discrimination which is what the Act forbids.

4. The third ground for rejection of the open tariff rules stated by the District Court is their supposed conflict with the freight forwarder provisions of part IV of the Act. (Appendix A, p. 45) The court's reasoning rests on the assumption that a motor carrier utilizing bimodal trailer-on-flatcar service is not operating as a motor carrier. Here, also, the unspoken assumption is that trailer-on-flatcar service is a rail service, an assumption we have dealt with above. Assembly and distribution of small-lot shipments are not uniquely attributes of freight forwarding (*supra*, n. 4), and as long as a motor carrier is performing such assembly and distribution *as a motor carrier*, he is excluded from the definition of "freight forwarder" in Section 402(a)(5) of the Act, 49 U.S.C. § 1002(a)(5).

The lower court's final ground for rejecting the open tariff rules is that a long line of past Commission decisions have proceeded on the premise that it is "repugnant to the act" for a motor carrier to act as a common carrier and a shipper as to the same service and what it frankly calls "legislative inaction." (Appendix A, p. 48) But the effect of such a holding would be either to force administrative agencies into an undesirable rigidity or to make them reluctant to act for fear that future changes in circumstances would call for a then unlawful modification of prior holdings. The whole justification for the

establishment of administrative agencies is to permit a development of the law to meet new circumstances. Congress has cast the regulatory provisions in general terms and left it to the agencies to spell out the contents of those terms. *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615 (1945). The Commission here was re-evaluating past decisions in the light of the recent spectacular growth of trailer-on-flatcar service and because those past decisions were rendered "during the infancy of this transportation prodigy." (322 I.C.C. 322) Unless agencies are free to respond to new developments when the need for regulation arises, they would fail to carry out the congressional purpose which is the justification for their being.

The Commission's decision here represents a commendable effort of an agency to act in response to a revolutionary development in the activities it is charged with regulating—a development which overturns many of the existing concepts in transportation. Trailer-on-flatcar service obliterates the historic lines of demarcation between modes of transportation, and permits the blending of the attributes of both rail and motor service. Faced with the question of the use of this new bimodal service in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954), without a record of past operations and without any basis for forecasting the future impact of this rail-motor service, the Commission approved the railroad use of it. Through its exploitation, the railroads have been able to avoid the limitations inherent in conventional railroad operations and offer the shippers a service which is predicated upon the door-to-door movement of freight in the same highway vehicle—the primary inherent advantage of motor carriers. As a result the transportation services of railroads are no longer confined to the railroad tracks, but extend over the streets and highways to the doors of shippers and consignees.

As a result of the *Movement of Highway Trailers by Rail* decision, railroads have been able to bar motor carrier use of this bimodal service except at their sufferance. In this proceeding, with a record of the phenomenal growth of this hybrid rail-motor service, the Commission has re-evaluated prior decisions. That record shows that railroads have been able to invade to a substantial degree the traffic of motor carriers. In its decision here the Commission sought to give the motor carriers a *quid pro quo* for allowing the railroads to exploit the motor carrier inherent advantages. Its decision merely assures that this bimodal rail-motor service will be equally open to both railroads and motor carriers.

Under the decision of the court below, the motor carriers would be barred from participating in this bimodal rail-motor service except at the sufferance of the railroads. In freeing the motor carriers from this railroad veto of their use of trailer-on-flatcar service, the Commission was acting in accordance with the mandate of the national transportation policy to provide for the "fair and impartial regulation of all modes of transportation subject to [the] Act." (49 U.S.C., preceding §§ 1, 301, 901, and 1001).

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, we urge that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

PETER T. BEARDSLEY
HARRY J. JORDAN
WILLIAM R. RUBBERT
PAUL D. BORGHESANI
F. G. FREUND
R. EDWIN BRADY
1616 P. Street, N.W.
Washington, D. C. 20036

BRYCE REA, JR.
1329 E Street, N.W.
Washington, D. C. 20004

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN
RICHARD R. SIGMON
1111 E. Street, N.W.
Washington, D. C. 20004

JAMES E. WILSON
Continental Building
Washington, D. C. 20005

GUY H. POSTELL
1375 Peachtree Street, N.E.
Atlanta 9, Georgia

FERDINAND BORN
708 Chamber of Commerce Building
Indianapolis, Indiana

GEORGE D. MICHALSON
P. O. Drawer 647
Kansas City 41, Missouri

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
411 San Jacinto Street
Dallas, Texas

Attorneys for Appellants

OF COUNSEL:

CARL L. STEINER, Esquire
Axelrod, Goodman & Steiner
39 South LaSalle Street
Chicago 3, Illinois

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 64 C 1442

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; LOUISIANA & ARKANSAS RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; UNION PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY; THE WESTERN PACIFIC RAILROAD COMPANY;

Plaintiffs,

v.

UNITED STATES OF AMERICA; AND
INTERSTATE COMMERCE COMMISSION;

Defendants.

August 20, 1965

Before Castle, Circuit Judge, Hoffman and Decker, District Judges.

Julius J. Hoffman, District Judge. Piggyback service—

the movement of highway trailers on railroad flatcars—constitutes "probably the most significant recent development in transportation", in the opinion of the Interstate Commerce Commission. Because of the "explosive growth" of this service in the past five years, the Commission in 1962 instituted on its own motion a proceeding to investigate the subject generally and "to explore new approaches" to its regulation. That proceeding culminated in a Report and Order of the Commission issued under the title *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, Ex Parte No. 230, reported at 322 I. C. C. 301-417, dated March 16, 1964, rehearings denied June 22, 1964, and December 21, 1964. By this Report and Order, the Commission promulgated eight rules intended to regulate trailer-on-flatcar (TOFC) service. These Rules, herein referred to simply as Rules 1 through 8, are officially designated and reported as Sections 500.1 through 500.8 of title 49, Code of Federal Regulations.

This suit was brought to enjoin and set aside the Commission's order on the ground that four of the eight rules issued by the Commission are beyond its authority and unlawful.[1] Pursuant to Sections 2284 and 2321 through 2325 of the Judicial Code,[2] the matter has been tried before a three-judge court. We conclude that the Commission's order must be set aside.

I.

The plaintiffs and intervening plaintiffs are aligned as five separate parties in interest, comprising three groups of railroads, one railroad individually, and a group of

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[1] A motion for a temporary restraining order was withdrawn when the Commission, on its own motion, stayed the effectiveness of its rules until further order.

[2] 28 U.S.C. §§ 2284, 2321-2325 (1948).

freight forwarders. For the defense, the American Trucking Associations, Inc., and some of its members, the Contract Carrier Conference, and the National Auto Transporters Association all intervened to join as defendants with the Commission and the United States. Despite this multiplicity, the several plaintiffs are agreed on the main point of the railroads' controversy with their rivals, the truckers, and in their objections to the Commission's new rules.

The primary issue to be decided is the validity of Rules 2 and 3, promulgated by the Commission in its proceeding by a divided vote. Briefly glossed, they require a railroad which offers TOFC service on an open-tariff basis, that is, to the regular shipping public, to make that service available on the same terms without discrimination to motor carriers[3] acting in that capacity in hauling freight, and, as a corollary, authorize the motor carriers to substitute this TOFC service of the railroads for their regular highway transportation by truck. In full, these rules provide:

> 500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.
>
> 500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

[3] These Rules apply equally to the use of railroad TOFC service by common and contract carriers by water, as by motor vehicle. Since the issues are largely identical, they will be considered by reference only to motor carriers except where different legal principles apply to water carriers. So-called fishyback service—the movement of highway trailers by barge—was severed from this proceeding for separate treatment, as were the practices of motor carriers of automobiles. Birdyback service is not involved.

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service shall not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

These Rules break new ground. To the present time, the available TOFC service has been divided among five categories or "plans" which have evolved from the carriers' practices and the Commission's rulings. As capsulized in the Commission's Report, the five plans involve the following arrangements:

PLAN I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

PLAN II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

PLAN III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

PLAN IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

PLAN V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

It will be seen that these five plans can be classed more simply into two groups: the open-tariff plans, numbered II, III, and IV, available equally to regular shippers and freight forwarders, but not to motor carriers; and the joint intermodal plans, numbered I and V, available only to common carriers, and only through negotiation and vol-

untary agreement between the rail carrier and the motor carrier. Thus motor carriers and ordinary shippers are differently served under separate plans. Negatively, this separation has foreclosed motor common carriers from the use of the three open-tariff plans. The prohibition implicit in the plans was explicitly declared by the Commission a short while after motor carriers first were brought under federal regulation.[4] Since 1939, this ruling has been reaffirmed in subsequent decisions and observed in practice consistently down to the present time.[5] The established principle and its supporting reasons have come to be summed up in the abbreviated statement that it is repugnant to the Interstate Commerce Act for a motor carrier to act both as a carrier and a shipper as to the same shipment.

The new Rules promulgated by a majority of the Commission would work an abrupt departure from this established principle and from the settled practice. Since joint intermodal service of the kind provided by plans I and V would be continued under new Rule 4, (49 C.F.R. 500.4), the motor common carrier would enjoy the option of both classes of TOFC service, and could choose either open-tariff service without the railroad's consent or concurrence if that rate should be more favorable, or the joint intermodal service if the railroad in negotiation should agree to offer that at a lower rate. The railroads, presently free to bargain with their highway competitors, would be bound to accept whatever TOFC freight their rival carriers might choose to tender. These basic changes in the industry are not, however, inadvertent. The Commission plainly avowed its purpose as "the reexamination of existing Commission precedents and pronouncements" and it specifically overruled those prior decisions which it found

[4] Substituted Freight Service, 232 I.C.C. 683 (1939).

[5] *See* Movement of Highway Trailers by Rail, 293 I.C.C. 93 (1954), and cases there cited.

to be indistinguishable and absolutely irreconcilable with its newer view. The issue of power is thus clearly drawn.

II.

In reviewing the authority of the Commission to issue the Rules in question, we are confronted at the outset by the duty to measure the administrative action solely against the statutory grounds invoked by the agency. In the exercise of judicial review, a court is not at liberty to seek its own justification for the Commission's order or to accept appellate counsel's *post hoc* rationalizations.[6] The Commission bears a correlative duty to disclose clearly the grounds on which it acts.[7]

Here we cannot say that the Commission's Report is a model of clarity, guiding the court unerringly to the statutory source of the power relied upon. The Rules are described in the Report as partly interpretive, partly imposing billing and tariff requirements, and partly "to implement the broad provisions of existing legislation", without specification of which ground supports any particular rule. In overruling its earlier decisions which prohibited motor carriers from shipping their customers' goods by rail, the Commission "does not doubt that when made they represented sound conclusions." The decisions are now regarded, however, as "incorrect in the light of this record and current conditions." The observation suggests that the Commission now regards itself as vested with a sweeping power to make quasi-legislative rules which it deems appropriate to carry forward the broad policies of the act of Congress, although it declared at an earlier day that

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[6] Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962); Atchison, Topeka and Santa Fe Ry. v. United States, 209 F. Supp. 35, 45 (N. D. Ill. 1962).

[7] Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 94 (1943); Automatic Canteen Company v. Federal Trade Commission, 346 U.S. 61, 81 (1953).

"We are invested with no roving commission to carry out the policy of Congress . . . ."[8]

It is unnecessary to decide, however, whether the power delegated in Section 12 of the Interstate Commerce Act, authorizing the Commission "to execute and enforce the provisions" of the Act, confers such a general power to make rules to meet changed conditions. The Rules in question here must stand or fall with the interpretation of the Act itself, regardless of altered circumstances in the transportation industry. On one hand, Rules 2 and 3 are simply declaratory of the command of Congess if the Commission is correct in construing the Act to forbid railroad discrimination against motor carriers in the services afforded, and in interpreting the Act as imposing no limits on the power of a motor carrier to avail itself of substituted rail service in its authorized operations. On the other hand, the Rules are invalid as in conflict with the Act, despite changed conditions, if the congressional enactment is read to excuse the railroads from a duty to serve motor carriers equally with ordinary shippers, or to limit the authority of motor carriers to ship their customers' freight by rail without the railroads' concurrence.

We turn first, then, to the interpretation of the relevant statutes, upon the Commission's assumption that the questions are open and may be treated as matters of first impression. We will thereafter consider the effect of the settled line of decision establishing an interpretation contrary to the Commission's revised views.

III.

The only statute mentioned in the Commission's report which could supply affirmative support for Rules 2 and 3

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[8] Kansas City Southern Ry. Co. v. Kansas City Terminal Ry. Co., 211 I.C.C. 291, 304 (1935).

is Section 2 of the Interstate Commerce Act.[9] Indeed, in considerable part the Commission's Rule 2 is merely a paraphrase of that Section. We may accept, therefore, the argument of counsel for the government, despite the ambiguity of the Report's reference and discussion, that the Commission invoked Section 2 as authority for its Rules.

Section 2 provides in full:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

By its terms, this Section deals only with discrimination in rates, and does not extend to a discriminatory refusal to provide service at all. This limitation in scope is not a legislative oversight, however. The next succeeding section of the Act rounds out the carrier's duty of equal treatment, by forbidding discrimination or preferences in the service afforded, in the following terms:

> Section 3(1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, terri-

[9] 49 U.S.C. § 2 (1887).

> tory, or any particular description of traffic whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

It appears, then, that the letter of the law singled out by the Commission as authority for its Rules offers no support, since the ostensible object and effect of those Rules is not to eliminate discrimination in rates under Section 2, but rather to compel the railroads to afford TOFC service to motor carriers if it is provided for others. The provision relevant to this purpose, Section 3, is nowhere cited in the Commission Report. This flaw might not be fatal if Section 3 provided the necessary foundation, since the two sections are plainly complementary and to be read *in pari materia*. But Section 3, by its proviso, specifically excludes from its coverage "the traffic of any other carrier of whatever description."

Endeavoring to avoid the plain meaning of this proviso, the government relies upon a portion of its complex legislative history. The proviso was enacted in 1940, when it was adopted from a parallel provision of part II of the Interstate Commerce Act, dealing with motor carriers, which had been enacted in 1935.[10] Tracing to this source, the government points to a statement of Senator Wheeler, made in explanation of the language as used in this earlier bill, tending to show that the proviso was intended to allay fears that carriers by competing modes might complain of injury by reason of the low rates of the rival.[11]

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[10] Section 216(d), 49 U.S.C. § 316(d) (1935)

[11] 79 Cong. Rec. 5656.

The Senator expressed his opinion that the fears were not well founded, however, because the basic command of the section had in turn been borrowed from Section 3 of part I (applicable to railroads) as originally enacted *without* the proviso, and because that section had "always been interpreted as covering unequal and unjust treatment by a carrier of its patrons." Reading "patrons" as including carriers who tender freight for shipment, the government's argument proceeds from this observation through the tangle of cross-references to the conclusion that Section 3 *does* protect carriers who seek to use another carrier's services since it is said that the proviso exempts only discrimination against the traffic of other carriers competing on parallel routes for the same business. The plaintiffs point out in response that Senator Wheeler was contrasting "patrons" with "carriers" in his remarks, so the government's major premise—that carriers are "patrons" in the Senator's thinking—is faulty.

At best this legislative history is inconclusive. It seems clear that the Senator did not have in contemplation the status of the carrier that tenders freight to another; and that his comments on this different bill provide only oblique evidence of the meaning of the basic provisions of Section 3(1), which had been enacted nearly fifty years earlier, or of the meaning of its proviso, enacted by another Congress five years later. This evidence of congressional intent is too slender a reed to support a disregard of the broad sweep of the words excluding from the railroad's obligation of equal service "the traffic of any other carrier of whatever description."

Practical problems which would arise under the Commission's interpretation of Section 2 also militate against such a reading. Although the Report emphasizes the value of *coordinated* service by motor carriers and railroads, the Rules promulgated would allow the motor carrier to use any open-tariff TOFC plan, including plan II

as well as plan III. Under plan II there is no coordination: the railroad provides complete door-to-door service, with its own tractors and trailers. Thus the motor carrier in using it would abandon any pretense of performing services as a carrier, and would function merely as the customer's agent in calling upon the railroad for its services. Moreover, if the Act required railroads to serve motor carriers and regular shippers without discrimination, there would be no warrant for confining the command to TOFC service. The trucker would be entitled to compel the railroads to carry not only the freight-laden trailer but bulk cargo and boxcar freight as well. The Rules announced, limited as they are to TOFC shipment, would fall far short of the need for guidance were the novel interpretation of the Act to be sustained; the greater need would be for rules to govern the problem of handling freight in other forms. And since Sections 2 and 3 of the Act apply to the transportation of passengers as well as freight, the Commission's interpretation would open a host of new problems concerning substituted service for passengers. Moreover, the Commission's view of the Act would appear to require intra-modal substituted service, as pointed out by Commissioner Webb in his dissent, by which one railroad could shunt its unprofitable traffic onto a competing railroad, or by which one motor carrier could call upon another for the difficult hauls. Pressed to its logical ultimates, the Act, in the Commission's reading, would permit a carrier which had received freight from another to exercise the same right by tendering the same freight immediately back to the original carrier. Such examples, while remote, are not too extravagant to cast doubt on the validity of the Commission's construction of the Act.

An additional anomaly lies in the fact that the Commission's own Rules would appear to offend against its interpretation of Section 2. While motor carriers could demand TOFC service at the open-tariff rates offered to

regular shippers, they would still be authorized to enter into agreements with rail carriers for joint intermodal service under Commission Rule 4, at rates fixed by private negotiation and contract. The choice would seem to be inconsistent with the Commission's own justifying principle as declared in its Rule 2, that TOFC service should "be made available to any person at a charge no greater and no less than that received from any other person . . . ." The effort to achieve equality rather produces a new inequality, since at least under the present practices carriers and shippers are separately served, each group at its own price. How far the Rules fall short of the announced objective of equal charges for all TOFC service is emphasized by the Commission's rejection of two proposed rules which would have fixed the open-tariff rate as the maximum rate which the railroad might receive through private agreements for joint intermodal service, and which would have required the railroads to treat all motor carriers equally, as to services and rates, in its agreements for such joint intermodal service.[12] If the Commission were correct in its view that carriers and regular shippers are equally "persons" within the meaning of Section 2 of the Act, then that statutory prohibition against a railroad's receiving "from any person or persons a greater or less compensation for any service rendered" than from another, "by any special rate . . . or other device," would seem to require not only that carriers be treated as well as shippers, but that shippers be treated as well as carriers, and each carrier as well as any other.

In still another aspect, the Commission's Rules countenance an apparent discrimination which may be difficult to reconcile with the interpretation of Sections 2 and 3 of the Act as fully applicable to motor carriers shipping their customers' goods by rail. By its Rule 3, the Com-

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[12] The proposed rules, distributed in the initial stages of the proceeding, are set forth, and rejected, at 322 I.C.C. 328.

mission permits motor common carriers to utilize open-tariff TOFC service only between points on their authorized routes, and to tender traffic to railroads, or receive it from them, only at points which the motor carriers are authorized to serve. Under Rule 5, motor common carriers are subjected to still another limitation, prohibiting the use of open-tariff TOFC as a means to serve by direct route points which the motor carrier is authorized to serve only indirectly and circuitously, by combining route authorizations for other points. Since ordinary shippers are subject to none of these limits, the Rules do not achieve that equality of service which the Commission would require from its reading of Section 2. The answer, of course, lies in the fact that a motor carrier which makes use of open-tariff TOFC service is not merely an ordinary shipper, but is still a carrier subject to all limits imposed by law on its authority. The Commission itself thus recognizes that carriers and shippers are not equally and indiscriminately "persons" entitled to the same service at the same rates under Sections 2 and 3 of the Act.

IV.

While we have concluded that the Rules in question are not authorized in their affirmative commands by Sections 2 and 3 of the Interstate Commerce Act, properly interpreted, there is a related but independent ground under which these Rules must fall. Even if the Act specifically commanded the railroads to serve motor carriers and ordinary shippers without discrimination, there would remain the question whether the motor carriers could lawfully avail themselves of that service without violating their contracts with customers or exceeding the rights conferred by the certificate of public convenience and necessity which authorizes their operations. In other words, we are bound to consider the statutes regulating the operations of motor carriers as well as those imposing obligations upon the railroads.

The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority conferred on the carrier. Each mode of transportation is the subject of a separate formal part of the Act: part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by "motor vehicle", not by rail or other modes, and on the "public highway".[13]

When operation by another mode is permissible, specific legislative exceptions have been created. Thus freight forwarders under part IV are specifically authorized to ship goods by means of common carriers governed by other parts of the Act.[14] Such special exceptions mirror the underlying statutory scheme that limits the carrier in each mode to transportation within and by that mode, absent special exception.

These elementary observations make plain the legislative plan that motor carriers shall perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception. The only relevant statute which allows such substitution is Section 216(c) of the Act.[15] It provides:

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[13] Secs. 203(a)(1) and (c), 206(a)(1), 209(a)(1); 49 U.S.C. §§ 303(a) and (c), 306(a)(1), 309(a)(1).

[14] Sec. 418; 49 U.S.C. § 1018.

[15] 49 U.S.C. § 316(c) (1935).

"(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water. . . . In case of such joint rates, fares, or charges, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. . . ."

It is agreed on all sides that this provision is permissive. In declaring that carriers "*may* establish" through routes and joint rates, Congress left the matter to voluntary agreement, and did not empower the Commission to require such cooperation or coordination. This literal interpretation of Section 216(c) is reinforced by comparison with other provisions of the Act which, as between other classes of carriers, authorize compulsory through routes by Commission order.[16]

In the proceedings before the Commission and in this court, these plaintiffs submitted that to require the railroads to offer TOFC service equally to motor carriers would constitute the compulsory establishment of through routes in violation of the section. The Commission did not dispute the two premises of the argument: first, that the Commission is "without statutory power indirectly to require the establishment of through motor or motor-rail routes," [17] and second, that requiring railroads to offer open-tariff TOFC service to motor carriers would amount to establishing compulsory *de facto* through routes. The

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[16] See Secs. 15(3), 1(4), Interstate Commerce Act, 49 U.S.C. §§ 15(3), 1(4); United States v. Pennsylvania R. Co., 323 U.S. 612 (1945).

[17] 322 I.C.C. 301, at 334.

Commission avoided the argument, however, by concluding that no compulsion was involved in its Rules. The Report states:

> "However, to say that we would be requiring the establishment of through routes merely by finding that it is lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it. We find this argument to be without merit." [18]

The Commission's position is at odds with reality. To say that the railroads are subject to no compulsion so long as they can avoid such through routes by abandoning all TOFC service for anyone hardly preserves the free choice intended by the congressional direction that such carriers "may establish" through routes. If the absence of compulsion is measured by the availability of alternatives, here compulsion is absolute. Under Section 1(4) of the Act, the railroad is bound "to provide and furnish transportation upon reasonable request therefor . . . ." [19]

With equipment available for TOFC service, the railroad is thus compelled by law to provide such service to the general shipping public, and would then be compelled, under the Commission's Rule, to provide equal service to motor carriers, with no alternative at all.

With the Commission's ground untenable, counsel for the government and the Commission have resorted in this court to new grounds for avoiding the application of Section 216(c) and its implicit prohibition of compulsory through routes. This new position asserts that a through route exists by definition only when two carriers join in holding out the joint service. Since under the Commis-

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[18] 322 I.C.C. 301, 335.

[19] 49 U.S.C. § 1(4) (1887).

sion's Rule the railroad would not join in holding out such service—and indeed would participate only by compulsion —it is said that no through route is involved. By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route.

The want of reason in the position is exemplified by the Commission's holding that TOFC service as now provided under Plan I is authorized as a through route arrangement under Section 216(c). The operative features of that Plan are identical with the TOFC service contemplated by the Commission's newly promulgated Rule 3. In each case the motor carrier has the option, subject to the shipper's veto, to employ substituted rail service or to haul the trailers over the highway. The shipper pays the motor carrier's rates upon motor carrier bills, and the motor carrier is subject to limits on circuity and points of service. The only difference between the two schemes is the railroad's consent under existing Plan I. If that Plan is to be sustained as a voluntary through route under Section 216(c),[20] then the Commission's new open-tariff TOFC service must be viewed as involving a compulsory through route forbidden by the section.[21]

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[20] None of the parties has challenged the validity of Plan I in the proceedings before this court. The legality of the Plan is under attack, however, in a separate suit pending in the District Court for the Northern District of Texas, Civil Action No. 4-355.

[21] Carriers by water, otherwise governed by the same principles as motor carriers, must be differentiated on the matter of through routes. By vitue of Section 15(3) of the Act, 49 U.S.C. § 15(3), "the Commission *may*, and it shall whenever deemed by it to be necessary or desirable in the public interest, *after full hearing* upon complaint or upon its own initiative without complaint, *establish through routes* . . . applicable to the transportation of passengers or property *by carriers by railroad* subject to this chapter and *common carriers by water* subject to chapter 12 of this title . . ." The Commission's Report and Order make no reference to this sec-

Moreover, the argument does not avoid the fundamental limit derived from the statutory scheme, prohibiting the carrier from performing its transportation services through a mode not within its authorization, absent special exception. Since the through route permitted by Section 216(c) is the exclusive statutory authority for the use of rail transportation by motor carriers, the Commission's Rule must qualify, if it is valid at all, as establishing through routes under that section.

V

Still another obstacle to the Commission's Rules is posed by the separate complaint of the freight forwarders. They assert that the Commission's new Rules are invalid in so far as they would permit motor carriers to "utilize TOFC service in the performance of all or any portion of their authorized service . . . ." [22] The motor carrier would thereby be permitted to confine its own service to the assembly and consolidation of the shipment, leaving the actual transportation to the railroad, and would be acting not as a carrier but as a freight forwarder. The Rules thus run counter to the provisions of part IV of the Act which forbid any person to act as a freight forwarder without a permit issued by the Commission, and which prohibit the issuance of such permit to a common carrier.[23] In response, the Commission appears to have concluded that so long as the motor carrier holds the requisite

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tion as authority for the Rules promulgated, and its proceedings did not in any sense constitute the "full hearing" on the necessity for through rail-water routes which is required by that section. Since the section is the exclusive method by which the Commission may require joint rail-water service, and since its powers were not exercised or its requirments met, the Rules are no more valid as applied to TOFC services due water carriers than to motor carriers.

[22] Rule 500.3(a), 322 I.C.C. 413.

[23] Sections 410(a)(1), (c), 49 U.S.C. 1010(a)(1), 1010(c).

authority, so that it *could* act as a carrier by transporting the shipment itself, it is acting in its capacity "as a carrier" even though no carrier service is performed in fact.[24] The non-carrying carrier thus would not be subject to the statute prohibiting any person from performing the services of a freight forwarder without a license, but would be excused by the provision exempting a person who performs such services "as a carrier."[25]

No reason is suggested why we should suppose that Congress meant to allow a motor carrier to perform only the services of a freight forwarder, not as an incident to furnishing transportation, merely because the carrier holds a bare unexercised authority to furnish transportation, while at the same time Congress prohibited the licensing of motor carriers as freight forwarders.

The principal foundation for the Commission's new Rules is apparently summed up in its observation "We can see no justification either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally."[26] The observation can be sustained only if the motor carrier is permitted, chameleon-like, to change its coloration to evade these statutory prohibitions. Thus, to escape the Congressional denial of power to establish compulsory through routes under Sec. 216(c), it is claimed that the motor carrier in using the railroad's open-tariff TOFC service is acting not as a connecting carrier, but merely as a private person belonging to the general shipping public. At the same time, to escape the freight forwarder's claim, it is said that the motor carrier does the same thing not as an ordinary member of

[24] 322 I.C.C. 333, 335

[25] Section 402(a)(5), 49 U.S.C. § 1002(a)(5).

[26] 322 I.C.C., at 335.

the general shipping public but as a carrier. To keep faith with Congress, to give reasonable effect to its commands, we are obliged to eschew word-play and to read the statutes in the light and spirit of their purpose. The policy explicit in Sections 216(c) and 402(a)(5), and implicit in the structure of the Interstate Commerce Act as a whole, does not allow a motor carrier to perform its authorized service simply by tendering the shipment to the railroad for transportation without the railroad's concurrence. This policy is reflected in the National Transportation Policy declared by Congress "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each . . . ." [27] This underlying purpose militates against allowing rail carriers to invade the motor carrier field,[28] and its reason extends equally to the converse situation, where motor carriers seek to exploit the inherent advantages of rail transportation.

VI

We have thus far approached the issues of statutory interpretation as a matter of first impression. Our conclusion that the Commission's Rules exceed its powers under the Interstate Commerce Act does not rest alone, however, upon our construction of that legislation. The holding is supported and confirmed by the consistent and repeated decisions of the Commission and the courts. Few of these opinions can be regarded as directly holding that motor carriers cannot legally avail themselves of the railroads' open-tariff TOFC service without railroad concur-

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[27] Act Sept. 18, 1940, 54 Stat. 899, 49 U.S.C. preceding § 1.

[28] American Trucking Associations, Inc. v. United States, 364 U.S. 1, 6 (1959); United States v. Rock Island Motor Transit Co., 340 U.S. 419, 431-2 (1951).

rence. Nonetheless, they proceed upon premises which reaffirm the statutory principles previously considered.

The Commission's course of decision began before the enactment of part II of the Act, and before motor carriers were subjected to federal regulation. In *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435 (1936), the railroad had offered open-tariff service to motor carriers before the passage of part II; in a decision handed down after the regulatory act had taken effect, the Commission sanctioned the offering. It should be noted, however, that the railroad had voluntarily offered the service to attract the traffic of a motor carrier, and that some five months later the railroad withdrew its open-tariff offering and entered into a through-route, joint rate arrangement with the motor carrier, approved in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245.

Whatever implications of approval might be drawn from the earlier decision were overruled three years later in *Substituted Freight Service*, 232 I.C.C. 683 (1939). Here the Commission plainly held that a motor carrier could not lawfully substitute rail service for its authorized highway service for a part of the line haul. Although the decision emphasizes the necessity for publication of tariffs disclosing the manner of carriage, it also requires that such tariffs be published with the concurrence of the railroad. In the absence of such concurrence, which would establish a through route at joint rates under Sec. 216 (c),[29] the opinion declares that it is "repugnant to the act" for a motor carrier "to act as a common carrier by motor vehicle and as a shipper by rail as to the same service . . . ."[30] This interpretation of the Act was followed and affirmed in an unbroken line of decisions of the Com-

[29] 49 U.S.C. § 316(c).

[30] 232 I.C.C., 690.

mission in the intervening years. Such cases as *Ringsby Truck Lines, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 263 I.C.C. 139, 141 (1945); *Savage Application*, 265 I.C.C. 157, 167 (1947); and *Movement of Highway Trailers by Rail* (the so-called New Haven case), 293 I.C.C. 93 (1954), are illustrative. For twenty-five years, until the decision here under review, the Commission had adhered to this interpretation of the act directly in conflict with its newly announced views.

In the courts, a similar principle is established in holdings to the effect that a person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the "grandfather" provisions of the Act. *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (D.C. N.Y. 1940), aff'd p.c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States*, 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. The relevant premise of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad. The cases would be distinguishable only if we were willing to rule that the unexercised power to provide highway service qualifies a person as a motor carrier even though he provides transportation solely by rail instead.

In the *Acme* case, it was also urged that a joint service arrangement might be valid outside the limits of Section 216(c) of the Act, 49 U.S.C. § 316(c), a contention similar to that presented by counsel for the government here. The court concluded as we have, that the provisions of that section are the exclusive means for establishing joint motor-rail through routes and joint rates, and that any such arrangement not in conformity with the section must

fall.[31] Implicit in that section is the Commission's lack of power to compel motor carriers and rail carriers to provide coordinated service, and it was this lack of power which justified permitting railroads to provide motor carrier service incidental and supplemental to their rail transportation. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 72 (1945). See Fulda, *Rail-Motor Competition: Motor Carrier Operations by Railroads*, 54 Nw. L. Rev. 156, 201 (1959).

Although it is settled that a common carrier may not discriminate against (or in favor of) another carrier shipping its own property for its own purposes,[32] Sections 2 and 3 of the Act have never, so far as appears, been interpreted by the Commission or the courts to require one carried to perform service as a substitute for another carrier, *qua* carrier, as the Commission's new rules would command. In the face of this settled interpretation of the Act by the Commission itself as well as the courts, the deference ordinarily due to the construction of the Act by the administrative agency responsible for its enforcement is not called for. See *All States Freight, Inc.* v. *New York, New Haven & Hartford Railroad*, 379 U.S. 343 (1964); *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 209 F. Supp. 35, 41-42 (N. D. Ill. 1962); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

Moreover, this settled interpretation of the Act has been recognized and accepted by both the executive and legislative branches. In his Message to Congress Relative to the Transportation System on April 5, 1962, the President recommended legislative action to achieve precisely

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[31] 30 F. Supp. at 973.

[32] I.C.C. v. Baltimore & Ohio R.R., 225 U.S. 326 (1912). Freight forwarders, not entitled to establish through routes and joint rates with common carriers under the Act, are in the same position as ordinary shippers and are thus protected from discrimination under the Act. I.C.C. v. Delaware, L. & W. R.R., 220 U.S. 235 (1911).

the result of the Commission's Rules here in issue.[33] Bills to effectuate this proposal were introduced both in the Senate and in the House in 1962 and again in 1963.[34] Pending at the same time were bills proposed by the Commission itself to achieve a similar objective by amending Section 216(c) of the Act to empower the Commission to compel motor carriers and railroads to establish through routes.[35] Congress failed to enact any of these proposals. While courts must take care not to give undue weight to legislative inaction, the fact that the President placed before the Congress a proposal predicated upon a specific interpretation of existing law cannot wholly be ignored in interpreting that law when Congress has refused to make the suggested change. See *Blau* v. *Lehman*, 368 U.S. 403, 412-13 (1962); *Maurer* v. *Hamilton*, 309 U.S. 598, 613 (1940).

In conclusion, it appears that neither the specific provisions of the Interstate Commerce Act nor its general underlying scheme confer authority upon the Commission to compel railroads to provide open-tariff TOFC service to motor carriers; on the contrary, the Act both in its specifics and general policy, forbid such compulsion. With the confirmation of this interpretation in an unbroken line of Commission decisions, in judicial precedent, and in executive and legislative understanding, there is no room for the Commission to alter the settled meaning. Like the Commission, this court is foreclosed from indulgence in

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[33] H.R. Doc. No. 384, 87th Cong., 2d Sess.

[34] S. 3242 and H.R. 11584, 87th Cong., 2d Sess. (1962) and S. 1062 and H.R. 4701, 88th Cong., 1st Sess. (1963). It should be noted that each bill would have amended Section 2 of the Act not to prohibit discrimination against competing carriers generally and as to all service, as the Commission's reading would require, but merely to prohibit discrimination in the transportation of "loaded or empty vehicles or shipping containers," that is, TOFC service.

[35] S. 3510 and H.R. 12362, 87th Cong., 2d Sess. (1962); S. 676 and H.R. 2088, 88th Cong., 1st Sess. (1963).

the broad formulation of wise transportation policy. Those considerations belong to the Congress. We therefore hold that Rules 2 and 3 as promulgated by the Commission in this proceeding, and Rule 5 in so far as it amplifies those rules, are invalid and must be set aside.

VII.

Two collateral matters remain for disposition. While the plaintiffs asserted principally the invalidity of Rules 2 and 3, they have also attacked Rules 5 and 7 promulgated by the Commission in the same proceeding and order.

Rule 5 represents the Commission's effort to assure that TOFC service will not be misused by motor carriers as a means of circumventing the limits of their certificates concerning authorized routes. Since a motor carrier might be able to link its separately authorized routes to create a circuitous route between authorized points of service, and to achieve the benefits of a direct route authorization by utilizing TOFC service directly between those points, Rule 5 permits motor carriers to use TOFC service "in lieu of their authorized line haul transportation" only if the rail distance is at least 85 per cent of the highway distance by the authorized route.[36] In so far as this Rule relates to open-tariff TOFC service, it falls, *pro tanto*, with Rules 2

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[36] The Rule provides in relevant part:

500.5 *Circuity limitations.*—

(*a*) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open-tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 per cent of the distance between such points over the motor or water carrier's authorized service route; *provided, however,* that the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

and 3. The railroads have attacked its remaining application to joint intermodal service as ambiguous and arbitrary, to the extent that it may control joint intermodal service under existing plan V. We cannot agree that the Rule is without rational foundation. To the extent that through routes are established end to end under plan V, the Rule by its terms has no application. Where the TOFC service is used "in lieu of" the motor carrier's line haul transportation between points the motor carrier could serve, we cannot conclude that the Commission was fatally arbitrary in concluding that respect for the limits of the certificates issued requires the imposition of circuity safeguards, whether the intermodal arrangement for the substitution of TOFC service would be classed as plan I or plan V.

Finally, the plaintiffs have attacked the validity of Rule 7, claiming it to be arbitrary, ambiguous, and beyond the Commission's power. In substance, the Rule requires publication in tariff form of the rates and rules governing the leasing of equipment (practically, highway trailers) by a railroad or its affiliate to any person using the railroad's TOFC service. Literally, the Rule does not require that the lease be *for the purpose* of TOFC shipment, but only to a "person using" the railroads' TOFC service. It is plain from the objectives of the Commission as elaborated in its Report, however, that the Commission was concerned with the leasing of trailers by the railroad for use in its own TOFC service, as part of the total transportation service supplied. This limited interpretation of the Rule was specifically avowed by counsel for the government on brief and in oral argument. In this reading, the Rule would find support in Section 6(1) of the Act, requiring full publication of all charges and privileges or facilities affecting the value of the service rendered to the shipper, and by Section 1(3)(a), defining rail "transportation" to include the instrumentalities of carriage, irrespective of ownership.

Since the proceeding must be remanded to the Commission in any event, for a general revision of the Rules as a whole in conformity with these views, we will adopt and accept this limited interpretation of Rule 7. The Commission will have an early opportunity to clarify its intent if a broader scope should be thought necessary. Limited in this way, the Rule appears to be subject to no invalidating objection.

A decree will be entered for the plaintiffs, consistent with the foregoing conclusions.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 64 C 1442.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO GREAT WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; LOUISIANA & ARKANSAS RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; UNION PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY; THE WESTERN PACIFIC RAILROAD COMPANY;

Plaintiffs,

v.

UNITED STATES OF AMERICA; AND
INTERSTATE COMMERCE COMMISSION;

Defendants.

DECREE

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having heard and considered the evidence and

the briefs and arguments of counsel for the parties, and having rendered and filed its Opinion herein containing its findings of fact and conclusions of law, and being fully advised in the premises, it is

ORDERED, ADJUDGED, and DECREED:

1. That the Report and Order of the Interstate Commerce Commission entered in its proceeding numbered Ex Parte 230 and entitled *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, dated March 16, 1964, in so far as it issues and prescribes Rules 2 and 3 contained therein and designated as 49 C.F.R. 500.2 and 500.3, be and hereby is set aside and annulled;

2. That the defendant Interstate Commerce Commission be and hereby is permanently enjoined and restrained from enforcing said Rules 2 and 3 contained in and issued by the Report and Order aforesaid; and

3. That this proceeding be and hereby is remanded to the Interstate Commerce Commission for such further proceedings, consistent with the Opinion and Decree of this Court, as may be appropriate.

Dated this 20th day of August, 1965.

ENTER:

/s/ Latham Castle
Circuit Judge

/s/ Julius J. Hoffman
District Judge

/s/ Bernard M. Decker
District Judge

APPENDIX B

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SPECIAL RATES AND REBATES PROHIBITED

Sec. 2 [*As amended February 28, 1920, June 19, 1934, and August 9, 1935*]. [*49 U.S.C. § 2.*] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less com-

pensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

PREFERENCES; INTERCHANGE OF TRAFFIC; TERMINAL FACILITIES

Sec. 3. [*As amended February 28, 1920, March 4, 1927, August 9, 1935, August 12, 1935, September 18, 1940, August 2, 1949.*] [*49 U.S.C.* § *3.*] (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

Sec. 216 [*August 9, 1935, as amended June 29, 1938, and September 18, 1940.*] [*49 U.S.C. § 316.*]

* * * * *

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

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INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS

(PIGGYBACK SERVICE)

Decided March 16, 1964

Upon notice of proposed rulemaking, rules and regulations governing the practices of for-hire carriers of property, operating in interstate or foreign commerce and providing or participating in trailer-on-flatcar service, prescribed.

A table of contents to this report is contained in appendix V.

Harry C. Ames, S.S. Eisen, James L. Givan, George H. Leonard, F. N. Melius, Jr., Giles Morrow, Theo. R. Schneider, Leonard Stelzer, D. Robert Thomas, and *Martin Whitten* for various freight forwarders and freight forwarder associations.

Peter T. Beardsley, Albert F. Beasley, James L. Beatty, Walter N. Bieneman, W. H. Borghesani, Jr., Ferdinand Born, Robert E. Born, R. Edwin Brady, Le Grand A. Carlston, Homer S. Carpenter, Eldon R. Clawson, James I. Collier, W. Wilson Corroum, Ray M. Cream, Paul M. Daniell, Francis P. Desmond, George S. Dixon, Robert C. Dryden, J. F. Edell, Howell Ellis, Marion M. Emery, W. B. Ewers, John S. Fessenden, F. H. Floyd, F. G. Freund, Robert Gawley, Harry L. Grubbs, Marvin Handler, James E. Haydon, Richard A. Heilprin, Harold G. Hernly, Thomas J. Houser, Earl Hummer, Harry J. Jordan, S. Harrison Kahn, Joseph E. Keller, James K. Knudson, Houston Lynch, Jr., Carney D. Matheson, Herman Matthei, Francis W. McInerny, George D. Michalson, M. Bruce Morgan, Glenn F. Morgan, Arlus C. Morris, Lloyd Ownbey, Jr., Guy H. Postell, Bryce Rea, Jr., G. M. Rebman, Roland Rice, Floyd M. Roach, William R. Rubbert, Reagan Sayers, Richard R. Sigmon, Louis E. Smith, R. P. Sohan, Hugh M. Steinberger, Glenn W. Stephens, C. Austin Sutherland, Clarence D. Todd, Edward G. Villalon, William M. Watt, Harvey A. Welty, Gene F. West, James J. Williams, James E. Wilson, James W. Wrape, and *Chester A. Zyblut* for various motor carriers and motor carrier associations.

John W. Adams, Jr., Margaret P. Allen, Curtis H. Berg, Harry N. Babcock, John J. Burchell, James A. Bistline, R. G. Bleakney, Jr., Benson T. Buck, Charles W. Burkett, Jr., J. T. Clark, J. L. Connor, Richard E. Costello, Robert W. Cronon, John A. Daily, John C. Danielson, Robert S. Davis, William E. Davis, C. H. Dickman, Kemper A. Dobbins, John H. Doeringer, Robert H. Duesenberg, Paul R. Duke, J. H. Durkin, Urchie B. Ellis, J. D. Feeney, James A. Gillen, E. D. Grinnell, Jr., Rene J. Gunning, Carl P. Greeley, John W. Hanifin, L. W. Hobbs; Bryce Hamilton, Louis A. Harris, William P. Higgins, James W. Hoeland, Richard A. Hollander, Eugene E. Hunt, J. H. Jester, Edmund J. Kenivy, Jess Larson, Harry B. LaTourette, Roland J. Lehman, E. R. Leigh, George M. Mariner, C. E. Martin, Amos M. Mathews, John E. McCullough, W. D. McLean, Thormond A. Miller, William M. Moloney, P. G. Mullen, Robert F. Munsell, Walter J. Myskowski, James W. Nisbet, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Earnest Porter, Gregory S. Prince, C. C. Rettberg, Jr., Wade M. Richards, Albert B. Russ, Jr., John F. Smith, John MacDonald Smith, Robert H. Stahlheber, William A. Thie, Robert A. Thompson, L. E. Torinus, Walter G. Treanor, Ray M. Van Hook, Harold Vikoren, Archie T. Walters, Philip F. Welsh, Edward K. Wheeler, Robert J. Williams, D. N. Zirkle, and *Erle J. Zoll, Jr.,* for various railroads and railroad associations.

Paul J. Coughlin, John Mason, Andrew A. Normandeau, and *Hugh H. Shull, Jr.,* for water carriers.

Theo. F. Behler, Harry Bradt, John M. Cleary, Ronald N. Cobert, Paul Coyle, John F. Donelan, Lester J. Door, Samuel W. Earnshaw, Donald W. Fisher, Walter R. Frizzell, Benjamin G. Habberton, Dan F. Hart, John B. Hedges, Leonard A. Jaskiewicz, Jess Larson, John C. Lincoln, Dickson R. Loos, Sumner J. McCollester, Clarence M. Mulholland, Clarke Munn, Jr., A. E. Norrbom, James E. O'Boyle, F. S. Partridge, Warren Price, Jr., Frederick M. Porter, Philip H. Porter, Aloysius F. Power, Theo. R. Schneider, William R. Settgas, Louis R. Simpson, Charles W. Singer, Harold E. Spencer, James E. Steffarud, Warren H. Wagner, Charles A. Washer, M. W. Wells, John C. White, and *Sidney Zagri* for shippers or other interested parties.

John M. Agrey for Public Service Commission of North Dakota.

Harold C. Heublein for Public Service Commission of Wisconsin.

Charles W. Bucy, Carl R. Bullock, Joseph E. Quin, George A. Robertson, and *Clarence H. Williams* for Department of Agriculture.

John E. Faulk, R. M. Hartsock, and *Clement T. Mayo* for Department of Defense.

William R. Pierce for General Services Administration.

John H. Fallon, Harvey Gobetz, and *Asa J. Merrill* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

This proceeding, instituted on June 29, 1962, on our own motion under the authority of parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act, constitutes this Commission's first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service. The notice of proposed rulemaking made it known that we intended this investigation to be broad in scope, encompassing every aspect of TOFC operations, and that we intended to explore new approaches to piggyback service. Among the matters specifically mentioned in the notice as a subject for consideration was:

> The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] rail rates and service in their operations.

It was also made clear that we intended to reexamine existing precedents and practices, and that consideration would be given to the adoption of rules and regulations which might be found necessary to regulate coordinated and substituted service transportation in the public interest.

The order instituting this proceeding named as respondents all railroads, motor carriers, and water carriers of property, freight forwarders, and express companies operating in interstate commerce, and authorized and directed our Bureau of Inquiry and Compliance to participate. It also assigned the matter for a prehearing conference, which was held October 9, 1962, and at which proposed rules, reproduced as appendix II hereto, were distributed. Oral hearings have not been held, but representations, verified statements, and reply statements have been received from numerous interested parties. The proceeding was assigned to two hearing examiners who recommended adoption of the regulations contained in appendix III hereto. Exceptions to the

examiners' recommended order and replies thereto have been filed by the parties listed in appendix I, and we have heard oral argument. Two issues, the practices of for-hire motor carriers of automobiles and the practices of for-hire water carriers providing "fishyback" service, were severed from the remainder of the proceeding by order of November 12, 1963, for oral hearing and separate handling.

The southern railroads have included in their exceptions motions to strike certain portions of the verified statements filed by the Bureau of Inquiry and Compliance and certain other parties. They argue that the Bureau has overstepped its authorization, contained in the order instituting this proceeding, to participate in this proceeding "for the purpose of developing the evidence and the issues," and that the other matter objected to is irrelevant or incompetent as evidence. Also pending is a motion filed by the same carriers on April 2, 1963, for cross-examination of the Director of the Bureau of Inquiry and Compliance. The southern railroads have obviously misunderstood the position of the Bureau in this proceeding. It is a party like any other, and it was free to introduce any evidence it saw fit. The Director of the Bureau did not sponsor a verified statement, and has appeared in this proceeding only as counsel. There is no more reason to subject him to cross-examination than any other attorney appearing in a solely representative capacity. The other verified statements objected to should, in our opinion, remain in the record. The motions will be denied.

TRAILER-ON-FLATCAR OPERATIONS

If the subsequent discussion is to be understandable, a word must be said at the outset about the nomenclature of TOFC services. The varieties of services available are commonly referred to in terms of five numbered plans. These designations have attained general use in the transportation industry, and for the sake of convenience we are using them in this report. They will be discussed in greater detail later, but the following capsule definitions were contained in the appendix to the order instituting this proceeding:

PLAN I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

PLAN II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

PLAN III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

PLAN IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

PLAN V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

The development and effect of TOFC service.— Transportation of loaded highway trailers on railroad flatcars is not a new development, although its growth has been explosive in the past 5 years. Nearly 40 years ago the Chicago, North Shore and Milwaukee Railroad Company pioneered a "ferry truck" service that was essentailly similar to today's plan II piggybacking by the railroads. Pressed by increasing independent motor carrier competition, the North Shore in May 1926 inaugurated a new service for merchandise traffic between Chicago and Milwaukee: using carrier-owned 16-foot trailers and specially constructed flatcars, it would provide a door-to-door delivery of less-than-carload freight in trailer units requiring no transfer of lading en route from shipper to consignee. This was a complete railroad service at rail rates on rail bills of lading. At the outset this service was performed at the same rates and charges previously applicable to the various classes of merchandise transported, but in February 1928 this rate structure was modified and a flat all-merchandise rate, subject to a minimum weight and excepting livestock and perishables, was published.

The prototypes of today's plan I and plan III TOFC service were developed on an experimental basis by several other railroads in the early 1930's. In these years the railroads were competing

with aggressive, rapidly expanding, if unorganized, independent motortruck operators who were not subject to route or rate regulation and who were able to provide extremely flexible pickup, delivery, and accessorial services. TOFC service at this early date was designed to induce trucking companies to ship their vehicles by rail instead of operating them over the highways. Private shippers were free to use this service, but there is no indication that they did so in any substantial volume at this stage of TOFC development. The rail rates that were charged for this service reflected substantially the average direct line-haul expense of operating a truck over the shortest available highway routes between the points served.

By tariff schedules filed to become effective in March 1936, the Chicago Great Western Railway Company offered to transport highway trailers between Chicago and St. Paul at a flat charge of $42.50 per loaded trailer, with a maximum lading of 20,000 pounds per trailer and a minimum charge of $85 if fewer than two trailers were tendered for shipment in a single day. This was an "open-tariff service" intended to attract traffic from all highway carriers, including for-hire motor carriers as well as private shippers operating their own trucks, and from freight forwarders. This service was substantially different from existing less-than-carload transportation because it did not include pickup, delivery, loading, or unloading, and it was essentially a ramp-to-ramp operation. When part II of the Interstate Commerce Act became effective in 1935, thus making for-hire interstate motor carrier operations subject to route and rate regulation, new tariff arrangements were proposed to provide for joint rates between the Great Western and the participating motor common carriers. The new schedules named motor-rail-motor rates between certain authorized "grandfather" service points of the motor carriers which were located beyond the Chicago and St. Paul ramp points. The railroad would act only as an intermediate or "bridge" carrier; the motor carrier would originate and deliver the traffic. The railroad would receive as its division of revenue substantially the same per-trailer amount previously published in the open tariff. These joint rates were allowed to become effective.

The New York, New Haven and Hartford Railroad Company instituted TOFC operations in 1937, offering an open-tariff service to private shippers and motor contract carriers, and a "substituted service" to motor common carriers. These TOFC

services were used almost exclusively by motor common carriers under the latter arrangement, which was essentially the same as present-day plan I service. In 1953 approximately 50,000 trailers were transported by the New Haven in this type of service.

The experience, however, of most railroads in TOFC operations was very limited until 1954, the year in which this Commission gave approval to a number of practices that were then slowly developing. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, the so-called *New Haven* case. Almost immediately a number of railroads inaugurated or expanded their plan I and plan II TOFC operations. The Pennsylvania Railroad Company, for example, began its plan II type of service in 1954 and it handled approximately 15,000 trailers in plan II during the last 6 months of that year. Its estimated total for plan II in 1962 was 55,000 trailers. In 1955, the Pennsylvania transported about 17,000 trailers in plan I service, and that amount has grown to an estimated 80,000 trailers in 1962. Its first full year of plan III was 1959 when 10,500 trailers were handled. By 1961 that total had grown to 43,000 trailers, and its estimate for 1962 was 65,000 trailers.

The Louisville and Nashville Railroad Company started its plan II service in 1955, and handled 193 trailers for total revenue of $33,790. In 1962 these totals for plan II operations had increased to 6,712 trailers and $1.3 million in revenue. In 1960 it handled 46 trailers in plan I service for a revenue of $3,468. In 1961 these totals for plan I had increased to 1,771 trailers and $150,388 in revenue. Plan III was inaugurated in 1960 when 181 trailers were moved for $24,271 revenue. In 2 years its plan III totals increased to 8,618 trailers and approximately $1 million revenue.

There can be little doubt that piggybacking has been a decisive factor in returning to the railroads a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire. The growth of plan I has meant a direct growth in railroad participation in motor common carrier highway traffic. For example, Consolidated Freightways, a motor common carrier, has plan I arrangements with 23 railroads providing for service between 340 pairs of points. During 1961 it paid approximately $1 million to these railroads for their plan I TOFC services. In the first 10 months of 1962, Consolidated Freightways moved 7,878 trailers in plan I operations, and paid more than $1.8 million to the railroads for their piggyback services, nearly doubling the 1961 payment.

The growth of plan III and plan IV TOFC service has also meant diversion of highway traffic both from the for-hire motor carrier industry and from individual companies either engaging in private carriage or planning to do so. The Eastman Kodak Company markets a large volume of miscellaneous chemicals as packaged freight from Rochester, N. Y., through seven sales divisions throughout the country. It began use of plan III from Rochester to its midwestern division at Chicago in 1959; to its South Dakota division and to Chamblee, Ga., in 1960; and then as a return movement from a Midland, Mich., supply point to Rochester in 1960. During 1961 its traffic between these cities totaled 24.5 millon pounds in plan III, and its 1962 tonnage was expected to reach 40 million pounds. Before its use of plan III, all of this traffic was shipped by motor common carrier. Its Chicago plant, for example, which accounts for the largest share, is an off-track facility. Rail service to this branch house previously was impractical because it involved local cartage and transfer of lading, but plan III rail service has turned out to be practical and efficient.

A few years ago the Monsanto Chemical Company had completed an exhaustive survey of private carriage for its St. Louis plants, and it was on the verge of going heavily into private motor carrier operations. Its projected motor operating costs were expected to be 35 cents a trailer-mile. One eastern railroad offered its plan III service at 50 cents a flatcar-mile, or 25 cents per trailer-mile. Consequently Monsanto turned to plan III, and it has since been shipping approximately 50 million pounds of package freight annually in plan III from its three St. Louis plants to its eastern territory between Philadelphia and Boston. About 15 years ago all of this package freight went by rail. Starting at that time there was a gradual shift to motor carriage and ultimately motor common carriers handled essentially all the traffic. This trend was reversed decisively with Monsanto's use of plan III which now has become the primary method of movement of this traffic.

At the present time the available statistical data on TOFC operations and services throughout the Nation is not sufficiently refined or reliable to demonstrate authoritatively the precise extent to which railroad successes with piggybacking have meant actual diversions of traffic from competitive modes of transport. But the examples of Consolidated Freightways, Monsanto, and Eastman Kodak are typical of many others around the Nation, and

the railroads generally are enthusiastically attempting to duplicate experiences like these. In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963 there were 100 class I roads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings, for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 loaded TOFC cars, a weekly rate of approximately 12,700 loadings.

It is apparent, however, that substantial investments have been made by the railroads and others in TOFC equipment. The New York Central has invested a total of almost $30 million, not including its investment in Flexi-van[1] terminals. The Seaboard Air Line Railroad Company has invested $1,147,000 in 55 ramps; The Chesapeake and Ohio Railway Company shows $2,800,000 invested in TOFC equipment and ramps; The Atchison, Topeka and Santa Fe Railway Company shows $2.1 million invested in piggyback facilities at Chicago, Los Angeles, and Oakland; The Baltimore and Ohio Railroad Company shows $2.6 million invested in TOFC trailers and freight cars, $670,000 in ramps, and $186,559 in cranes; the Pacific Fruit Express Company has $6,579,600 invested in TOFC equipment and in addition its leased equipment represents an investment of $2.8 million. It has placed orders for 200 additional 40-foot refrigerated trailers at a cost of $2,470,000 making a total investment of approximately $12 million.

This record does not show how extensively commercial shippers have invested in TOFC equipment but the investment of freight forwarders is set forth. As of January 1, 1963, the freight forwarders, represented in this proceeding, had an investment amounting to $10.5 million in trailers, tractors, and freight cars. They also have annual obligations in long-term leases on freight cars and trailers amounting to $1.6 million.

The five piggyback plans.– Plan I TOFC service involves the movement by railroad of loaded trailers or similar containers of motor carriers, with the contents thereof moving on one bill of lading issued by the trucker. This substituted rail service is

[1] "Flexi-van" is a specialized type of TOFC equipment, developed primarily by the New York Central, and used by only a few railroads. Its principal characteristics are a trailer with a demountable body and a specially built, light-weight rail car which is designed to carry only Flexi-van trailers and which may be side-loaded without the use of the normal circus-type ramp.

available only between points where there is actually available service by the motor carrier which substitutes rail for motor service. The traffic moves on rates which are the same as the trucker applies on its all-highway service. The motor carriers solicit the traffic for movement in their own trailers, which, in the absence of the shipper's forbidding the use of substituted rail service, is tendered to the railroad for line-haul transportation. The trailer is brought to the railroad ramp by the motor carrier where it is placed onto the flatcar. The trailer is sealed and the railroad has no knowledge of the traffic being transported, except for the total weight of lading in each trailer. The railroad's compensation in such a move is based upon a division of the charges arrived at through negotiations between the two carriers. This division of charges is published as a division sheet but is not customarily made available to the shipping public nor is it filed with the Commission. At destination the trailers are unloaded from the flatcars and delivered over-the-road to destination by the motor carrier. So long as the motor common carrier meets the financial responsibility and route authority requirements, the participating railroads are generally willing to share plan I arrangements with any such motor carrier.

As previously noted, the *New Haven* case provided the framework of legal principles that has governed the renewed growth and interest in piggyback operations which began in 1953. There the Commission defined the relationships of motor carriers, railroads, and shippers involved in these trailer-on-flatcar services. For several years following the *New Haven* decision there were few controversies within the industry about the scope of plan I TOFC services permissible under the various operating authorities of the motor carriers. More recently, however, with the vastly accelerated utilization of TOFC services, the whole concept of plan I TOFC has anew been brought into question, both on the point of its essential legality under the controlling statutes and on the point of its economic desirability under regulation. At the same time there have arisen a number of related questions concerning the authority of motor carriers to engage in plan I piggyback in specific circumstances, such as the following: whether motor carriers may interchange plan I piggyback traffic at the point of origin of the traffic, with the railroad performing the entire line-haul movement; whether a motor carrier needs specific operating authority to provide service *to* or *from* the ramp points at which it will interchange plan I traffic with the railroad

performing the piggyback operation; whether the relative circuity of the authorized service route of a motor carrier should be considered as a factor in allowing that motor carrier to use railroad TOFC service between such points; and whether motor contract carriers may participate in plan I TOFC to the same extent as motor common carriers.

Under plan II, the railroad holds out to provide a complete door-to-door service under a single bill of lading. Neither the shipper nor the consignee intervenes in any way in the overall transportation activities or does anything beyond tendering the shipment to the railroad at origin or at the shipper's loading dock. The railroad assumes full responsibility in the following respects: providing the shipper with a trailer; moving the trailer to, and placing it at, the shipper's door for pickup; loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the rail TOFC ramp, furnishing a tractor and driver; supplying the rail flatcar; placing and securing the trailer onto the flatcar; providing the line-haul transportation from origin ramp to destination ramp; unloading the trailer from the flatcar at destination; moving the loaded trailer from the destination ramp to consignee's store door, again furnishing a tractor and driver; unloading the freight from the trailer; and finally removing the empty trailer.

The published rate which includes all of the above-mentioned services to be performed by the railroad generally applies (*a*) to a specific commodity or a group of specific commodities; (*b*) in straight or mixed carloads without mixture limitations; (*c*) in a single trailer; and (*d*) subject to a rate per 100 pounds and a minimum rate tailored to the specific commodity involved.

Under plan III, the railroad furnishes only a transportation service between its TOFC ramps. The only additional service the railroad performs in accordance with its tariff is placing and securing the trailers onto the flatcars at the origin ramp and the unloading of the trailers from the flatcars at the destination ramp. This service is offered to private shippers and freight forwarders. The shipper using plan III must assume the full responsibility for the following: supplying its own trailer either by ownership or through a lease arrangement; moving or arranging to move the trailer to the shipper's dock for loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the railroad TOFC ramp, which means that the shipper must arrange for the furnishing of a tractor and driver; arranging

for the issuance of an appropriate bill of lading from the railroad origin ramp to the railroad destination ramp; receiving the loaded trailer at the destination ramp; furnishing or arranging for the furnishing of the physical facilities for removing the trailer from the destination TOFC ramp to the consignee's store door; unloading the freight from the trailer; and finally returning the trailer, where leased, to the lessor.

Under plan III the published rate generally applies (*a*) to freight, all kinds; (*b*) in mixed carloads; (*c*) subject to specific mixing rules and regulations; (*d*) in two-trailer lots; and (*e*) further subject to a maximum load of 70,000 pounds at the flat charge per carload and irrespective of the mixture of freight involved.

Trip leasing of trailers from the railroads or their subsidiary leasing companies has become commonplace with many shippers and freight forwarders. At the present time the tariffs offering plan III service do not include, in most instances, the leasing charges, a statement of the amount of free time allowed for loading or unloading, detention charges, or protective service charges.

Plan IV is comparable to plan III except that the shipper has the additional responsibility of furnishing the railroad flatcar, including the loading and unloading of the trailers onto and off the flatcar.

Plan V involves through motor-rail or motor-rail-motor services at joint rates applicable only over the through route or routes. Either mode may originate or deliver a plan V shipment, and the traffic will move on either a rail or motor bill of lading depending upon which carrier originates the shipment. In particular contrast to plan I operations, there need not be available to the shipper an alternative all-highway motor carrier service between the points where the plan V joint rate is applicable. Plan V coordination therefore is used either (1) where the rail and motor carriers serve different areas and are combining their services to perform a new service between origin and destination; or (2) where they are performing service over parallel routings and are in effect, at least, substituting one mode of transportation for the other for a portion of the line-haul.

Equipment leasing practices.— Many forms of leasing arrangements have burgeoned forth in the past few years as part of the accelerated growth of plans III and IV TOFC service. As seen, these plans contemplate use of trailers or flatcar-trailer combinations owned or provided by shippers, rather than the railroads. Although some shippers own such equipment, most do not; more-

over, those who do find it difficult or impossible to balance their traffic so as to secure maximum economic use of equipment in TOFC service. Consequently, as TOFC service has grown there has arisen the practice of trip-leasing trailers and flatcars by individual shippers wishing to take advantage of the available, minimal-service, ramp-to-ramp rail rates, and of the fact that their responsibility for the trailer ceases at the end of a one-way trip, thus eliminating the cost of deadheading an empty vehicle back home.

But it is not only the shippers who depend on leased equipment. Most of the class I railroads participating in TOFC supplement use of their own flatcars by leasing specially designed piggyback cars from car companies, such as Trailer Train Company, North American Car Corporation, or General American Transportation Co. In 1959 railroads themselves owned two-thirds of the 6,835 railroad flatcars equipped for use in piggyback service. By June 1963 this figure had dropped to less than 40 percent of the total of 16,708 TOFC flatcars then in use. In its first full year of TOFC operations, 1955, the Baltimore & Ohio operated a total of 75 piggyback flatcars. At the end of 1962 it has assigned approximately 450 flatcars to piggyback operations, about 175 of which were leased from the Trailer Train Company.

Some railroads lease or sublease their TOFC flatcars to freight forwarders and private shippers. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for example, leased a Flexi-van rail car and two trailers to an association of shippers in Seattle on an experimental basis for 6 months in 1959. The association thereafter used the railroad's plan IV service between Seattle and Chicago with such satisfactory results that it has itself directly purchased, or leased from manufacturers, a total of 5 Flexi-van rail cars and 10 trailers. The Milwaukee also occasionally leases TOFC flatcars to freight forwarders, on a round trip lease basis, when the forwarders need to supplement their own equipment during peak periods of traffic.

The Pacific Fruit Express Company is a carline company, owned jointly by the Union Pacific Railroad Company and the Southern Pacific Company, supplying a fleet of refrigerator cars to certain railroads for movement of perishables. As of September 30, 1962, it owned 421 40-foot refrigerated trailers and 50 85-foot flatcars for use in TOFC operations. It also was operating an additional 200 85-foot flatcars under lease, and as previously mentioned, it had ordered 200 more refrigerated

trailers. This equipment was designed for transportation of either perishable or dry commodities, and was acquired in contemplation of its being trip leased to shippers and freight forwarders on westbound shipments of dry freight as a return movement for perishable traffic eastbound by piggyback from west coast origins.

The Pennsylvania Railroad does not directly own the trailers that it uses in its plan II operations, or that it makes available to its shippers for plan III service. A wholly owned subsidiary corporation, Excelsior Truck Leasing Company, Inc., supplies all such automotive equipment in a flexible leasing arrangement. Trailers to be used in plan II TOFC service are leased to the railroad on a long-term basis in which pools of trailers are made available at strategic plan II terminals. Because inbound plan II traffic to certain terminals substantially exceeded the outbound traffic and in order to make trailers available to individual plan III shippers, the original arrangement was modified in 1958 so that "surplus" trailers at plan II terminals would be returned to the control of Excelsior. In turn, Excelsior would make these trailers available to plan III patrons for one-way trip leases on a first come, first served basis. In these situations ordinarily the trip-lease forms are executed by employees of the railroad acting as agents for Excelsior. The railroad in turn is given a credit against its monthly leasing expense for the shipper rentals from Excelsior.

These trailers are trip leased to individual shippers only on condition that they be used for specific plan III TOFC shipments either to destinations on the Pennsylvania or to destinations on certain other railroads which have agreed with it to specific interline arrangements. As far as home-line destinations are concerned, an effort is made to limit plan III trip rentals to destinations where trailers are needed by the Pennsylvania for plan II loadings.

The written lease agreement between Excelsior and an individual shipper does not specify the per-shipment charge, the free detention time, or the schedule of charges applicable at the end of the free time. These charges and practices are ordinarily explained to a shipper on its first inquiry, and are thereafter followed as a part of a general understanding governing subsequent shipments.

Excelsior charges a flat rental of $20 for conventional trailers for plan III shipments to destinations local to the Pennsylvania, and a graduated scale of rentals to destinations on certain foreign

lines. For example, a shipment to Atlanta from a Pennsylvania Railroad origin point would mean a trailer rental charge of approximately $30. At the foreign line destination, the trip lease would terminate when the responsible shipper or consignee returned the empty trailer to the Atlanta rail ramp. With termination of the trip lease, responsibility for the trailer would revert to the Pennsylvania, as between it and Excelsior, and the terminating railroad in turn would be responsible to it for a per diem rental of the trailer. The terminating railroad, accordingly, would be free to use the trailer in any arrangment it wished, paying the Pennsylvania the agreed per diem rate.

The Louisville & Nashville operates a fleet of about 775 trailers in its plan II and plan III piggyback operations. Of the number about 350 are leased on an 8-year term from REA Leasing Corporation, and another 200 are available in pools assigned by REALCO to the L & N at principal points of use. It leases 24 refrigerated trailers from the Fruit Growers Express. L & N also uses foreign line trailers which are unloaded on its line, provided that there is a specific understanding with the other railroad regarding use of the trailers for new loadings. L & N instituted plan III service in June 1960, and began its practice of trip leasing trailers to individual shippers in February 1961. It attributes to the development of trip leasing a great increase in its plan III traffic volume.

In practice, a shipper desiring to use L & N trailers in plan III service approaches the road's traffic department or one of its freight agents with a request to lease two trailers. A trip lease is prepared when the trailers are picked up at the rail ramp either by the shipper with his own tractor or with that of a local cartage company employed by him. The L & N does not use any affiliated trucking companies to perform this operation, but it will recommend independent local operators to any shipper.

The L & N has been charging a minimum $20 rental for plan III shipments to destinations local to its lines, with either a first morning or second morning delivery. The time and date of start and termination of the trip lease are shown on the lease form. The lease itself does not specify the detention privileges and limitations, but they are verbally described to shippers. When a shipper picks up the trailers prior to 10 a.m. he must return the loaded trailers to the L & N ramp prior to 6 p.m. the same day or else be subject to a $9 per day charge for ordinary trailers or $12 per day for refrigerated trailers. At the destination

point the shipper is allowed free detention also until 6 p.m. on the date of delivery, at which time the daily detention charges begin to run. An individual shipper wishing to transport its own trailers in L & N's plan III service is free to do so, but then is faced with the necessity of either paying for an empty return shipment of his trailers or acquiring a return load of owned commodities.

One practice engaged in by the L & N provides an interesting example of how a TOFC movement can change in midcourse from one plan to another. At East St. Louis the L & N receives some piggyback traffic — usually fresh meats and packinghouse products — which has originated in *plan II* service on the lines of western trunkline railroads. At East St. Louis, the trailers come under the control of the L & N which becomes responsible to the connecting western railroad for per diem charges for the foreign trailers, trip leases the foreign trailers to the shipper, and moves the trailers in *plan III* service generally to Atlanta or to Florida destinations.

Perhaps the ultimate in advantages to be gained from short-term equipment leasing is to be found in the "return" trip lease. The ordinary trailer trip lease involves a railroad, railroad affiliate, or independent company renting a vehicle to a shipper for a one-way movement. It has already been pointed out that this arrangement carries with it the understanding that the shipper's responsibility for the vehicle terminates at the destination point so that it need not bear the cost of an unproductive empty return movement. Under the return trip-lease arrangement, however, the railroad provides transportation under a published plan III TOFC rate of a loaded *shipper-owned* trailer at the published rate from a given origin to destination; then leases the trailer from the shipper after it has been unloaded at destination; and then assumes responsibility for the return of the trailer to the shipper at the origin point. The railroad, of course, is free to use the empty trailer which it has leased for any legitimate purpose, but in normal practice it does not do so, simply returning it empty to the shipper. The shipper, then, has in effect had his trailer shipped back to him at something better than no cost at all, for he has also received from the railroad some nominal sum as "lessor." Although this provision of free transportation does not seem to be widespread, it does occur in connection with certain types of TOFC operations.

Accessorial services.–A fundamental concept of plan III service and plan III pricing is that a shipper receives only basic ramp-to-ramp rail transportation and must provide for himself all other required facilities and services. Many railroads, however, supply a labor force to load or unload plan III trailers, either at no cost to the shipper or at a negotiated price. Some TOFC tariffs provide for the railroad's performance of such accessorial services, but others do not. As pertinent here, the Elkins Act (49 U.S.C. 41) requires regulated common carriers to file and publish all rates and charges and strictly to observe them until changed according to law. It accordingly is unlawful for any person to give or receive any rebate or concession as a result of which any property — by any device whatever — will be transported at a lesser rate or will provide any other special advantage than that named in the published tariff.

During 1961 criminal proceedings were instituted under the Elkins Act against a number of railroads performing questionable loading services. Essentially, in each case the defendant railroad was performing the loading of freight for particular shippers into those shippers' trailers, with the apparent understanding that these trailers were to be shipped under plan III-type tariff arrangements. The applicable plan III tariffs provided that the loading of freight into and the unloading of freight from the trailers had to be performed by the shipper, consignee, or their agents, at the shipper's expense. In fact, the railroads were performing the loading or unloading functions, purportedly as the agents for the shippers. The railroads' tariffs did not provide for performance of the loading or unloading functions or the agency relationship.

In December 1961, the Baltimore and Ohio Railroad and the Erie-Lackawanna Railroad Company were each fined $1,000 on pleas of *nolo contendere* to criminal informations alleging that they loaded trailers for plan III shippers in circumstances such as those just described. However, in a similar, stipulated factual situation the Pennsylvania Railroad Company, on June 8, 1962, was found not guilty of the Elkins Act violations charged. Subsequently, similar criminal charges against the Santa Fe and the Burlington railroads were dismissed at the request of the United States attorney. The extent to which a railroad may contract privately with a TOFC shipper for these and similar services incidental to TOFC transportation has thus remained unsettled.

Billing and assessment of charges.—Although all-rail TOFC services held out by the railroads throughout the country have been formed into relatively standardized tariff descriptions, there is evidence of considerable confusion and disagreement within the transportation industry as to the precise application of tariff rules, as well as evidence that published charges are not always collected. For example, as the applicable plan III rate is often based on a weight factor, it would seem that the participating railroad would assume responsibility for ascertaining the weights of the shipments tendered, either by actual weighing or through some system of certification by the shippers. In fact the class I railroads in the western district have devised procedures for certification of weights of TOFC loadings, as part of their long established bureau system of weighing and inspection. But it has become clear in this proceeding that a number of major railroads participating in TOFC operations have not been determining TOFC shipment weights by any reasonably reliable method or procedure, and therefore cannot know whether proper charges are being assessed.

Many plan III tariffs provide a rate applicable to the total weight of two trailers moving from one shipper to one consignee on one day on one bill of lading. This rule is often loosely applied, with the result that it has no consistent meaning which can be relied upon as a certainty by all potential shippers. In some instances the railroads will consider that the "tender" of two trailers in a given 24-hour period by a plan III shipper satisfies the tariff requirement. In any event it is a frequent practice for the railroads to dispatch loaded plan III trailers whenever received at the rail ramp, with the result that trailers which are paired for billing and rate purposes as single-day shipments actually are shipped on separate days for arrival at destination on different days. We have also been informed of the practice in certain types of TOFC movements (particularly in those where there has been a conversion from plan II to plan III en route from original consignor to ultimate consignee) for the railroad which is taking up the plan III segment of the shipment to neglect to issue a receipt or bill of lading until the day or so after it has forwarded the shipment. This type of delayed issuance of a required shipping document may constitute a violation of section 20(11) of the act, and can open the door to improper preferences to favored shippers, in violation of the Elkins Act.

A similar, perplexing problem for shippers and carriers has been interpretation of the "mixture" tariff rule applicable to plan III transportation of "all-commodity" traffic. Ordinarily this type of rule will provide that not more than 60 percent of the weight of a total, two-trailer shipment may consist of any one commodity or article. One frequent variation of this tariff rule provides the alternative test; not more than 60 percent of the total shipment or not more than 60 percent of 70,000 pounds. The carriers do not seem to be applying any consistent approach in determining whether commodities being shipped are the "same" commodity or article. In general, neither commodity classifications nor other published listings are used to determine whether the articles included in a single shipment are sufficiently dissimilar to constitute different commodities for the purposes of mixture rules. This state of affairs leaves a railroad free to haul straight truckloads of high-rated commodities at hidden bargain rates should it choose to do so for a favored shipper.

Bearing in mind the historical development of piggyback transportation and its present-day problems—as well as its appealing advantages—we shall now proceed to an examination of the issues raised directly by the instant investigation.

THE PROPOSED RULES.

At the prehearing conference held in this proceeding on October 9, 1962, a series of proposed rules, reproduced as appendix II hereto, was distributed. As noted at that time, they were designed to serve as a framework upon which rules ultimately to be adopted, if any, could be developed. The proposed rules represented something of a new approach to TOFC terminology as they attempted to separate TOFC service, without regard to the five numbered plans now in common use, into two more basic classes: "joint intermodal" TOFC service which would include any piggyback service performed jointly by a rail carrier and a motor or water common carrier; and "all-rail" TOFC service which would include any piggyback service in which traffic moves exclusively at rail rates and on rail billing.

The proposed rules were predicated upon the basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers. The proposed rules B-4, B-5, C-1, and C-2 in

particular were designed to implement this concept. Other important aspects of the proposed rules included a requirement that a rail carrier providing all-rail TOFC service make specific provision in its tariffs for all incidental and accessorial services offered by it in connection therewith (rules C-1 and C-2); a prohibition against the publication of joint intermodal TOFC tariffs covering commodities the transportation of which is not subject to economic regulation for their entire movement (rules B-2 and C-7); a requirement that rail carriers providing joint intermodal TOFC service ascertain whether their connecting motor or water carriers hold appropriate operating authority (rule B-5); a requirement that where joint intermodal service is provided, the distance over an intermodal route used by a railroad and a motor carrier be not less than 90 percent of the distance over the authorized motor carrier route from origin to destination (rule B-3); a provision permitting joint intermodal TOFC service for the entire line-haul movement (rule B-7); and a prohibition against the leasing, directly or indirectly, by railroads or persons under common control with railroads of highway trucks, trailers, or semitrailers and rail cars to and from shippers or freight forwarders (rule C-3).

Section D of the proposed rules contained certain billing and notification requirements. These would have included a requirement that TOFC service be provided only when the movement was covered by a bill of lading and manifest with appropriate certification of weights and contents of trailers (rules D-1 and D-2); a regulation providing that two trailers would have to be tendered on the same day in order to qualify for a rate covering the transportation of multiple vehicles (rule D-3); and a rule which in effect permitted rail carriers to restrict the application of all-commodity rates to shipments containing no more than a designated percentage of a single commodity (rule D-5).

THE EXAMINERS' RECOMMENDATIONS

The examiners, in their report and recommended order, find a general need for the promulgation of rules and regulations which would have the effect of fostering the orderly development of TOFC service. The rules which they recommend be adopted are set forth in appendix III to this report. The examiners recognize the same general divisions of TOFC service into its "joint intermodal" and "all-rail" aspects as do the proposed rules, but

they find the plan-number terminology useful and retain it. Plans I and V are defined specifically, and are grouped together as "joint intermodal" service.

The examiners recommend that railroads performing all-rail TOFC service be required to publish in their tariffs all the rates, charges, and rules connected with such service, including charges for leasing of equipment, detention of trailers, accessorial services, and pickup and delivery service if any such services are offered. The ban on leasing of equipment by rail carriers and their subsidiaries to or from shippers contained in the rules as originally proposed would not be retained by the examiners. They would, however, require that all charges for the leasing and return of equipment be included in the rail carrier's tariff publications. Also recommended for adoption were a number of rules consisting largely of modifications of and improvements on those originally proposed, all of which will be discussed later in more detail.

Exceptions to the examiners' recommended order and replies to these exceptions have been filed by representative groups or associations of, or by individual, rail, motor, and water carriers, freight forwarders, and shippers, and by our Bureau of Inquiry and Compliance. In large part, the positions taken by the parties in their exceptions, or in replying to the exceptions of others, reflect those expressed in their representations and considered at length by the examiners. Like the examiners' recommendations, their arguments can best be discussed in relation to the specific topics treated below.

THE NEED FOR TOFC REGULATIONS

If there is one predominant theme that has run through the vast majority of the many representations and pleadings filed in this proceeding, and stressed by those participating in the oral argument, it is the desire for flexibility. Carriers and shippers alike agree that TOFC has already established itself as an extraordinarily significant and valuable innovation on the transportation scene and that it has an almost unlimited future ahead of it. Many of the parties have urged that we take no action here which might have the effect of restricting the growth of piggyback, of forcing it into any fixed mold, or of limiting in any way the inauguration and development by the transportation industry—and particularly the railroads—of new types of TOFC services and of new variations on or applications of present services.

There can be no doubt of the benefit which TOFC service has already rendered the railroads in allowing them to recapture traffic lost to competing modes of transportation, and especially to private motor carriage. Also benefiting have been the motor carriers, which have been provided with an opportunity, through the use of plan I TOFC service, to obtain efficient line-haul transportation and thus to help themselves even while their business helps their rail competitors; the freight forwarders, which have been afforded an economical means for transporting the small shipments which they consolidate; and—most important—the shippers and the general public which ultimately reap the benefits of the increased efficiency and economy that are invariably the result of the combination of competing forces so that each operates in the area where it functions best.

It is our purpose and our hope to encourage the growth of this transportation phenomenon. Large-scale piggyback has had a short history, but it is obviously no longer an infant. Perhaps we might characterize it as a fast-developing teenager, healthy but not without some growing pains. Looking back on some of our past decisions—decisions which must necessarily affect the future of TOFC service because they contain definitions or restrictions which could hamper its logical development—it is apparent that most of them were rendered during the infancy of this transportation prodigy, and some, like *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, might almost be said to have predated its birth. The fact that these decisions were handed down before anyone could have realized the important place TOFC service was destined to attain does not mean that they reached erroneous results, but it does mean that their pronouncements need to be reexamined in the light of modern developments.

The assembling of the information necessary for such a reevaluation was one of the principal reasons for our embarking on a general investigation of piggyback operations, and the factual material which has been introduced into this record, and which will be of great value to us in the future administration of the act, alone amply justifies this proceeding. The need for information relating to TOFC service will, of course, be a continuing one if we are to remain properly informed for the future, and to keep it flowing we have recently revised certain of our reporting requirements in docket No. 34364, *Piggyback Traffic Statistics*, to call for the quarterly reporting of TOFC traffic data by railroads, motor

and water carriers, freight forwarders, and the Railway Express Agency.

In addition to our desire to fill the gaps in our available knowledge about TOFC operations, there had arisen, shortly before this proceeding was begun, certain immediate and pressing problems which required solutions. For example, *National Auto. Transporters Assn.—Declaratory Order*, 91 M.C.C 395 (the *NATA* case), had presented anew the questions whether contract carriers should be allowed to use TOFC service—a question answered in the negative in the *New Haven* case, *supra;* whether interchange of TOFC traffic between rail and motor carriers should be allowed at other than common points of service—an issue which had been treated earlier in *Gilbert Carrier Corp. Extension—Kearny, N. J.*, 72 M.C.C. 204; and how the certificates, peculiar to carriers of motor vehicles, limiting service to initial or secondary movements should be interpreted vis-à-vis piggyback operations. *Gordons Transports, Inc.*, v. *Strickland Transp. Co.*, 318 I.C.C. 395, had raised again the problem, first considered in *Substituted Rail Service by Red Ball Transfer Co.*, 52 M.C.C. 75 and 303 I.C.C. 421, of the use by a circuitous motor carrier of a more direct rail TOFC service between authorized points. The propriety of the extensive practice of leasing trailers for use in TOFC service between rail carriers or their affiliates and shippers, and the apparent opportunities for rebates and discrimination afforded by this practice, had been called to our attention by our field employees. The need to deal consistently with the problems presented in each of these situations was instrumental in persuading us that a proceeding such as the instant one was necessary.

The information that we have received from the parties and the arguments which we have read and heard make it apparent that there are many differences of opinion as to the wisdom and the correct application of some of our past decisions. This proceeding affords the opportunity to explore the areas in which the differences exist. Also, there have been revealed some abuses in the performance of piggyback service. To cite a single example, it is clear that some railroads, in spite of the fact that their rates for transporting loaded trailers in TOFC service are based on maximum weights, make no attempt to ascertain the actual weight of the shipments tendered to them and are failing to collect their published charges.

We think that the record clearly supports the conclusion that it would be in the public interest to lay down, through formal rules,

certain guidelines for TOFC service and practices. We visualize these rules as an aid in furthering, not restricting, the growth of piggyback, as providing some standardization of industry practices, and as a means of insuring that this recent and valuable transportation development is made available to all persons who are able to make effective use of it. Some of the rules to be adopted here are simply interpretive, but we think it well to have summarized and assembled in convenient form the various requirements of the Interstate Commerce Act as they relate to piggyback operations. Other rules take the form of tariff and billing requirements. Still others may be said to implement the broad provisions of existing legislation. A few of the parties challenge the legality of our prescribing rules—particularly of the last-mentioned kind—but we think we have ample authority to take such action. Under parts II, III, and IV of the act, we are given a general rulemaking power by sections 204(a)(6), 304(a), and 403(a), respectively; and in section 12 we are "authorized and directed to execute and enforce" the provisions of part I. The Courts have recognized our rule-making authority. See, for example, *Assigned Car Cases*, 274 U.S. 564, 575 et seq. (1927), which arose under what is now part I of the act; *American Trucking Assn's.* v. *United States*, 344 U.S. 298, 308-13 (1953), which arose under part II; and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945) in which the Supreme Court pointed out that the act, since its inception—

> has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system.

The proposed rules distributed to the parties at the prehearing conference contained several ideas which appeared to many to be both radical in approach and stultifying in net effect. Particularly criticized have been rule C-3 which would have flatly prohibited the leasing of trailers for use in TOFC service; rule B-4 which would have required that the charges received by a rail carrier under a division of revenues for performing part of a joint intermodal TOFC movement could be no greater than its compensation for performing all-rail service between the same points; and the statement in the material accompanying the draft of the proposed rules to the effect that they did not contemplate the use

of TOFC service by motor contract carriers. Proposed rules such as these were largely designed to draw as much comment as possible from various components of the transportation industry to the end that we might obtain as much assistance as possible from every faction in making our final determinations. The response has demonstrated that they have served this purpose well.

We cannot help but be aware that the development of TOFC transportation is not at a standstill, and that whatever we do here will not be the final and definitive word on all the ramifications of piggyback service. If any of the regulations to be adopted here should prove in practice to have the unwanted effect of in any way hampering the flexible development and free use of TOFC service, we feel sure that this fact will promptly be called to our attention by the affected carriers or shippers so that appropriate remedial steps can be taken.

DEFINITIONS

Part A of the proposed rules contains suggested definitions for three terms: "Trailer-on-flatcar (TOFC) service," "Joint intermodal TOFC service," and "All-rail TOFC service." The plan-number terminology is not used at all in the proposed rules, but it is immediately apparent to those accustomed to thinking of piggyback services in this way that "joint intermodal" TOFC service includes what has come to be called in the industry plans I and V, while all-rail TOFC service includes plans II, III, and IV and variations thereof. The examiners used the plan-number terminology throughout their report, and in their recommended rules they provided definitions for plans I and V.

We agree with the examiners, and with virtually all the parties, that the five numbered plans have become firmly ensconced in transportation language, and we are certain that the various TOFC services will continue to be referred to in such terms regardless of what we do here. At the same time, we think that the grouping of these different services into two major classifications—intermodal service, in which traffic moves pursuant to a negotiated agreement for the division of revenue between carriers of different modes, and all-rail, or open-tariff, TOFC service, in which only a rail rate is involved—represents a genuine and useful distinction. In the rules which we are adopting here, this distinction is retained, but we see it as one which simply exists as a necessary element of TOFC service, not as one which has to be, or should be, imposed by definition.

Moreover, we do not think it advisable to attempt a formal definition of plan I or plan V TOFC service. Again the distinction between them is a real one, and it is convenient to refer to the different types of intermodal service by these handy and well-recognized terms. We are, obviously, using them in this report. But while they represent a convenient form of shorthand, their use is not essential to the explication of TOFC regulations. One of the few parties commenting on the proposed definitions in its exceptions, the Southern Railway System, takes the position that the definitions contained in the examiners' recommended rules 2 through 5 are unnecessary and could lead to confusion. We are inclined to agree. The attempt specifically to define certain types of TOFC operations could well prove futile, as well as unnecessarily restrictive, in view of the industry's demonstrated capacity to develop new services and variations on old ones. The rules to be adopted, then, will contain a formal definition only of TOFC service itself.

TOFC service would have been defined in proposed rule A-1 as follows:

> "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

The examiners pointed out that the meaning of "return transportation" might be subject to more than one interpretation, and they recommended the following modification of the definition, in their rule 1:

> "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car.

On exceptions, the Western Railroads contend that this form of the definition might also create interpretive problems as it could be construed to include the transportation of new trucks and trailers shipped by a manufacturer and not actually being used in performing piggyback service. They propose an alternative form of the definition which, we believe, meets this objection and clearly and adequately defines TOFC service. We shall, therefore, adopt it, with minor modifications, as our rule 1:

1 *Definition of TOFC service.*— Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

Several of the parties object that the examiners' recommended rules as a whole, and particularly the definitions contained in rules 2, 3, and 4, fail to provide for the use of TOFC service by water carriers subject to part III of the act. There is now some use by such carriers of TOFC service in lieu of authorized water service between certain Florida ports. It was certainly not our intention in instituting this proceeding to preclude the continuance of such operations, and the rules to be adopted will make provision for the use by water carriers of piggyback service. Operations of this kind should not be confused with those in which water carriers transport their own or other carriers' or shippers' trailers or containers by water in so-called fishyback service. That portion of the instant proceeding involving the latter type of service has been separated from the other issues involved herein for individual treatment and oral hearing by order entered November 12, 1963.

OPEN-TARIFF TOFC SERVICE

Every TOFC service necessarily involves the participation of a railroad which performs certain line-haul transportation. This fact, so obvious that it may seem banal to draw attention to it, is of fundamental importance in any consideration of either the practical or legal aspects of piggyback operations. So too is the further proposition that because TOFC operations involve the rendering of a rail service, they also involve the earning of some compensation by a rail carrier and the provision, through some form of tariff publication, for transportation charges, at least a portion of which will ultimately be received by a rail carrier.

There are only two ways in which a rail carrier can provide for receiving compensation for its transportation services. It can through tariff publication establish charges, which must be just and reasonable, for a particular service to be rendered, or it can enter into joint-rate arrangements with other carriers and estab-

lish divisions, which must also be just and reasonable, of the charge established jointly for the through service. The proposed rules, in attempting to achieve the end that TOFC service be made available to all at equal charges, took an approach which would have required that the divisions received by a rail carrier providing joint intermodal service could not exceed any all-rail TOFC rate maintained by the rail carrier for like services. Proposed rule B-4 would provide:

> The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

Also, proposed rule B-5 would have required any rail carrier providing joint intermodal TOFC service with any motor or water carrier to do so indiscriminately with other such carriers. This rule reads as follows:

> Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

The hearing examiners rejected both these proposed rules,[2] and we think that they were correct in doing so. We do not believe that it would be practical to attempt to control by a rule of general applicability the level of compensation to be received under division agreements which are, by nature, private contracts negotiated by individual carriers. We are, nevertheless, still concerned with the concept of equal TOFC charges for all underlying the proposed rules. For this reason, in the notice setting this proceeding for oral argument, another approach was suggested, and the parties were asked to discuss "Whether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight for-

[2] They did, however, recommend adoption, in their rule 9, of the substance of the second portion of proposed rule B-5 requiring rail carriers to ascertain whether connecting motor carriers hold appropriate authority to join in TOFC service. This matter will be discussed subsequently.

warders, express companies, and common and contract motor and water carriers, exempt or regulated)."

It is the concern of the rail carriers that should motor carriers be given the opportunity to utilize TOFC service at the open-tariff rate for their line-haul movements, they will be in a position to divert traffic from all-rail TOFC service. Those supporting the extension of open-tariff TOFC service to other carriers point, on the other hand, to the obvious fact that whenever such service is used, whether by private shipper, freight forwarder, or competing carrier, the immediate result is revenue for the railroad. Why, they ask, should a railroad object to receiving additional business? The only concrete, practical answer to this query by any railroad party to this proceeding is that there may be situations in which a TOFC open-tariff rate between two given points is established, for competitive reasons, at a particularly low level, and that by using TOFC service between two such points a motor carrier could take advantage of the favorable rate in the performance of part of its line-haul transportation and thus provide service at points beyond those named in the TOFC tariff at a lower rate than, and thus to the ultimate detriment of, the railroad.

It is argued by some that the use of open-tariff TOFC service by carriers would be in contravention of the stated national transportation policy "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each * * *." The Western Railroads, for example, in their reply to exceptions argue that motor carriers would thus be able to "exploit" the railroads' "acknowledged inherent advantage as the nation's low-cost line-haul carrier of goods for great distances," and that this "inherent advantage would be submerged, to be used as a means by which motor carriers could establish their primacy in surface transportation." What they overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery. TOFC could even be said to be *trimodal*, because added to the two factors already mentioned is its ability to combine in a type of container service many small shipments—a

type of service which has become associated with the business of the freight forwarder.

It should not be forgotten in considering the arguments advanced here that all three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail. The railroad does this under its plan II TOFC tariff; the trucker does it under plan I, in which it is encouraged by the railroads (all railroads participating in this proceeding except the Southern Railway System favor continuation of plan I); and the freight forwarder does it through use of plans III and IV rail tariffs.

We think that the rail carriers' fear that the free use of open-tariff piggyback service by motor carriers would end in the elimination of the inherent advantage of rail transportation is misplaced. On the contrary, it seems obvious to us that the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination, and that encouragement of such coordination is in the public interest. We might also note that the presidential transportation message of 1962 asked that all carriers be assured the "right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to non-carrier shippers," so that the various carriers would be placed "in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques."

Those protesting against the legality of the use by a carrier of open-tariff TOFC service point to a line of our decisions in which we concluded that it was "repugnant to the act" for a person to act as both a carrier and a shipper which respect to the same service. That such was stated in a number of cases cannot be disputed, but it should also be noted that when this proceeding was instituted, one of its stated goals was the "reexamination of existing Commission precedents and pronouncements governing coordinated and substituted service transportation." It is argued, however, that this longstanding and consistent administrative interpretation of the act must be deemed to have received the effect of law and that we are precluded from changing it. Cited as supporting this general rule are *United*

tates v. *Leslie Salt Co.*, 350 U.S. 383 (1956); *Helvering* v. *Winmill*, 305 U.S. 79 (1938); and *Atchison, T. & S. F. Ry. Co.* v. *United States*, 209 F. Supp. 35 (1962). Certainly, were we summarily to reject past Commission holdings and attempt somehow to penalize some individual party subject to our jurisdiction for engaging in a course of conduct in which he had followed those holdings, the principle enunciated in the cited cases would be applicable. We do not, however, understand the courts to have taken the inflexible position that an administrative agency, even if it has followed a consistent line for some time, cannot, when faced with new developments or an appreciably changed factual picture in the segment of the national life which it is charged with regulating, alter its past interpretation in a formal proceeding such as this where rules having future effect are to be issued. When cogent reasons and the public interest compel it, even a consistent and generally unchallenged administrative practice may be overturned. Compare *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933).

So far as we have been able to determine, the first time the Commission made the definite statement that a person could not act as both carrier and shipper as to the same service was in the 1939 decision in *Substituted Freight Service*, 232 I.C.C. 683. That proceeding arose soon after the beginning of Federal regulation of interstate motor carriage and was directed toward determining whether certain special permissions granted as a temporary measure to permit continuance of substituted service arrangements of a type prevalent prior to the effective date of part II of the act should be renewed. The special permissions allowed publication of tariff rules which in turn provided for the substitution of motor for rail, water for rail, and rail for water service. They did not require motor common carrier operating authority as a prerequisite for the substitution of motor service for rail or water service; they permitted substitution at the carrier's option, without giving the shipper a negative option; and they did not call for the identification of the parties participating in the substituted service or of the routes to be used therein. The Commission concluded that the special permissions should not be renewed, and in doing so made three specific findings: (1) that the service substituted for common carrier service is itself common carriage and cannot be performed by motor vehicle in the absence of appropriate motor common carrier authority, (2) that the substitution of one form of transportation for another

where the shipper otherwise directs would be a breach of the contract of carriage, and (3) that the routes over which substituted service is performed and the parties performing it must be fully set forth in lawfully filed tariffs. Certainly, we would not dispute any of these findings; in fact, we shall incorporate them in the rules to be adopted.

The statement that a person may not act as both carrier and shipper as to the same service appears first at page 688 of the report in *Substituted Freight Service, supra.* The Commission there noted that the substituted service practices of the eastern rail carriers differed from most others in that these railroads utilized "so-called contract carriers" in such service, and that they "argue that neither they nor such contract carriers are or should be required to act as common carriers by motor vehicle in their relation to the public." The report then states, without explanation or supporting precedent: "But they cannot act as common carriers by rail and shippers by motor vehicle as to identically the same service." Later, on page 690, in discussing an arrangement whereby Consolidated Freight Lines, Incorporated, substituted rail service for its authorized motor service between Minneapolis, Minn., and Terry, Mont., the Commission said:

> It appears that between these points it acts as a forwarder or shipper and assembles the traffic tendered by the individual shippers into carload lots paying the railroad the carload rate between Minneapolis and Terry and assessing the individual shipper or consignee its less-than-truckload rate between primary origin and destination. But for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it appears that it actually has common-carrier rights between Minneapolis and Terry.

Considering the limited nature of the ultimate findings in *Substituted Freight Service, supra*—that is, that service substituted for common carriage must itself be common carriage and that the tariff publications allowed under the special permissions were legally insufficient—it is not clear to us why the underlying conclusion that a person may not be both shipper and carrier with respect to the same service was necessary to the determination of the case. A contrary result had previously been reached in 1936 in *Trucks on Flat Cars between Chicago and Twin Cities*, 216 I.C.C. 435. There the Chicago Great Western Railroad had

published, prior to the passage of part II of the act, an open-tariff TOFC rate which was primarily designed to attract the traffic of a motor common carrier, Keeshin Motor Express Company. The rate was approved, and the Commission commented, at page 444, "We have here a published tariff, and a motor carrier would have the same right to make shipments thereunder as any other member of the body politic." Later, when motor transportation was made subject to our regulation, thus making possible the filing of joint motor-rail rates, the Great Western and Keeshin joined in publishing such rates, which were approved in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245. The Great Western stated at that time that its intention was to withdraw the open-tariff rates previously approved, but the Commission in no way indicated that such a tariff could not be used as originally proposed; that is, by motor common carriers. Nor did it in *Substituted Freight Service*, *supra*, either specifically overrule or attempt to distinguish *Trucks on Flat Cars between Chicago and Twin Cities*, *supra*.

These considerations lead us to the conclusion that the Commission in *Substituted Freight Service*, in saying that a person could not be shipper and carrier as to the same service, did not intend to proscribe the kind of substituted service originally intended by the Great Western and Keeshin in which one common carrier service is substituted for another through the use of an open-tariff rate of the carrier performing the substituted service—provided that proper notice is given in the tariff publication of the carrier using the substituted service. What this language was directed at, as we understand it, was the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. Such a situation might occur were a carrier to tender a shipment to another carrier for transportation to a point it cannot serve or over a route it cannot use, or without providing in its tariffs for the substitution. Consistent with this interpretation is the fact that the report characterizes Consolidated's operation between Minneapolis and Terry as that of a *forwarder* or *shipper*. Presumably, had Consolidated, through an appropriate tariff publication of the kind prescribed in *Substituted Freight Service*, held out its service as a *motor carrier*, through the use of substituted service, the arrangement would have received the same approval as did the original Great Western-Keeshin proposal.

We think that certain other language in the report in *Substituted Freight Service, supra,* also tends to support this conclusion. At page 688 it is said:

> In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act.

Again it should be noted that the emphasis is placed upon the proper publication and notice to the shipping public, and that there is no requirement that what is called a "joint service" can only be performed under joint rates and not pursuant to a properly published substitution arrangement using the open-tariff rates of the underlying carrier. Admittedly, certain of our decisions, including *Ringsby Truck Lines, Inc. v. Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 139, 141, *Savage Application*, 265 I.C.C. 157, 167, and the *New Haven* case, *supra*, have followed a contrary interpretation of the *Substituted Freight Service* case. We are now of the opinion, however, that these decisions, although we do not doubt that when made they represented sound conclusions, are incorrect in the light of this record and current conditions. Two other decisions cited by those opposing the use of open-tariff TOFC service by motor carriers, *Greer Broker Application*, 23 M.C.C. 417, and *Stone's Exp., Inc., Common Carrier Application*, 32 M.C.C. 525, are consistent with our present interpretation of *Substituted Freight Service, supra.*

Another argument which is advanced by a number of the parties is that any intermodal operation in which transportation services are performed by two or more carriers will necessarily result in the creation of a *de facto* through route. Because we are without statutory power directly to require the establishment of through motor or motor-rail routes, this argument continues, we are also without power indirectly to require their establishment by compelling rail carriers to provide open-tariff TOFC service to other carriers. It is, of course, well established that what is a through route is a matter of fact, and that a through route may be found to exist in the absence of a joint rate or any other express arrangement between the carriers involved. *Den-*

ver & R. G. W. R. Co., v. *Union Pac. R. Co.*, 351 U.S. 321 (1956); *Thompson* v. *United States*, 343 U.S. 549 (1952); and *Hausman Steel Co.* v. *Seaboard Freight Lines, Inc.*, 32 M.C.C. 31, 37, and cases cited therein. However, to say that we would be requiring the establishment of through routes merely by finding that it is lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it. We find this argument to be without merit.

We can see no justification, either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariffs, it can substitute another's service for its own in this way. Of course, should the first carrier hold out to perform what may amount only to assembly and distribution services at points, and should it use the underlying transportation of the second carrier between points, which it cannot itself serve in a practicable manner, it would no doubt be found to be operating not as a carrier but as a freight forwarder as defined in section 402(a)(5) of the act. Where it does have the requisite authority, it may perform such service not as a forwarder but as a carrier because section 402(a)(5) defines a freight forwarder as any person performing forwarding services *other than as a carrier subject to parts I, II, or III of the act.* We are aware of no other legal impediment to the use of an open-tariff service by any carrier, whether common or contract, and whether or not subject to our regulatory jurisdiction.

Section 2 of the act requires rail carriers subject to part I to make "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" available to any person at a charge no greater and no less than that received from any other person. It might be argued, however, that service provided for a competitor could not be said to be performed "under substantially similar circumstances and conditions" as that provided for private shippers.

Whether two or more transportation services were performed "under substantially similar circumstances and conditions" would be a matter of fact to be determined in each individual case as it arose, but we see no reason why the fact that the user

of a service was another carrier rather than a private shipper would compel the conclusion that dissimilar circumstances and conditions were present. In *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 753 (1931) the Supreme Court, in upholding a finding of the Commission that transportation by railroads of private passenger cars owned by other railroads at other than published tariff rates was unlawful, refused to recognize any distinction between the transportation of cars owned by railroads and private shippers. The Court noted that all such cars are hauled between the same points, on the same line, in the same or like trains, and in the same manner. This is equally true of the transportation of loaded highway trailers in TOFC service. See also *Warehouse Co.* v. *United States*, 283 U.S. 501, 511-12 (1931).

Some rail carriers are apprehensive lest they be forced to offer TOFC service to possibly financially irresponsible motor carriers, thus running the risk that they would not be paid for their services or that they would be required to handle unsafe motor vehicles. Obviously, a railroad would be free to deal with a motor carrier wishing to use open-tariff TOFC service just as it deals with any private shipper. Thus, the rail carrier, through a tariff rule such as Rule 9 of the Uniform Freight Classification, can require that an insolvent or financially unreliable motor carrier prepay freight charges, or it can provide that shipments not be surrendered until such charges are paid. Also, it is clear that it would not be in the public interest to allow, much less to require, any carrier to utilize unsafe equipment. Rule 6(b), adopted subsequently in this report, will deal with this matter.

We conclude that when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers, in lieu of their all-highway operations in the performance of authorized transportation between authorized service points, or by for-hire carriers engaged in transportation which is exempt from economic regulation. To the extent that this conclusion differs from that expressed in any of our previous decisions, including the *New Haven* case, *supra*, such decisions are hereby overruled. The following rules will be adopted to reflect this conclusion:

2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the

transportation of a like kind of traffic under substantially similar circumstances and conditions.

3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*

(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(b) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(c) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(d) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

JOINT INTERMODAL SERVICE

Having concluded that there is neither legal nor policy bar to the use by motor and water carriers of open-tariff TOFC service proffered by rail carriers generally, and that such use should be allowed in the public interest, we come next to a consideration of the proper status and scope which joint intermodal TOFC service should possess in the broad pattern of piggyback regulation and service. Initially, it must be noted that no one questions that voluntary coordination between the several modes of transport should be encouraged and promoted to the fullest extent possible in the interests of both the carriers and the shipping public. Nor does anyone assert that there is anything improper or unlawful with respect to properly published, through-route and joint-rate arrangements among the various modes of carriage. Rather, what is challenged by certain of the parties herein is whether certain operations and services, and the tariffs embracing rates and charges therefor, properly fall within that class of coordinated intermodal service which is allowable under the act. In order to examine this issue in its proper perspective, it is necessary to review briefly the legal growth and development of that kind of piggyback service which embraces the participation of both rail and motor common carriers.

Prior to August 1935, when part II of the Interstate Commerce Act became law, the motor carrier industry was not subject to Federal regulation and such carriers, therefore, could utilize the services of railroads as could any shipper. *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435. Part II of the act, however, subjected motor carriers to economic regulation by this Commission, and section 216(c) thereof provided in specific terms that motor common carriers may establish reasonable through routes and joint rates with rail carriers. Shortly thereafter, the Chicago Great Western Railroad Company and certain motor common carriers proposed motor-rail-motor rates between Chicago and various points east thereof, on the one hand, and, on the other, Minneapolis-St. Paul, Minn., and certain points in contiguous territory. The proposed rates were of the same amount as the corresponding all-highway rates published by the participating motor carriers, and the rail service of the Great Western was to be performed (substituted) between Chicago and St. Paul. These rates were approved by the Commission in November 1936, in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, the first reported Commission decision dealing with the subject of coordinated service by rail and regulated motor common carriers. The Commission stated, at pages 272-73:

> One of the protestants contends that the proposed routes are inconsistent with the provisions of section 217(a), which impose a duty upon a common carrier by motor vehicle to publish rates between points on its own route, and whenever it enters into a through-route and joint-rate arrangement with a common carrier by railroad to publish rates between points on its own route and points on the route of such railroad. This protestant claims * * * that joint rates are authorized only between a point on the route of a motor carrier, on the one hand, and a point on a rail line, on the other. We have frequently approved through routes and joint rates in connection with a rail carrier serving the points of origin and destination and another rail carrier participating only as an intermediate carrier in the transportation.
>
> Section 216(c) does not define the particular type of through routes therein authorized to be established, the only requirement being that they shall be reasonable. * * *
>
> As many considerations bear upon the feasibility and practicability of such arrangements, we cannot conclude that the proposed through routes are unlawful because similar routes are not provided from and to all points on the line of the participating rail carrier. Nor can we accept the contention that because the haul which a motor common carrier might receive on some traffic would be short, or terminal in character, that it may not participate in such a joint rail-motor route.

In finally approving the motor-rail-motor rates proposed, the Commission conclusively found such rates to be valid joint rates, saying, at page 274:

> One of the protestants argues with great insistence that it is unlawful for a motor carrier having authority to operate over particular routes to "substitute transportation of its motor vehicles on flat cars over a totally different route for its highway operations." This argument assumes that under the proposed arrangement the status of respondent motor carrier with respect to the rail portion of the transportation would be that of a shipper. Nothing in the evidence warrants that assumption. *The motor carrier's status is that of a connecting carrier under a joint-rate arrangement which, as previously indicated, is specifically authorized by law.* The novel way in which the traffic is handled does not affect the status of the participating carriers in that agreement. It does not appear that any portion of the transportation which the motor carrier would perform under the arrangement would be over routes other than those over which it may lawfully operate. [Emphasis supplied.]

About 2 years following this decision, the Commission instituted an investigation into the lawfulness of certain special permission tariff rules and other practices of common carriers by rail and water subject to part I of the act and of common and contract carriers by motor vehicle subject to part II, in connection with the substitution of motor-vehicle service for rail or water service and of rail or water service for motor-vehicle service. After extensive consideration of the background of substituted service generally, the Commission in *Substituted Freight Service*, 232 I.C.C. 683 (decided July 25, 1939) found, as relevant to the issues presented here, that where a common carrier by one transport medium substitutes another form of transportation therefor, it breaches its bill-of-lading contract with the shipper unless the shipper is apprised of such optional substitution of service by appropriate tariff provisions; and that so-called substituted service may not lawfully be furnished without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs. In arriving at these conclusions, the Commission remarked, at pages 687–88:

> There can be no doubt that the interstate transportation service here under consideration is common-carrier service and that either the rail carrier must have authority to engage in common carriage by motor vehicle in its own right, or the motor carriers joining in such service must be authorized to act as such carriers in their individual capacities. [Footnote omitted.] In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is

fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act.

Noting the contentions of certain respondents in that proceeding to the effect that the maintenance of ordinary joint rates covering the considered service would be "rigid, inflexible, cumbersome, uneconomical, unexpeditious, expensive, and impractical," the Commission approved a suggestion of certain of the southern and western rail carriers under which the substituted service could be covered by a tariff rule and directory containing a list of participating rail, motor, and water carriers, and showing between what points the substituted service is performed. In thus sanctioning a form of tariff publication now known as a "Substituted Freight Service Directory," the Commission stated, 232 I.C.C. at page 689:

It appears that this substituted service, confined as it is to on-line points served by the originating or destination carrier, is of such a nature as readily to lend itself to such method of tariff publication. Any possible breach of contract could be avoided by inserting the words "unless otherwise directed by the shipper" or a phrase of similar import in an appropriate place in the tariff rule. It appears that such publication in the form of a tariff rule and directory could be devised so as to preserve the benefits of the substituted service without subjecting the carriers to undue expense or contravening the specific provisions of the act, and thus to protect the rights of competing carriers and the general public.

While limited TOFC operations had been conducted at various times during the 1930's and 1940's by a few railroads and motor common carriers, there was a notable resurgence of interest in this type of service during 1953. Late in that year, The New York, New Haven, and Hartford Railroad Company presented to the Commission for its consideration 20 questions concerning the legal relations, limitations, and obligations incident to the transportation of highway trailers on railroad flatcars. In response to such questions, the Commission, in *Movement of Highway Trailers By Rail*, 293 I.C.C. 93 (decided July 30, 1954), referred to its past decisions in the coordinated and substituted service field, and confirmed the holdings of those cases. It stated, beginning at page 106:

we are of the opinion that trailer-on-flatcar transportation is in fact transportation by railroad. And this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.

A joint rate is one that applies to transportation extending over the lines of two or more carriers, and which is made by arrangement or agreement between such carriers and is evidenced by concurrence or power of attorney. 49 CFR 141.0 (b)(3). In *Substituted Freight Service, supra,* we said that " where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated." We recognized that substituted freight service presented certain problems in the publication of tariffs, and indicated that interested carriers might confer with representatives of our Bureau of Traffic to work out a simplified form of tariff publication. * * * We stated that if publication takes the form of a directory, it should be published with appropriate concurrences of the rail and motor carriers listed therein. * * * In these circumstances, *this substituted freight service directory, and the related rate tariffs which make reference thereto, may be said to conform to the requirements as to the publication of joint motor-rail rates,* [Emphasis added.]

Subsequently, in *Substituted Rail Service by Red Ball Transfer Co.*, 303 I.C.C. 421 and *Substituted Service – Consolidated Freightways, Inc.*, 305 I.C.C. 301, *aff'd. Consolidated Freightways, Inc.*, v. *United States*, 176 F. Supp. 559 (N. D. Cal. 1959), other substituted rail-for-motor service proposals were approved and authorized. In the last-cited proceeding, the court noted the contention that the disputed rates were not in fact "joint rates," since Consolidated Freightways, Inc., was required to point to its motor carrier rights to justify the substituted service arrangements proposed. That the court did not fully accept this view is evident from the following language taken from pages 562 and 563 of its decision:

The conflicting contentions can best be dealt with in the light of the language of the service which plaintiff proposed to render, the pertinent parts of which read as follows:

"Application of this Tariff:

"Unless the shipper directs that rail service shall not be performed, the motor carriers parties to this tariff may, at their option, substitute rail service between the points and via the rail carriers shown herein, *for their actually available services via highways for which such motor carriers have lawful operating rights* as common carriers via motor vehicle." [Emphasis supplied by the court.]

This language clearly indicates that plaintiff, when filing these rates, operated under the assumption that the proposed service was to function between points which it could service under lawful motor carrier operating rights. The fact that plaintiff expressly reserved for itself the option to perform the proposed service by motor carrier is further evidence that it deemed the proposed tariff

to be an integral part of its motor carrier operations. Under these circumstances a determination of whether the proposed service is to be labeled railway or motor carrier service is superfluous since plaintiff must be found to have designated it as the latter. It appears that the legality of the proposed substituted trailer-on-flatcar service depends on the legality of the motor carrier service which plaintiff offers to provide at its option. Consolidated's contention in the instant case that the trailer-on-flatcar service should be dealt with as distinct from its operating authority as [a] motor carrier is thus without merit.

There thus came into existence two fundamental types of coordinated motor-rail piggyback services and arrangements, both of which have been sanctioned by this Commission as lawful joint-rate and through-route arrangements. One form of operation—which has come to be known as plan I TOFC service—provides for the "substitution" of rail for motor service at rates which are the equivalent of corresponding all-highway rates published by the participating motor carrier. A motor Substituted Freight Service Directory provides reference to the concurrence of the rail carrier and the points between which the substitution may be made, and such information is incorporated into the governing rate tariff by an appropriate tariff rule which preserves the shipper's right to direct that such substitution not take place. The other type of coordinated motor-rail TOFC operations has come to be known as plan V TOFC service. As here pertinent, under plan V, rail-motor, motor-rail, or motor-rail-motor services are provided under joint rates which are generally published in a tariff separate and distinct from other tariffs maintained by the participating regulated common carriers and which are applicable only over the through route or routes. There is no question but that a motor common carrier may, under an appropriate plan V tariff, interchange traffic with the participating railroad at an authorized service point short of the full length of its authorized operations, and later receive such traffic back again for movement between other of its authorized points of service. In such an operation, of course, the rail carrier's physical participation in the through movement is as a "bridge" carrier and is substantially similar to that present in a plan I operation.

None of the parties herein challenge the lawfulness or propriety of plan V TOFC service. And predicated upon the foregoing Commission precedents as well as their own independent analysis of the relevant statutory provisions in the light of the contrary

arguments of the regulated freight forwarders, Southern Railway System, and Helm's Express, Inc., the examiners concluded that plan I TOFC service is a lawful through-route and joint-rate arrangment specifically authorized by section 216(c) of the act; that the arguments of those attacking the legality of plan I operations are without merit; and that the continuation of plan I service is in the public interest and in harmony with the national transportation policy. With this position we agree.

In the *New Haven* case, *supra*, it was found, properly we think, that "trailer-on-flatcar transportation is in fact transportation by railroad," and that "this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers." We have also noted previously that a railroad lawfully may receive as compensation for its services only such rates and charges as are published in tariffs open to the shipping public generally or such reasonable divisions of joint rates as may be negotiated with the other carriers participating in the through service. See, for example, *Louisiana, A. & T. Ry. Co. Operation*, 170 I.C.C. 602. Since the rail portion of plan I service is not as such available for use by the general shipping public, it necessarily follows that such an operation, if it is to be sustained at all, must be sustained as a joint-rate arrangement under section 216(c), the only statutory provision authorizing the maintenance of through routes and joint rates between a railroad and a motor carrier. Stated somewhat differently, we think the examiners were correct in concluding that motor and rail carriers may participate in plan I TOFC service only as connecting carriers under through-route and joint-rate arrangements specifically authorized by section 216(c). This, as seen, is not because of any specific legal restriction upon motor carriers as such, but because of the statutory limitations on the manner in which a railroad may be compensated for its service.

Whether plan I TOFC service qualifies as a lawful joint rate under section 216(c) of the act is, as has been noted, the subject of considerable controversy among certain of the parties hereto. Thus, on exceptions the regulated freight forwarding companies and Southern Railway System renew their contentions made throughout this proceeding that plan I TOFC service is unlawful under the act. Their arguments in this respect are stated in full in the examiners' report, have been considered by us, and need not be repeated here. We shall instead confine our attention to the more essential aspects of this dispute.

Section 216(c) of the act reads as follows:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

This section does not denote the particular type of through routes and joint rates therein authorized to be established, and nowhere else in the act are the terms "through routes" and "joint rates" specifically defined. The freight forwarders, however, assert that section 216(c) must be read in conjunction with the provisions of section 217(a) of the act, and that when this is done it is clear that a lawful through-route and joint-rate arrangement must represent a joint undertaking by two or more connecting carriers to transport property from a point on the line of the originating carrier to a point on the line of the delivering carrier. We do not so read section 217(a).

That section, as here material, provides the following:

Every common carrier by motor vehicle shall file with the Commission * * * tariffs showing all the rates * * * and charges for transportation, and all services in connection therewith, of * * * property in interstate or foreign commerce between points on its own route and *between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad * * * when a through route and joint rate shall have been established.* [Emphasis supplied.]

We think it clear that the italicized portion of section 217(a) quoted above was not intended to be, and is not, a limitation upon the general permission which section 216(c) grants to motor common carriers to establish through routes and joint rates with rail carriers. Instead, such language is a necessary adjunct to the statutory requirement that motor common carriers shall file tariffs showing their rates and charges between points on their own routes, and but for the inclusion of that language in the statute, tariffs providing for joint rates and through routes would not be required to be filed. And because it is not lawful for a motor common carrier individually to publish rates to or from points it is not authorized to serve, tariffs containing such rates must be predicated upon previously established through routes and joint

rates. To put it another way, section 217(a), as we read it, provides that a motor common carrier shall file tariffs applicable to or from points it itself is not authorized to serve only when a through route and joint rate shall have been established; but the converse—that a through route and joint rate may be established only to or from points the motor carrier is not authorized to serve—is simply not true. We conclude, as was concluded in the *Traffic in East and Midwest* case, *supra*, that the permission granted motor common carriers by section 216(c) of the act to establish through routes and joint rates is not limited by anything contained in that section or in section 217(a), except that the through routes and joint rates must be reasonable. See also *Lubbock-El Paso Motor Frt., Inc., Com. Car. Application*, 27 M.C.C. 585, *Lubbock-El Paso Motor Freight, Inc., Extension*, 29 M.C.C. 281, and *Daniels* v. *Rose*, 43 M.C.C. 726.

The freight forwarders further argue that plan I services do not comply with the requirements of a through joint rate in that (1) the rates charged for such service do not apply on a given shipment, as such, throughout the entire movement, because the contract of carriage between the motor carrier and the shipper calls for the transportation of less-than-truckload shipments, whereas the arrangement between the motor carrier and the railroad covers the transportation of freight in carloads only, consisting of loaded or empty trailers; and (2) the rates charged for plan I service are not divided on a just and reasonable basis between the carriers participating therein. These arguments, we think, lack merit. Under a plan I arrangement, the motor carrier and railroad do, in fact, agree to transport, at a single through rate, any given shipment of freight falling within the scope of their tariff publication, and no rates are charged or tariffs published with respect to such plan I operations on any other basis. The arrangement between the railroad and the motor carriers, under which the railroad is to be compensated for its portion of the through service, is thus a division agreement specifically authorized by section 216(c), and not a separate rate or charge. With respect to the second argument of the forwarders, section 216(c) requires only that the carriers, parties to the joint rates, establish "just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers." The question of what constitutes just, reasonable, and equitable divisions necessarily involves many considerations, both factual and

legal, but plainly the maintenance of divisions computed on exactly the same basis as is the overall joint rate, to the exclusion of all other factors and considerations, is not required by the statute and may, in fact, be in violation thereof. The argument of the freight forwarders that "It is highly probable that in some instances the 'division' is greater than the whole," is not supported by the record. For these reasons, we reject the considered arguments of the freight forwarders.

Yet another argument raised by the freight forwarders is that plan I service is not a lawful joint-rate arrangement because the railroad assertedly is not a party to the bill of lading given to the shipper by the motor carrier; that is, that before there can be a through route and joint rate, all participating carriers must be bound by, and jointly and severally responsible under, the original bill of lading. This argument, however, begs the ultimate question as to the status of the carriers participating in plan I service, and, in our view, assumes matters which are simply not true. If, as we hold, plan I operations are, in fact, valid through-route and joint-rate arrangements between connecting carriers, it necessarily follows that the respective liabilities of the participating carriers are to be governed by sections 20(11) and 20(12) of the act. Compare *Pacific Purchasing Co.* v. *Chicago & N. W. Ry Co.*, 12 I.C.C. 549, 552, and *Savage Application*, 265 I.C.C. 157, 167. Under section 20(11), the initial carrier is liable to the shipper for all damage or loss, whether caused by it or not, on the theory that in accepting the shipment under the through joint rate it becomes a principal and all its connecting carriers agents for the transportation of the goods; and section 20(12) provides a "right over" in order to insure that the ultimate burden falls upon the carrier responsible for the loss. Nor can we accept as seriously made the contentions of the freight forwarders to the effect that a railroad cannot assume responsibility to an unknown shipper. Prior to enactment of part IV of the act, shippers by freight forwarder had for many years been allowed to sue the underlying carriers for loss or damage occasioned by the latter. Such actions were based upon the fundamental theory that the shipper was the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier. See *Chicago, M. St. P. & Pac. R. Co.* v. *Acme Fast Freight* 336 U.S. 465 (1948) at page 488 (footnote 27). The contrary contention of the freight forwarders is without foundation.

At this point, it might be well to mention that our conclusion with respect to the applicability of sections 20(11) and 20(12) in

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determining the liability of the carriers participating in plan I TOFC service is not new and appears to have been generally accepted by the industry for many years. This is indicated not only by the statements and representations filed by those carriers favoring the continuation of plan I service, but also by an exhibit appended to the exceptions of Clipper Carloading Company, which contains representative items from a division sheet of the Pennsylvania Railroad Company, which are said to limit the liability of the railroad. Even a cursory examination of these items, however, makes it plain that they do not limit the rail carrier's liability to the public, but instead merely constitute indemnification agreements which govern the allocation of responsibility in disputes between the participating carriers. If the railroad were to have no liability to the shipper in a plan I arrangement, or if it were to believe that it had no such liability, there would be no reason for the inclusion of these provisions in the division sheet.

By far the argument most strenuously urged by the freight forwarding companies is that plan I TOFC operations allow motor carriers to depart from their statutory role as highway carriers and to function in a manner reserved for freight forwarders. The equivalent of plan I service was first approved in 1936 in *Motor-Rail-Motor Traffic in East and Midwest, supra,* and the directory form of tariff publication received Commission sanction in 1939 in the *Substituted Freight Service* case, *supra,* approximately 6 and 3 years, respectively, prior to the advent of Federal regulation of the freight forwarder industry. What the forwarders here seek to eliminate, then, is a coordinated service, the lawfulness of which had been confirmed prior to congressional recognition of their own activities. There is nothing in part IV of the act, under which freight forwarders are regulated, or in its legislative history which suggests that Congress intended to curtail existing coordinated transportation services. Rather, part IV, in defining those services and persons subject to its scope, specifically excludes from its purview persons who, as carriers subject to parts I, II, or III of the act, hold themselves out to the general public as common carriers to transport, or to provide transportation, of property for compensation.

In their final attack upon plan I operations generally, the freight forwarders maintain, as they have on brief and in their petition for separation of the issues filed April 2, 1963, and denied by the examiners in their report, that the record herein does not contain sufficient evidence to support the lawfulness of plan I

service as practiced, even if the plan should be found to b lawful per se. They argue, in effect, that, unlike the Commission approved plans II, III, and IV which involved exhaustive hearing at which were explored all questions relating to the lawfulness o such plans, including the justness and reasonableness of the rate and their economic and competitive effect, proceedings involvin plan I operations have dealt solely with an exploration of variou legal theories concerning the statutory basis for the plan; that w should not promulgate rules to perpetuate a service about which w lack any precise knowledge; that such evidence as the preser record contains about plan I operations is incomplete and has no been tested by cross-examination of witnesses; that generall plan I charges are materially lower than plan III charges, and i the latter are just and reasonable, the plan I charges become sus pect; that they have not been afforded a full and fair hearing wit respect to the issues involved; and that, therefore, their petitio for separation of the issues and for oral hearing regarding pla I TOFC service, as practiced, should be granted. We find thes arguments to be without merit and, accordingly, affirm the ex aminers' denial of the freight forwarders' petition. The followin quotation, taken from page 686 of the *Substituted Freight Servic* case, *supra*, best sums up our views in this regard:

> * * * The issuance of a report setting forth our interpretation of the law, afte briefs and oral argument, is consistent with our practice in a number o important proceedings [citations omitted]. The principal issue in the insta proceeding is one of law***. On this issue we think the procedure outline above has constituted a full hearing within the meaning of the act, all partie having been given full opportunity to be heard as to the step proposed to b taken.***It may also be that*** mixed questions of law and fact [may] aris whether the practices in connection therewith are reasonable, nondiscrimina tory, or otherwise lawful, which will require oral hearings for the taking o testimony. If so, requests for such hearings will receive proper consideratio In the meantime, at this stage of the proceeding, such oral hearings would n be in the interest of justice nor serve any useful purpose.

The views so stated apply with equal force to the present proceed- ing, and we see little that can be added thereto. It should be noted however, that we have, from the outset, said that the level o reasonableness of TOFC rates was not in issue in this case. W adhere to that position.

The freight forwarders have raised additional arguments whic call for brief comment. One which is also urged by the Loca and Short Haul Carriers National Conference involves the legalit

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of plan I TOFC service wherein rail service is provided or substituted by a motor common carrier for the entire line-haul movement, and will be taken up at a later point in this report. The forwarders also argue that we have been inconsistent in dealing with plan I service in that we have termed it "in legal effect" a joint service, but have regulated it as if it entailed operation over an alternate route or a deviation route within the meaning of section 208(b) of the act. This view appears to be the result of a misconception of the rationale underlying the imposition of so-called circuity limitations, to be discussed fully below, upon a regulated motor carrier's participation in TOFC service.

In summary, we conclude, as did the examiners and the Commission decisions prior to the *NATA* case, that when a motor common carrier participates in plan I TOFC operations, paying the railroad compensation other than that set forth in the railroad's regularly published tariff, the motor carrier's status is that of a connecting carrier in a joint service provided voluntarily by the participating rail and motor common carriers; and that plan I TOFC operations thus constitute a valid through-route and joint-rate arrangement within the contemplation of section 216(c) of the act. A fact which we have referred to before in this report is the general lack of opposition to the provision of a through joint intermodal TOFC service under what are known generally as plan V tariffs and arrangements. Plan I and plan V, however, share in common the important features of a through-route and joint-rate arrangement: both entail the voluntary cooperation and agreement of the participating carriers; both involve the payment by the shipper of a single through rate which is divided among the carrier participants on a negotiated basis; and both may involve the rendition of joint service between points the motor carrier is authorized to serve in all-highway service. The fundamental distinction between plan I and plan V operations, as we see it, is that rail and motor carriers serving different areas may combine their service in plan V operations to perform a through service between origin and destination. Another difference is that the tariff rules covering the rendition of plan I service specifically embrace a holding out by the motor carrier to perform an all-highway service at the election of the shipper, whereas the rates provided in plan V joint tariffs are applicable only over the joint intermodal route. In substance, then, plan I merely embraces a simplified form of tariff publication, which combines a joint motor-rail-motor rate applicable over the intermodal route with

an all-motor rate of the same level which is applicable over t alternate all-highway routing. And though this form of tari publication and intermodal operation necessarily raises questio as to the motor carrier's underlying motor-carrier operati authority, for that is a service alternatively held out, we do n think any real significance may logically be accorded this featu of plan I TOFC operations from the standpoint of the basi legality of such service under the statute.

The net effect of the above conclusions is, as was recognize by the examiner, to allow only motor common carriers subject t part II of the act to participate in plan I service arrangement and to preclude such participation by contract carriers as we as by unregulated carriers generally. See, for example, *Holme Contract Carrier Application*, 8 M.C.C. 391; *Reed Contract Carrie Application*, 24 M.C.C. 459; and *Acme Fast Freight, Inc., Comm Carrier Application*, 2 M.C.C. 415 and 8 M.C.C. 211; *affd. Acm Fast Freight, Inc.*, v. *United States*, 30 F. Supp. 968, *affd. pe curiam*, 309 U.S. 638. Our conclusions, however, with respect t the availability of open-tariff rail service to everyone on a equal basis will, we think, ease any burdens which otherwise migh be thought to result and make further discussion of this matter un necessary. We, of course, recognize that the conclusions express ed here are at variance with some of the reasoning in the *NAT* case. However, as previously noted, the TOFC practices o motor carriers of automobiles – whose operating authorities ar limited specially to initial or secondary movements – have bee separated from the other issues here present because of the unique problems involved and have been set for further proceed- ings.

The Bureau of Inquiry and Compliance and the freight forwarders ask that a rule be adopted requiring carriers participating in joint intermodal TOFC service to file with the Commission the division sheets or contracts containing the arrangements under which revenues for plan I or plan V TOFC movements are shared. Sections 6(5)[3], 220(a), and 313(b) of the act give us the authority to require the filing by common carriers subject to parts I, II, and III respectively, of all contracts with other common carriers related to regulated traffic. We have hitherto called for the filing of such contracts in only a few special instances, and we do not think that the present record offers any basis for departing from this general policy. This Commission has recently made con-

[3]As implemented by our general order of August 19, 1952, 49 C.F.R. 4.1

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certed efforts to reduce and condense the amount of necessary information which must be filed with us in an attempt to relieve the carriers subject to our regulation, as well as our own staff, of heavy administrative burdens. We do not propose to depart from this policy in the absence of convincing reasons. There has been no showing here that the division arrangements established by railroads and other common carriers engaging in joint intermodal TOFC service have been in any way unlawful or unduly prejudical to any other carrier. Should we be informed in the future that the unpublished divisions are being used as a shield for improper activities by any carrier, it will then be time enough to make the determination whether a general rule is needed to correct the situation. In the absence of any such evidence, no such rule will be adopted.

Much of what has been said in this discussion of joint intermodal TOFC service has been stated in an interpretive vein and is not susceptible to statement in the form of general rules and regulations. To the extent that rules are necessary and desirable, however, we think that those set forth below, as supplemented later in this report, will suffice. Such rules are not intended, nor do we believe them, to modify in any substantive manner the fundamental requirements of the statute. As an example, the use of permissive terms in speaking of joint water-rail service in rule 4(a) does not alter the mandatory requirements of section 1(4) of the act that common carriers by railroad subject to part I *shall* establish reasonable through routes with common carriers by water subject to part III of the act. The following rules governing joint intermodal TOFC transportation will be adopted:

4 *Joint intermodal TOFC service.* –

(*a*) Except as otherwise may be prohibited by these rules, any rail carrier or carriers subject to part I of the act may enter into through-route and joint-rate arrangements with any motor common carrier subject to part II of the act or any water common carrier subject to part III of the act, wherein TOFC service is to be provided either in lieu of, or in addition to, the authorized all-highway or all-water service of such motor or water common carrier.

(*b*) Motor or water common carriers may participate in joint intermodal TOFC service in lieu of their authorized all-highway or all-water service only if their tariff publications give notice that such service may be provided at their option, but that the right is reserved to the user of their services to direct that in any particular instance such TOFC service not be provided.

(*c*) Tariffs embracing joint intermodal TOFC rates or charges, including Substituted Service Directories, if used, shall set forth the service covered by

the published rates or charges; the points of interchange between modes transportation; and the names of the carriers participating therein.

PARTIALLY EXEMPT TRANSPORTATION

Both the proposed rules and those of the examiners contai provisions which would have the effect of prohibiting the trans portation in joint intermodal TOFC service of commodities th transportation of which is exempt from economic regulation for part of the movement, and of permitting the transportation of suc commodities only in open-tariff TOFC service. The examiners recommended rules 7 and 18, which correspond closely to pro posed rules B-2 and C-7, respectively, would provide:

7. Tariffs setting forth rates or charges for joint intermodal TOFC trans portation may be published only by rail, motor, or water common carriers, o their agents, on commodities the transportation of which is subject to economi regulation throughout their entire movement, and shall show appropriate concur rences of all carriers participating in the movement.

18. The handling by a railroad of a motor or water carrier's trailer, loade with commodities the transportation of which is not subject to economic regu lation under the Interstate Commerce Act, is permissible only under all-rai TOFC tariffs.

The assumption underlying these rules is that there is no way, under the provisions of the Interstate Commerce Act, in which a carrier can publish a joint through rate covering transportation not wholly subject to the Commission's economic regulation. Several parties, particularly the Eastern and Western Railroads, the Southern Railway System, and the Florida Shippers, challenge this assumption, arguing that tariffs can be filed covering the movement of so-called exempt commodities, that once they have been filed the Commission's jurisdiction "attaches," and that such tariffs can become the basis for a plan I type of TOFC service.

The parties taking this position cite no supporting statutory authority, and they also seem to overlook the obvious fact that the Commission's jurisdiction, even if it did "attach" in some unexplained way, would be of no effect in the absence of statutory power to enforce compliance with the stated charges. Should a motor carrier file with the Commission a tariff which by its terms might appear to cover exempt transportation (for example, a rate on "foodstuffs," a generic description which would include many unprocessed agricultural commodities), it would nevertheless not be bound to charge the published rate, and the Commission would

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have no authority to compel it to do so. The corollary to this proposition, which is equally true, is that with regard to transportation for which the Commission cannot compel compliance with tariff publications, a carrier cannot publish with the Commission a tariff which can be recognized by it in any way. The upshot of the matter is simply that there is no way in which a motor or water carrier can publish an effective rate covering transportation not subject to the Commission's economic regulation. It must follow that an attempted joint rate covering such transportation is equally abortive, for where one party to an alleged through rate is under no obligation to collect the stated charges, the rate itself can be of no force and effect.

The Commission's decisions on this subject have been consistent. *Cosmopolitan Shipping Co.* v. *Hamburg-Amer. Packet Co.*, 13 I.C.C. 266, 281; *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539, 548; and *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 729. *Drayage and Unloading at Jefferson City, Mo.*, 206 I.C.C. 436, which arose prior to Federal regulation of interstate motor carriage, involved an attempt by rail carriers to enter into joint rates with motor carriers. The Commission stated, at pages 440-41:

> While there is no express prohibition in the act against the publication of rates in connection with a common carrier not subject to the act, we have consistently held that the line must be drawn between those carriers whose rates and practices we can control and those which we cannot control; and upon this line of reasoning it has been our ruling that joint rates cannot be made between carriers subject to the act and those not subject to the act.

Later, after the passage of part II of the act brought interstate motor carriers within the scope of Federal regulation, we said in *Interchange of Traffic at Point of Origin*, 46 M.C.C. 623, 626:

> It is apparent that the absence of power to regulate all carriers parties to joint rates would, in effect, render void our power to regulate such joint rates. * * * Specifically, motor common carriers of property are authorized to establish joint rates with the several classes of carriers designated in section 216(c) of the act only when the participating carriers' rates and practices are subject to our control.

The principal cases relied upon by the parties opposing recommended rules 7 and 18 are not controlling here. *Dixie Carriers* v. *United States*, 351 U. S. 56, and *Refrigerated S. S. Line, Inc., Rates and Advance Charges*, 279 I.C.C. 567, deal not with joint rates but with proportional rates. *Carstens Packing Co.* v. *Great North-*

ern Ry. Co., 264 I.C.C. 164, involves the publication of a joint through rate on traffic moving between a point in the United States and a point in Canada. Part I of the act permits the publication of joint rates in such a situation. On the other hand, joint through rates between rail and motor common carriers may be established only by virtue of section 216(c) of the act, and this section contains no provision for the participation in such rates by carriers not subject to the Commission's economic jurisdiction. For us to hold otherwise and to permit the publication of rates for the performance of exempt transportation would be to contravene the intent of Congress to exclude such transportation from the rate provisions of the act.

Although the publication of joint intermodal TOFC rates for the movement of commodities the motor transportation of which is exempt from economic regulation is not possible, the transportation of such commodities in piggyback service may still be accomplished by a motor carrier through the use of open-tariff rates where they are made available by the railroads. It would also be possible for a rail carrier, even though it may not participate in a joint through rate, to establish a proportional rate on traffic moving in part by a nonregulated motor carrier. See the *Motor Bus and Motor Truck Operation* and the *Refrigerated S. S. Line* cases, *supra*.

We shall adopt the following rule to reflect the conclusions reached in the foregoing discussion:

4(*f*) Tariffs setting forth through rates or charges for joint intermodal TOFC transportation may be published only with respect to commodities the transportation of which is subject to economic regulation throughout the entire movement provided for in such tariffs.

LIMITATIONS ON TOFC SERVICE

This proceeding also presents a number of questions relating to the underlying operating authorities of motor carrier participants in or users of TOFC services generally. Such questions, briefly stated, concern the nature and scope of the operating rights which a regulated motor carrier must hold in order to participate in joint intermodal TOFC service or to utilize the open-tariff TOFC services proffered by the rail carriers; the duty of a railroad to determine a connecting carrier's authority; and the effect which a motor carrier's participation in or utilization of TOFC services may have upon its underlying operating authority. These issues will next be considered.

Interchange at other than authorized service points. – Proposed rule B-8, the adoption of wpich was recommended by the examiners (as their rule 11), provides that carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service. The Eastern Railroads are the only parties which specifically except to the proposed rule and they contend that such a rule as applied to substituted joint TOFC service is unnecessary. They reason that the fundamental purpose of any rule requiring that both parties to a joint arrangement be authorized to serve an interchange point is to avoid the creation of new and unauthorized competitive service, and that this objective is as well achieved in the case of substituted joint service arrangements simply by requiring the motor carrier to hold appropriate authority for the entire movement. It is our opinion, however, that the facts of record in this proceeding do not warrant any departure from the long-established practice of this Commission prohibiting a motor carrier from interchanging traffic at points other than its authorized service points. *Gilbert Carrier Corp. Extension–Kearny, N. J.*, 72 M.C.C. 204. The following rule, will, therefore, be adopted:

4(*d*) Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

Where motor or water common or contract carriers use open-tariff TOFC service in the performance of authorized service, they do not, in tendering or receiving freight to or from a rail carrier, participate in joint rates and through routes, and no interchange of traffic is involved. However, if such operations are to be effectively controlled, particularly for the purposes of the circuity provisions discussed and adopted below, we believe that these carriers should be limited to the use of TOFC service only between points they are authorized to serve. The following rule to effect this purpose will be adopted:

3(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

Interchange within terminal areas. – Rule B-7, as proposed at the prehearing conference herein, would allow tariffs embracing joint intermodal TOFC rates or charges to provide for TOFC

service for the entire line-haul movement. Under this rule, TOFC service could be substituted for the over-the-highw service of the participating motor common carrier with latter performing no line-haul motor service but merely pick delivery, and transfer services within terminal areas at the term ni of the intercity movement. The substance of this proposed ru limited to plan I TOFC service, was adopted by the examiners their recommended rule 10.

Exceptions to this rule were filed by the regulated freig forwarders, the Local and Short Haul Carriers National Confe ence, and by the Southern Railway System. In general, the fo warders contend that joint rates may not be established betwe carriers who perform only terminal area services and those w perform line-haul service, citing *Interchange of Traffic at Point Origin*, 46 M.C.C. 623; *Palisano Common Carrier Application*, M.C.C. 591, 41 M.C.C. 229; *Substituted Freight Service*, 232 I.C. 683; *Advance Transp. Co.* v. *Allard*, 305 I.C.C. 751; and *Rubb Articles, Philadelphia to Ill., Ky., Mich. & Mo.*, 319 I.C.C. 632. Th further say that if motor carriers are permitted to substitu rail TOFC services for the entire line-haul operation, they wou be unlawfully augmenting their facilities and services by the use the facilities and services of the railroads, and would be pe forming no motor service at all, having completely abandon the highways, in contravention of their certificates and the certi cate requirements of the act. The Southern Railway System argu that use of plan I TOFC service through the Substituted Servi Directory device should be prohibited, but that a motor comm carrier having appropriate authority should be allowed to jo with a railroad in publishing plan V TOFC joint rates under whi the railroad would perform a part or even all of the line-ha service between points which the motor carrier is authoriz to serve. The Local and Short Haul Carriers National Conferen contends that an essential feature of joint-line service is th each transportation mode will perform some semblance of trans portation service as contemplated by parts I and II of the ac and that where the motor carrier performs merely termin services and substitutes line-haul rail service for its over-the highway service, it is not performing any operation under th terms of its certificate. If we, however, adopt the position th plan I TOFC service is a joint service between two modes carriage under a joint-rate arrangement authorized under sectio 216(c) of the act, and further allow rail TOFC service to be pro

vided for the entire line-haul movement, the conference believes that motor carriers now operating in a similar fashion pursuant to the partial exemptions provided by sections 202(c) and 203(b)(8) also should be subjected to economic regulation.

At the outset, it should be noted that nothing in the statute specifically prohibits the establishment of joint-rate arrangements between certificated motor common carriers performing terminal operations and common carriers by railroad providing the entire line-haul service. As was stated by the Commission in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245, at page 273:

> Nor can we accept the contention that because the haul which a motor common carrier might receive on some traffic would be short, or terminal in character, that it may not participate in such a joint rail-motor route. On this point we see no reason for departing from the following conclusion reached in *Trucking L.C.L. Freight in Lieu of Rail Service*, 185 I.C.C. 71, 73:
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> "And while terminal carriers may publish switching charges, and act as the agents of connecting road-haul carriers when the latter assume and pay those charges, there is nothing in the act which prohibits the terminal carriers from participation in their own right in joint through rates as they have elected to do here."

Other than for the partial exemption embraced in section 202(c)(2), we have been referred to, and we know of, no provisions of the statute which in any manner could be said to require a result different from that reached in the cited proceeding. Accordingly, it is necessary that we examine section 202(c)(2) in some detail, particularly in the light of those cases cited by the parties which interpret that section.

Section 202(c)(2), as here relevant, provides that the provisions of part II (except those in section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment) shall not apply—

> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

The manner in which this provision, so far as material to t present controversy, has been interpreted and applied in t past may be stated in the following form: (1) motor carri pickup and delivery service within the terminal area of a lin haul carrier, rail or motor, will be considered as being perform "for" the line-haul carrier regardless of the character of the co tractual arrangements between the terminal and line-haul carrier so as to bring such operations within the exemption provisions section 202(c)(2) of the act; (2) our regulatory jurisdiction, ther fore, does not extend to the rates and charges of motor carrie engaged in the performance of collection, delivery, or transf service within such terminal areas; and (3) in accordance with t general principle that joint rates cannot be established betwe carriers whose rates and practices are subject to regulation a those whose rates and practices are not so subject, it follo that joint rates may not lawfully be maintained by the termin area motor carrier and the line-haul carrier.

To put it another way, the conclusion that a motor carrier pe forming only terminal area service may not lawfully join through-route and joint-rate arrangements with a line-haul ra carrier in the circumstances here present (a conclusion reach most recently in the *Rubber Articles* case, *supra*) rests upon tw interrelated syllogisms. The first such syllogism may be stat as follows: section 202(c)(2) exempts from direct regulation und part II, all motor transfer, collection, and delivery service pe formed "for" a common carrier by railroad subject to part such terminal service will be deemed to be performed "for" t line-haul rail carrier regardless of the form of contractu arrangements involved and notwithstanding an attempt to establi bona fide joint rates and through routes between such line-ha rail carrier and a motor carrier performing only pickup, deliver and transfer service within the rail terminal area; and, conse quently, a motor carrier providing only terminal service in co nection with the line-haul operations of a railroad subject to pa I is exempt from direct regulation under part II. This consequen then forms the minor premise in a second syllogism, which h as its major premise the proposition that joint rates may n lawfully be maintained between carriers whose rates and practice are subject to our control and those whose rates and practice are not so subject, in order to arrive at the ultimate conclusi stated above. For the reasons hereinafter stated, we believe th this theory is inapplicable to joint intermodal TOFC service pr

vided in lieu of, rather than as an extension to, a motor carrier's authorized all-highway service.

The quoted provisions of section 202(c)(2) were first construed in the *Palisano* case, *supra*, which was decided September 18, 1941, exactly 1 year following their enactment. There, division 5 found that the applicants' motor carrier pickup and delivery service within the terminal areas of line-haul motor carriers, under joint rates to which the applicants were parties, or under combination rates, came within the partial exemption of section 202(c)(2), and that, therefore, no certificate or permit was required for its performance. In so finding, the division stated at 30 M.C.C. 593, et seq.:

> There is, however, some question worthy of comment as to whether services performed by a carrier as an independent carrier operating under duly established through routes and joint rates or performing through service under separately established rates of the two carriers can be deemed to be performed "for" the connecting carrier. If such services are not "for" the line-haul carrier, they lie outside the exemption.
>
> We consider that the word "for" imports the idea of something done in furtherance of the operations of the connecting carrier and that the services in question which result in placing shipments at the convenient disposal of the line-haul carrier must be regarded as performed for such carrier in any reasonable interpretation of the word "for." * * * To construe the word as applicable to service performed under one type of arrangement with a line-haul carrier and to deny the application of the exemption to precisely the same service performed under a different mode or style of agreement seems to us to constitute a sacrifice of substance to form. Essentially the situation in every such case is that the line-haul carrier, having the right to perform this local service, elects rather to have another carrier do it for him.

Plainly, this reasoning cannot be said to apply to those instances wherein joint intermodal TOFC service is provided in lieu of a motor common carrier's authorized all-highway service. In such situations, the motor common carrier possesses the requisite authority to perform the entire transportation service itself, and it is only at the option of such motor carrier (absent a negative direction by the shipper) that the traffic moves in joint intermodal TOFC service. And at the time the motor carrier picks up or receives the shipment from the consignor, it may not be known to the shipper (again absent such a negative direction) whether the shipment will move in the all-highway service of the motor carrier or in the joint intermodal TOFC service which the motor carrier, in conjunction with the line-haul railroad, undertakes to provide at its option. It cannot logically be doubted, therefore, that

whenever joint intermodal TOFC service is to be provided i lieu of an authorized all-motor operation, it is the motor carrie and not the line-haul railroad, which is the primary carrier an which gives the terminal operations color under the law. O stated somewhat differently, it seems clear that in these circum stances the collection and delivery services performed by a moto carrier within terminal areas are part and parcel of that moto carrier's authorized line-haul highway service and are to be re garded and regulated as such. *Cf. Pontin Lighterage & Trans Corp. Com. and Contr. Car. App.*, 250 I.C.C. 441. All things con sidered, it is our opinion that these motor carrier terminal are operations, in the circumstances here considered, cannot reason ably be considered as being performed "for" the line-haul ra carrier within the meaning of section 202(c)(2) of the act, and tha therefore, such operations are subject to full economic regulatio by this Commission.[4] In view of this conclusion, it follows tha section 202(c)(2) is no bar to the establishment of joint rates an through routes between a common carrier by railroad performin the line-haul service and a properly authorized common carrie by motor vehicle providing only terminal area pickup and deliver services and substituting, in effect, the line-haul rail servic for its own authorized over-the-road operations.

All of the proceeding which are cited by the parties (which case have been referred to earlier herein) as reaching a different con clusion from that expressed above are, we believe, bottomed upo the single basic factual flaw which formed the basis for the deci sion in the *Palisano* case.[5] As such, we do not deem it necessar to discuss each of those cases in detail herein, and we merel note that to the extent such decisions may differ from the view here expressed, they will not in the future be followed. To giv effect to our conclusions herein, the following rule, which will b applicable to joint intermodal TOFC service provided in lieu of

[4] No separate authority is required for this operation, however, for the right provide terminal services is implied in the line-haul motor carrier authorit *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, 108 and 109.

[5] While we believe that this conclusion adequately settles the matter here i dispute, we think it appropriate to note our belief that such decisions als suffer from a general failure to recognize that the provisions of section 202(c only provide a partial exemption from "direct" regulation under part II an that such terminal area operations, including the rates and charges therefo are subject to indirect regulation through the line-haul service to which the are incidental. Accordingly, application to this situation of the general prin ciple prohibiting joint rates between regulated and nonregulated operations, a noted above, is at best questionable.

motor or water carrier's authorized all-highway or all-water service, will be adopted:

4(e) Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement.

Circuity limitations.– A problem which has confronted this Commission for a number of years is that presented when a motor carrier authorized to operate between two given points over a circuitous route attempts to use, in lieu of its all-highway service, the TOFC service of a railroad whose lines provide a more direct routing between the termini. This issue arises because motor carriers, whether operating over regular or irregular routes, are ordinarily limited as to the points they can serve and the manner in which they can operate between them. A regular-route motor carrier is restricted to operation over certain highways, and as its business expands and its operating authority increases on a piecemeal basis, it is likely to find itself with authorized routes between certain points in its system which are not the most direct available. An irregular-route motor carrier is apt to find itself engaged in circuitous operations only if it combines two or more grants of authority at common service points in order to provide through transportation. To allow carriers to ignore the routing and gateway limitations in their operating authorities and to provide service between any points they serve, no matter how indirect their authorized operations, would be to allow them to provide totally new services for which no public need had been established, and would largely negate the certificate and permit requirements of the act. *Motor Carriers of Property–Routes and Service*, 88 M.C.C. 415, 423-25. It is obvious that this result would obtain from the indiscriminate substitution of direct TOFC service for indirect all-motor service.

In *Substituted Rail Service by Red Ball Transfer Co.*, 52 M.C.C. 75 and 303 I.C.C. 421, Red Ball, a motor common carrier, had filed schedules providing for the substitution of the TOFC service of the Chicago Great Western Railway between Chicago and Kansas City. Although the rail route was somewhat shorter than Red Ball's authorized highway route between these points, it was found that using TOFC service would not enable Red Ball to provide an improved service and would not affect its competitive situation vis-a-vis motor carriers authorized to operate directly between

Chicago and Kansas City. In *Gordons Transports, Inc.*, v. *Strickland Transp. Co.*, 318 I.C.C. 395, we reached the opposite result on a different factual basis. Strickland held highly circuitous motor authority between Chicago and St. Louis and New Orleans, operating through a Houston gateway. It wished to substitute the direct TOFC service of the Illinois Central Railroad for its indirect highway operation. We found that to do so would enable it to perform service entirely different from that authorized by its certificates, and would therefore constitute a destructive competitive practice. This decision was upheld by the United States District Court for the Northern District of Texas in *Strickland Transp. Co.* v. *United States*, 209 F. Supp. 618 (1963). The court's opinion, we believe, eliminates any remaining doubt as to our authority to require that TOFC operations must bear some reasonable relationship to the authorized motor service for which they are substituted.

Further support for this conclusion is found in the fact, already noted in our discussion of open-tariff TOFC service, that a motor carrier providing, through the medium of piggyback service, transportation of consolidated loads of small shipments between points which it cannot serve over-the-highway in a practicable manner, may actually be operating unlawfully as a freight forwarder. We could also point out that motor and water carriers offering joint intermodal TOFC service are required to give each customer the negative option to require that its shipment move in all-highway or all-water service. This means that the carriers themselves hold out to perform in joint intermodal TOFC service only such service as could lawfully be provided under their pertinent motor or water authority. Or, as the court expressed it in *Consolidated Freightways, Inc.*, v. *United States*, 176 F. Supp. 559, at page 563, in language quoted earlier in connection with our discussion of joint intermodal service: "It appears that the legality of the proposed trailer-on-flatcar service depends on the legality of the motor carrier service which plaintiff offers to provide at its option."

Proposed rule B-3 would have dealt with the circuity issue in the following manner:

> Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon

consideration of an appropriate application filed by the motor carrier in which it seeks relief from the percentage provisions of this section.

The hearing examiners recommended a similar approach, but would have liberalized the requirement somewhat by increasing the permissible mileage saving. Their recommended rules 8A and 8B provide:

(A) Motor common carriers shall not participate in Plan I TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 85 percent of the distance between such points computed (1) if a regular-route carrier, over its authorized regular route, or (2) if an irregular-route carrier, through any gateway point which it is required to use; *except* as may be permitted by the Interstate Commerce Commission upon consideration of an appropriate application filed by a motor common carrier or a railroad in which relief is sought from the percentage provisions of this rule.

(B) Motor common carriers participating in Plan I TOFC service which comes within the 85 percent circuity provision provided in part (A) of this rule shall file with the Interstate Commerce Commission, on the same date that tariffs or substituted service directories are filed, information showing the name of the rail carrier to be used, the total mileage from origin to destination over its all-motor route, the points between which TOFC service of the rail carrier is to be used, and the total mileage from origin to destination over the joint motor-rail-motor route to be used.

We think that this recommendation, which has drawn very little adverse criticism from the parties, supplies a generally adequate solution to the circuity problem. The 85-percent circuity provision appears to be a reasonable one, and we will follow the examiners' lead in this respect. Exceptions to these rules are taken by the Southern Railroads, but they have apparently failed to recognize the distinction pointed out above between TOFC service substituted for authorized motor service and that in which motor and rail services are joined to form an end-to-end connection. The Local and Short Haul National Conference, on exceptions, asks that we adopt a limination on maximum allowable circuity in addition to that proposed. Just what the benefit of such a requirement would be escapes us. A railroad operating between two given points over lines less direct than those of competing railroads is not prevented from providing service between those points if it wishes to do so, and we do not believe that there is any justification for treating differently such a railroad's provision of TOFC service—whether on an all-rail basis or jointly with motor common carriers. When an operation of this kind becomes

too circuitous to be economically feasible is something which think can properly be left to the discretion of the carriers involv

The Bureau of Inquiry and Compliance excepts not to the reco mended rules themselves, but to a statement in the examine report to the effect that the rules would not have a retroacti effect. If this were so, the Bureau argues, carriers alrea performing TOFC services which would not be permitted und the recommended rules would be given some sort of "gran father" rights to continue such operations. Clearly, it would impossible for us to examine all plan I TOFC tariffs now file with an eye toward determining whether they offer or that service which a motor carrier could properly perform und the formula established in rules adopted in this proceeding. To th extent, a circuity rule would have only prospective effect, applyi to future filings. However, any operation now being conduct under tariffs already on file, were it made the subject of a cor plaint or formal investigation, would be judged in the light of t standards set forth in such a rule and might be found unlawfu just as were the operations considered in the *Strickland* cas

The circuity rule which we will adopt will take a somewh different form from that recommended, and we will omit th substance of recommended rule 8B which we believe would merely duplicative of our rules 3(d) and 4(c). The following ru will be adopted:

5 *Circuity limitations.*

(a) Motor and water common carriers shall not participate in joint intermod TOFC service which is to be provided in lieu of their authorized line-ha transportation, and motor and water common and contract carriers shall n utilize open-tariff TOFC service, where the distance from origin to destinati over the route including the TOFC movement is less than 85 percent of th distance between such points over the motor or water carrier's authoriz service route; *provided, however,* that the Interstate Commerce Commissi may grant relief from the provisions of this paragraph upon consideration an appropriate petition.

(b) For the purpose of paragraph 5(a), the distance from origin to destin tion over the motor or water carrier's authorized route shall be computed (1 if a motor carrier operating over regular routes, over its authorized regul service route, (2) if a motor carrier operating over irregular or a combinatio of regular and irregular routes, through any gateway point which it is require to observe, and (3) if a water carrier, over the most direct available all-wate route.

Abandonment of service at authorized points.– Proposed rul B-9 would have required that–

Notwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous service at all points authorized to be served by it.

The obvious advantage of TOFC service to a regulated motor carrier stems from the railroads' ability to provide efficient transportation of large volumes of freight for relatively long distances. On the other hand, one of the advantages of over-the-road motor carrier service is that it offers an easy means of serving those communities lying along or near the highway, intermediate to major shipping centers. Because the longer hauls are likely to be the more profitable ones, a motor carrier may find it tempting to perform long-distance service, through the use of piggyback, to the neglect of its over-the-highway operations and, thus, to the detriment of would-be shippers at authorized intermediate service points. We are cognizant of the difficulties facing the smaller community dependent for transportation service upon motor carriers to which it must appear as a less important, intermediate point served only in conjunction with operations between larger cities. See *Cham. of Com. of St. Joseph, Mo.* v. *Red Ball Exp. Co.*, 91 M.C.C. 513. As the interstate highway system reaches completion, and motor carriers turn naturally to the use of faster and better roads, which generally bypass all but the larger cities, its problem will become more acute.

Section 204(a)(1) of the act directs this Commission to regulate motor common carriers, and authorizes us, to that end, "to establish reasonable requirements with respect to continuous and adequate service." We therefore include in every certificate issued to a motor common carrier the specific requirement that it provide reasonably adequate and continuous service to the extent authorized. The examiners found that nothing further was necessary, and recommended that proposed rule B-9 not be adopted. We agree. The adequate-and-continuous service requirement is well known, and is one which we have frequently enforced. We think that it provides sufficient protection to the interests of those who may be affected by a particular motor carrier's overenthusiastic embracing of TOFC service, and that the rules to be adopted here should not be encumbered by a regulation of this kind.

A railroad's responsibility for determining a connecting carrier's authority.–Proposed rule B-5 and the examiners' recommended rule 9 would have imposed upon rail carriers providing TOFC

service jointly with motor or water carriers the responsibility for ascertaining whether their connecting carriers hold appropriate operating authority. The Southern Railroads, the Southern Railway System, and the New York Central take exception to such a rule, arguing that the railroads should not be singled out and forced to "police" the operations of carriers of other modes. We do not think that a general rule such as that proposed is necessary or desirable. Other rules being adopted herein, which require full disclosure by publication of the names of the carriers participating in a joint intermodal service and the points between which TOFC service is used, should be sufficient to achieve the purposes intended by proposed rule B-5. We do, however, wish to repeat the admonition contained in the *New Haven* case, 293 I.C.C. at page 107:

> Although the railroads are under no obligation to police the operations of motor carriers with respect to their certificates, we believe that, when they enter into joint-rate arrangements with such carriers, they should satisfy themselves that the motor carriers have authority to operate with respect to the commodities concerned between the points where the substituted service is performed.

Responsibility for placing and securing trailers.– Proposed rules B-11 and C-5 and the examiners' recommended rules 12A and 12B place upon railroads participating in TOFC service the responsibility for seeing that trailers are safely placed upon, secured, and removed from rail cars. The only substantive objection to such a rule appears in the reply to exceptions of the Western Railroads which are apprehensive lest it impose upon them a liability to third persons, including employees. We think it obvious that in adopting a rule of this kind we are not in any way attempting to fix or to predetermine a rail carrier's liability for any injury which might be suffered by an employee or other person. We are simply attempting to promote and encourage safe railroad operation, and we believe that a rule such as that proposed is necessary. We shall, therefore, adopt the rule recommended by the examiners, modifying it only to the extent necessary to incorporate a minor change suggested by the Bureau of Inquiry and Compliance which will serve to clarify the relationship between a railroad and a connecting carrier to which it may have delegated the responsibility for loading and securing trailers:

6 *Responsibility for placing and securing trailers.*

(*a*) Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff, or in the case of connecting common carriers by agreement, railroads shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

(*b*) Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portion thereof) which do not conform to the motor carrier safety regulations prescribed by the Commission.

TOFC TARIFF PUBLICATION AND EQUIPMENT LEASING

We will consider together the related issues raised by the proposed rules and treated by the examiners in recommended rules 13 through 17 governing the filing by rail carriers of TOFC tariffs. Proposed rule C-1 would have required that tariffs offering all-rail TOFC service take one of two prescribed forms, either providing for the furnishing of complete door-to-door service by the railroad (plan II) with appropriate allowances where the shipper furnished the trailer or terminal services, or providing for the furnishing by the railroad of only ramp-to-ramp service (plan III) with a schedule of additional charges where it furnished the trailer or terminal services. Rules C-2 and C-6 would have required that TOFC tariffs specify whether rates include such services as pickup and delivery, and that they state in clear and explicit terms the charges for and the rules governing demurrage, storage, switching, weighing, loading and unloading, and the like. Rule C-3, completely barring equipment leasing, would have provided:

> Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

Proposed rules B-10 and C-4 would have forbidden common carriers to act as agents of shippers without providing therefor in their tariffs.

The examiners found that there is neither need nor justification for adopting rule C-1 requiring that TOFC tariff publications follow a specified form or rule C-3 prohibiting the leasing of equipment by rail carriers for use in TOFC service.

They did, however, conclude from their appraisal of the evidence that there is a need for formal rules to spell out the obligations of rail carriers performing all-rail TOFC service so as to make clear not only the basic quantum of service being offered and the rates therefor, but also the variants on that basic service and the allowances or charges due to or from shippers electing such variants. They placed the leasing of equipment in the latter category, and found that the publication of leasing charges, along with those for other accessorial or special services, would effectively eliminate any opportunity for rebates, concessions, or discriminatory treatment. Recommended rule 14 would provide:

> Each railroad performing, or holding itself out to perform, TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to or from shippers, freight forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges.

Recommended rule 13 deals with allowances and provides:

> No allowance shall be payable to any shipper, freight forwarder, and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

The examiners' recommended rules 15, 16, and 17 require that TOFC tariffs define the areas within which pickup and delivery services are provided, that they specify the extent to which published charges include loading and unloading, and that they provide for demurrage and storage charges with respect to highway vehicles and rail cars furnished by shippers or forwarders. They recommended rejection of proposed rules B-10 and C-4 which dealt with carriers acting as shippers' agents on the ground that the rules were unneeded and unclear, a finding with which we agree.

The examiners' proposed method of dealing with tariff publication and the leasing of equipment is acceptable to all the railroads participating in this proceeding except the New York Central, which contends that the Commission has no power to require publication

of charges for accessorial services. The A.T.A. takes exception to the recommended rejection of proposed rules C-1 and C-3. It argues (1) that it is improper for railroads to offer more than a single kind of TOFC service—for example, a complete door-to-door service (plan II) and a ramp-to-ramp service (plan III)—between the same points; (2) that we should by rule prescribe a strict format for TOFC tariffs, requiring that the only rate published be that for the most complete service a railroad is willing to offer between given points, together with a schedule of allowances due to shippers electing to provide some of the services themselves; and (3) that the leasing of equipment by railroads or their affiliates to shippers should not be allowed as it is a fraudulent practice by which the rail carriers shirk their obligation to provide the equipment needed to provide transportation service and which opens the door to discrimination. Exception to specific aspects of the recommended tariff rules is also taken by Seatrain Lines, which asks that the rule requiring publication of leasing charges be extended to include the practice of leasing equipment by rail affiliates as well as by the railroads themselves, and the Bureau of Inquiry and Compliance, which suggests editorial changes in recommended rules 13 and 14.

Proposed rule C-1 was designed to further the worthy aim of tariff simplification. TOFC service, because of its flexibility, can take many forms; in fact, A.T.A. has enumerated 256 different combinations of line-haul transportation, pickup and delivery services, and various accessorial services which a railroad might provide. Under present rate publication practices, it would be possible for a railroad to offer what amounts to exactly the same service in a variety of ways. A shipper wishing to use TOFC service obviously expects the railroad to provide the line-haul transportation. Let us assume a situation in which such a shipper also expects the railroad to provide the trailer, but plans itself to load the trailer and to move it to the railroad's TOFC terminal. It expects the railroad to perform the necessary loading, securing, and unloading of the trailers, and it also wishes the railroad to deliver the trailer to the consignee's door and to unload it. This shipper might well be able to obtain the service it wants under two separate rates: a door-to-door rate (plan II) minus allowances for shipper loading and drayage at origin; or a ramp-to-ramp rate (plan III) plus charges for the railroad's providing the trailer and drayage and unloading at destination.

It is apparent that this state of affairs places a preminum on a shipper's having a sophisticated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment. We think that carriers should be encouraged to use as simple a method of tariff publication as possible, and should be discouraged from permitting the kind of situation illustrated. It is also clear that the general practice by which railroads and their affiliates trip lease trailers to shippers for immediate use in TOFC service contains potential seeds of discrimination. Unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the Elkins Act.

While we recognize that there are opportunities for discrimination in persent rate publication and equipment leasing practices, we cannot agree with the A.T.A. that the only available cures are a straitjacket for TOFC tariffs and major surgery to excise trailer leasing. The contentions that rail carriers are required by statute to publish rates only for a "complete" service and that they are obligated to furnish trailers wherever TOFC service is provided were disposed of in *Eastern Central M. Carriers Assn. v. Baltimore & O. R. Co.*, 314 I.C.C. 5, 45-47, *aff'd. sub nom. Cooper-Jarrett, Inc., v. United States,* . F. Supp. (W. D. Mo. 1964) (civil action No. 13469, February 6, 1964). The basic flaw in the A.T.A.'s legal argument, which was also pointed out in that decision, appears to be the false assumption that a highway trailer necessarily is an "instrumentality of transportation" which carriers must furnish. This can, of course, be the case when a railroad holds out a service which by its nature requires performance of some motor carriage. But it need not hold out to perform more than rail service, and in that case the trailer, tendered for transportation by a shipper, is nothing more than a container—an "article of commerce."

We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensibly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other "accessorial" services, we think that it is *in fact* holding out a complete door-to-door

service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers nontransportation services. This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles. Such services, we believe, will normally be transportation services when offered in connection with TOFC transportation.

The existence of opportunities to engage in discriminatory practices, standing alone, will not, in our opinion, justify our requiring a strict format for TOFC rate publications or striking down the prevalent practice of trailer leasing by railroads. The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused. In spite of the variety and complexity of all-rail TOFC tariffs, they seem to be serving their purpose effectively, and we would not be justified in imposing a new scheme of publication in the absence of specific shipper complaints. The same appears to be true of trailer leasing. Where complaints of discrimination have been made, as in the case of certain midwestern meatpackers, the railroads involved have taken steps to correct the situation. We agree with the examiners that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse. Should this approach prove ineffective, additional steps can be taken at some future time. At present, we conclude that they are not needed, and that regulations substantially similar to those recommended will suffice. The only significant change we think necessary in the recommended tariff rules is to provide for publication by rail carriers of the leasing charges of affiliates. To omit the practices of rail-affiliated leasing companies from the effect of the leasing rule

would obviously be to create a legal loophole and to allow the doing by indirection of what could not be done directly. The following rules will be adopted:

7 *Tariff publication regulations.*

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to provide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

BILLING AND NOTIFICATION RULES

Section D of the proposed rules and the examiners' recommended rules 19 through 23 deal with the billing of TOFC shipments and

with the notification to be given the rail carrier as to the contents of trailers tendered for movement in TOFC service.

Bills of lading and manifests.—Proposed rule D-1 would provide unequivocally that no TOFC shipment could be transported until the origin carrier had issued a bill of lading therefor and had received from the shipper any manifest used in connection therewith. The examiners, upon finding that there was evidence of delay by rail carriers in issuing bills of lading in connection with TOFC movements, recommended that a rule requiring the prompt issuance of either a receipt or a bill of lading be adopted. They also recommended that this rule require submission of a manifest where used—not immediately, but within 24 hours after the shipment reaches the destination ramp. Their recommended rule 19 would provide:

> No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor, and where a manifest is used by the shipper or freight forwarder, such manifest shall be delivered to the originating carrier not later than 24 hours after the shipment reaches the destination ramp.

As the examiners point out, none of the parties have any objection to a rule requiring the issuance immediately of a bill of lading, although the eastern railroads point out that this matter is also under consideration in Ex Parte No. 73, Regulations for Payment of Rates and Charges, which was reopened on July 29, 1963. The notice of proposed rulemaking in that proceeding states that one of the questions to be considered is whether or not existing regulations should be modified "to require that sufficient information to render a freight bill be made available to the railroad within a reasonable period of time after delivery or after the shipment leaves the origin." These exceptants suggest that adoption of a rule such as that proposed would be more appropriate in Ex Parte No. 73. We think, however, that insofar as TOFC service is concerned, all billing rules should be promulgated herein and thus be available, for the sake of convenience, as a single and consistent unit in one place. The following rule, therefore, will be adopted:

> 8(*a*) No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor.

The principal objection to proposed Rule D-1 is to the requirement that any manifest used would have to be received by the car-

rier before the transportation was begun. The examiners' recommended modification of this aspect of the rule to permit delivery of the manifest up to 24 hours after the trailer reached the destination ramp seems to be generally acceptable to the industry. It is the subject of exceptions of only three parties, the Eastern Railroads, the Florida Shippers, and the Bureau of Inquiry and Compliance, all of which point out that there are instances in which a manifest is prepared by a shipper for its own use and in which it is not used or needed in assessing the freight charges. We think that they are correct in arguing that there is no reason for requiring that such a manifest be delivered to the carrier, but where a manifest is necessary for the determination of freight charges, the rules to be adopted herein should require its provision. There is no need for such a requirement to be stated as a separate regulation, however, and it can more conveniently be incorporated into the proposed rule next to be discussed; namely, the requirement that carriers obtain from shippers a certification of the weight and contents of trailers used in TOFC service.

Certification of trailer weight and contents.–The examiners recommended adoption of their rule 20A, which is almost identical to proposed rule D-2. This rule would require:

> Certification as to the weight of a highway truck, trailer, semitrailer (or demountable container portion thereof) shall be made by the shipper at the time of its tender to the originating carrier.

They also recommended adoption of the following rule 20B in addition to those originally proposed:

> Shippers shall certify at the time of tendering a shipment to the originating carrier, whether or not the contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) consists of (1) any commodity which is prohibited from movement in TOFC service by the carrier's tariff, and (2) explosives or other dangerous articles.

Perhaps none of the proposed rules has drawn as much uniformly adverse comment from rail carriers and shippers as has rule 20A. The Eastern, Western, and Southern Railroads, the Southern Railway System, the National Industrial Traffic League, and the Florida Shippers complain that the rule as drafted is unclear in that it does not specify whether it is the weight of the trailer itself, its contents, or both that must be certified; that

to require certification by a shipper of the weight of a trailer in circumstances where the shipper does not furnish the trailer would be unreasonable; and, most important, that requiring certification of weight at the time of tender to the originating carrier would place an impossible burden upon shippers and carriers alike, discriminating against small shippers not having ready access to highway scales, and making it difficult if not impossible to use piggyback loading facilities at small stations where scales are not available.

It was originally contemplated that proposed rule D-2 would accomplish two purposes. First, it was believed, and the record clearly bears out this belief, that in many instances rail carriers, in spite of the fact that their rates for performing TOFC service are based on the weight of loaded trailers or their contents, are not in fact ascertaining whether the relevant weights exceed stated maxima. The rule, then, was intended to insure that information needed to determine applicable charges is obtained by the carrier. We agree with the examiners that a rule which will accomplish this purpose is necessary. In addition, it was thought that a requirement that the carrier be informed of the weight of a loaded trailer prior to its transportation in TOFC service would provide needed information to the rail carrier, enabling it to assess power requirements for a given train and to insure that a particular flatcar would not be dangerously overloaded. We are convinced, however, that the record before us will not support the conclusion that a rule such as this is needed for these reasons. There is no indication that the possible weight variances of loaded highway trailers has constituted or will constitute an operational or safety problem for the railroads.

We think it unnecessary, therefore, to require that certification of the weight of TOFC shipments be made at the time the shipment is tendered to the originating carrier. Also, there is no reason to require the provision of such information unless it is actually needed for a determination of the freight charges. We think it sufficient, as in the case discussed above where a manifest is used, where knowledge of the weight or nature of a TOFC shipment is needed to determine the freight charges, that certification thereof be delivered to the originating carrier within 24 hours after the shipment reaches its destination. However, it is clear that once a loaded trailer leaves the line of a railroad, it will very likely be impossible for the carrier to ascertain its weight, so we shall make it a further requirement that the rail carrier

shall not relinquish possession of a TOFC shipment until it has received certification as to its weight from the shipper or has itself weighed the loaded trailer. Finally, we think it more appropriate to direct this rule to the carriers which we regulate rather than to shippers. It will be phrased to require carriers by tariff publication to in turn require shippers to deliver manifests and to certify the weight and nature of TOFC shipments.

The following rule will be adopted:

8(*b*) Carriers by tariff publication shall require that where a manifest or a statement of the weight or nature of a TOFC shipment is needed to determine the TOFC freight charges, such manifest or a certification by the shipper as to the weight or the nature of the shipment shall be delivered to the originating carrier within 24 hours after the shipment reaches its destination; *provided, however*, that where the weight of a loaded highway truck, trailer, or semitrailer (or the demountable container portion thereof) or the weight of the contents thereof is needed to determine rail TOFC freight charges, the rail carrier shall not relinquish possession of the shipment until it has received certification from the shipper as to such weights or has itself ascertained them.

A regulation such as the examiners' recommended rule 20B is, in our opinion, unnecessary. It is necessary, for reasons of safety, that a carrier be informed when it is tendered a shipment containing explosives or other dangerous articles, but the examiner's recommended rule 22—which, as will be noted below, we are adopting in substance—is all that is needed to accomplish this purpose. On the other hand, if a rail carrier wishes to restrict TOFC service against the transportation of other articles, the carrier will, of course, have to inform the public of that fact through appropriate tariff publication, and it is obvious that it will have to establish some means of ascertaining from the users of its service the nature of their shipments. It seems likely that this information would be needed to prepare the bill of lading, which rule 8(*a*) will require be issued before TOFC transportation is begun. At any rate, we believe that how to obtain this information is a matter best left to the managerial discretion of the rail carrier and one that need not be the subject of a formal regulation.

Multiple-trailer rail rates.—It is a common practice of railroads offering open-tariff TOFC service to publish reduced rates covering the movement of two or more trailers. Proposed rule D-3, which would place certain restrictions on this practice, reads as follows:

Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

The examiners, noting that the Commission is without power to require a rail carrier to provide TOFC service jointly with motor carriers, rejected that portion of proposed rule D-3 which would allow complete flexibility to rail carriers offering multiple-trailer rates, provided that they were "made available to other shippers and carriers." Their recommended rule 21 is thus much more restrictive than that originally proposed. It would provide:

In order to qualify for a rate applicable on the movement of multiple highway vehicles (or the demountable container portion thereof), two or more highway trucks, trailers, or semitrailers, (or the demountable container portions thereof) shall be tendered to the carrier within the time period, not to exceed one calendar day, specified in tariffs on file with the Interstate Commerce Commission.

All the rail carriers filing exceptions object to this rule, principally because of the requirement that trailers to take advantage of the multiple rate be tendered on the same calendar day. The Southern Railroads and the Southern Railway System would have no objection to a rule that trailers must be tendered within a 24-hour period, as this is now a common tariff requirement with respect to multiple-vehicle rates. These carriers, and the Western Railroads as well, take issue with the examiners' finding that "to change the time limit to 24 hours would make it difficult, if not impossible, to keep track of which trailers, if any, were tendered within that time limit." They point out that many railroads regularly keep records of the exact time when trailers are received, and that the record herein fails to support the examiners' conclusion that undue difficulty would be encountered in complying with a requirement that this be done.

The A.T.A. believes that this rule should be made more restrictive and that only when trailers are tendered simultaneously should they be allowed to qualify for a reduced multiple-vehicle rate. It contends that volume rates are permissible only so long as they apply to a single "shipment" and that unless trailers are tendered at the same time, they cannot be said to constitute one shipment. It also argues that the only justification for such a rate stems from cost savings to the rail carrier resulting from its handling of more than one trailer together instead of separately,

and that where trailers are tendered separately, the cost advantage must be lost.

We cannot agree with the A.T.A., and we do not think that the cases which it cites, including *Coal to New York Harbor Area*, 311 I.C.C. 355, *Wearing Apparel, Railway Exp. Agency, Inc.*, 301 I.C.C. 177, and *Consolidation–Great American Transport, Inc.*, 66 M.C.C. 423, support its position. Volume rates of various kinds have been approved many times by the Commission even where, as in *Coal to New York Harbor Area*, the involved traffic was to be tendered in multiple shipments over a long period of time. Needless to say, such a rate may in certain instances be found to be discriminatory as designed to afford a special advantage to a particular shipper or group of shippers, which was found to be true in *Consolidation–Great American Transport, Inc.*, but this is a matter for determination on an individual case basis. It would clearly be inappropriate in a proceeding such as this to issue a general condemnation of volume rates applicable to TOFC shipments. In fact, we cannot agree with the examiners that it is necessary to impose any time limit within which trailers must be tendered in order to qualify for a multiple-vehicle TOFC rate. So long as the carrier offers the same volume rates to all persons wishing to use its service, as is required by section 2 of the act, such rates would not be per se unlawful, and the rules to be adopted herein will recognize this. Where the applicable tariff publication does not provide a fixed period in which trailers must be tendered for the purposes of volume rates, we shall provide that this period will be one calendar day, which is the time now specifed in rule 14 of the current Uniform Freight Classification.

The following rule will be adopted:

8 (c) Unless a rail carrier by appropriate tariff publication specifically provides otherwise, in clear and unequivocal terms, two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered within one calendar day in order to qualify for any rate for the movement of multiple highway vehicles (or for the demountable container portion thereof).

TOFC transportation of dangerous articles.–No exception has been taken to the examiners' recommendation that the following rule, their recommended rule 22, which corresponds to proposed rule D-4, be adopted:

Arrangements for the movement of highway trucks, trailers, or semitrailers, (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement; *except* that shipments containing explosives or other dangerous articles shall *not* be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Interstate Commerce Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

The need for such a rule for safety purposes is obvious, and with minor editorial modifications we shall adopt it as rule 8(*d*).

Mixture rules applicable to all-freight rates.— It is a common practice for railroads offering TOFC service under all-commodity rates to include provisions limiting the quantity, by percentage of total weight, of any one article in a given shipment. Such provisions, having as their objective the protection of the railroad's straight carload traffic, have been approved by the Commission. Proposed rule D-5 would have established a standard mixture rule, certification form, and penalty provision:

All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:

"Not more than _____ percent of the articles (or commodities) in this shipment consists of an article or articles embraced by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity) rates do not apply; and the applicable rate on the shipment will be _____.

[In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the Class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."]

The examiners found that there is general agreement that some reasonable mixture provision is needed; that the Uniform Freight Classification is not a proper basis for such a provision; that if the tariff within which the all-freight TOFC item is included contains a list of commodity rates, it would be proper to refer to such a list to determine if the articles included in the TOFC shipment are in fact different for rate classification purposes; but that a general rule based on this approach would be ineffective as it could not be drafted to cover all possible situations. They took the position, therefore, that the railroads themselves should

be given the opportunity to make their tariff provisions governing mixture rules more clear and explicit; and that the carriers should provide in their tariffs that shippers must certify that the shipment consists of more than one article as described in the applicable tariff, and the percentage by weight which a particular article bears to the entire shipment. They recommended that the following regulation (rule 23) be adopted:

> All-freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms the conditions under which such rates apply.

No exception is taken to this aspect of their recommended order.

We are in general agreement with the examiners' findings with respect to the need for a regulation governing mixture rules, but we do not think that their recommended rule 23 is entirely adequate. We believe that it is necessary, if abuses are to be avoided, that a tariff in which an all-freight rate subject to a mixing rule is published contain or refer to a readily available freight classification from which it can be determined what constitutes a "single article" for purposes of the mixture rule. To eliminate possible confusion, we also think it desirable that the regulation provide specifically that the relationship of a single item to the entire shipment be expressed in terms of comparative weights, and that the tariff specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate. The rule which we shall adopt will contain these provisions:

> 8(*e*) All-freight (all-commodity) rates that are restricted to apply only when not more than a designated proportion of a shipment consists of a single article shall be made subject to tariff provisions which (1) shall describe in clear and explicit terms the conditions under which such rates apply, (2) shall contain or refer to a commodity classification, such as the current Uniform Freight Classification or a designated tariff, from which it can be determined what constitutes a "single article" for purposes of the all-freight rate, (3) shall require certification by the shipper of the percentage which the weight of a given article bears to the weight of the entire shipment, and (4) shall specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate because it contains more than the designated proportion of one article.

PAYMENTS TO LABOR UNIONS BY MOTOR COMMON CARRIERS USING TOFC SERVICE

It has become a common practice for labor contracts between motor common carriers and the bargaining agents for their employees to contain a provision that the carrier will pay a specified sum, usually $5, to a labor union's pension or welfare fund each time a trailer is transported in TOFC service. One such clause, article 45 of the Central States Area Over-the-Road Motor Freight Agreement for the period February 1, 1961, to January 31, 1964, reads as follows:

> The Union reserves the right to re-open this Agreement for the purpose of negotiations for employees engaged in operations which combine with or are part of other methods of transportation such as "piggy-back," barge, etc. If the parties are unable to agree upon such matters, the Union may engage in lawful economic recourse in support of its demands. This shall not apply to such operations as were in existence prior to January 1, 1955.
>
> Effective February 1, 1962, for each trailer or container placed on, or delivered to, rail flat cars, birdy-back, fishy-back, or barge operations the sum of Five ($5.00) dollars shall be paid into either the Pension or the Health and Welfare Fund as the Union may direct provided the parties have not before then agreed to a mutually satisfactory alternative to the problems created by such methods of transportation. To that end the parties shall appoint a committee to study and recommend possible solutions.

The Eastern and Southern Railroads and the Bureau of Inquiry and Compliance urge that we adopt regulations prohibiting motor common carriers from making payments to labor unions as a prerequisite to moving traffic in TOFC service. The examiners found that this proposal was beyond the scope of the present proceeding. We do not agree. Even though the proposed rules did not touch upon this matter, the notice of proposed rulemaking was sufficiently broad to encompass it, stating, as it did, that we would consider evidence bearing on rules which might be needed "to regulate, in the public interest, the utilization of coordinated and substituted service transportation from a competitive standpoint or otherwise," and "all related matters inherent in or to the basic purpose underlying this investigation."

We are asked to prohibit payments to labor unions when TOFC service is used on the ground that they constitute illegal rebates and concessions under section 1 of the Elkins Act, 49 U.S.C. section 41(1). *United States* v. *Braverman*, 373 U.S. 405 (1963), is cited by the Western Railroads as supporting the proposition that

the force of the Elkins Act extends not only to shippers and carriers but to *any* person "tamper[ing] with the statutory scheme." (373 U.S. at 408.) However, section 1 of the Elkins Act, and related sections of the Interstate Commerce Act such as section 222(c), prohibit the giving and receiving of rebates and concessions to the end that transportation service be obtained at less than applicable tariff rates. We have not been shown how the payment by a motor carrier to a labor union under the circumstances covered by employment contracts such as that quoted above could result in any person's obtaining transportation services at less than published charges. Consequently we must conclude that such agreements do not constitute tampering with the statutory scheme in any way which is prohibited by the Elkins Act, and that the *Braverman* decision is not in point here.

This Commission is charged only with the regulation of transportation, and then only to the extent provided in the Interstate Commerce Act. Our writ runs only to the carriers subject to that act, and to others to the limited extent provided in the Elkins Act. We are not charged with the regulation of labor-management relations, even as to the carriers which we regulate. This is the province of the National Labor Relations Board, to which the Congress has entrusted the supervision over agreements between carriers and labor organizations affecting labor relations. We therefore lack the jurisdiction to consider the legality of such agreements. *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617, 625.

Should a carrier subject to our jurisdiction enter into a union contract under which it attempted to bargain away its statutory obligations, we would have the necessary authority to order it nevertheless to perform such obligations, but we would not have the authority to strike down that contract as void or to pass regulations forbidding the execution of subsequent similar contracts. The *Galveston Truck Line* case just cited involved a complaint against a number of motor common carriers which had refused to accept interline shipments tendered by the complainant, a non-union carrier, because their labor contracts contained so-called hot cargo clauses. We entered an order requiring these carriers to cease and desist from such practices because they resulted in an abdication of their statutory duty as common carriers to render reasonably adequate and continuous service. In *Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93 (1958), generally known as the *Sand Door* case, the Supreme

Court commented with approval on our action in the *Galveston Truck Line* decision, saying, at page 109:

> It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty.

Although we have ample authority to require a carrier subject to our jurisdiction to fulfill its legal duties, we must act circumspectly in taking any other action which might encroach upon the area of labor relations lying within the ambit of the NLRB. *Burlington Truck Line* v. *United States*, 371 U.S. 156, 172 (1962).

Motor common carriers have the statutory obligation, imposed by section 216(b) of the act, to provide adequate service, and their certificates contain the further condition, prescribed by us under sections 204(a)(1) and 208, that they provide reasonably adequate and continuous service. While we would not wish to predict future standards of reasonableness for motor carrier service, even were we able to do so, certainly at present no motor common carrier could be found to be violating its duty to provide adequate service by failing to offer TOFC service in lieu of all-highway transportation. We must conclude, therefore, that motor carriers, in honoring labor contracts providing for a payment to a union fund for each trailer transported in piggyback service, do not thereby violate the Interstate Commerce Act. This is not to say that we approve of such arrangements. We have said repeatedly that we favor the increase of intermodal transportation generally, and the growth of TOFC service in particular, and it seems clear to us that labor contracts such as these must have a deleterious effect upon their development. Any remedy for this situation, however, must lie not with this Commission but with the Congress.

FINDINGS

We find that title 49, chapter 1, of the Code of Federal Regulations requires modification by the adoption of subchapter E, "Intermodal Transportation, part 500, Practices of For hire Carriers of Property Participating in Trailer-on-flatcar Service," containing the rules set forth in appendix IV hereto, and that such rules are reasonable and necessary, and should be prescribed. An appropriate order will be entered.

COMMISSIONER HUTCHINSON, concurring in part:

While I agree with the majority's repudiation of the concept that a person may not act as a carrier and a shipper as to the same shipment, I do not believe that a motor carrier's use of an "open tariff" under Plan III should be placed on a mandatory basis. A mandatory requirement raises serious legal questions which are not adequately answered in the majority report. Mandatory use of Plan III results in the forced establishment of through motor-rail routes contrary to the provisions of the act, and it is no valid answer to say, as does the majority report, that there is "no compulsion whatever" on the rail carriers to hold out a TOFC service. Clearly, there is a considerable degree of compulsion inherent in a rule which says, in effect, that Plan III rates can be established by the railroads for shippers only if the service is also held out for motor carriers acting as shippers. This diminishes the right of the railroads under section 3(1) with respect to the traffic of other carriers. The possibility, expressed in the majority report, that a railroad's refusal to provide service for motor carriers pursuant to a Plan III tariff might violate section 2 of the act does not justify the mandatory requirement since the purview of section 2 cannot be enlarged by rule.

I agree with the determination that Plan I involves joint rates and through routes and that TOFC service provided under Plan I and Plan III should bear a reasonable resemblance to the all-highway service for which it is substituted. However, a circuity limitation in the form of a percentage possesses certain inherent defects. Reliance on such a limitation could, in some situations, encourage wasteful transportation and place a premium on circuitous rail routes as alleged in the exceptions. Moreover, the percentage limitation imposed will be virtually impossible to apply fairly in situations where the trailer is loaded with more than one shipment originated at and/or destined to different points. For example, operations under Plan I might involve a trailer loaded with individual shipments originated at various points in New England, Pennsylvania, Ohio, and Indiana and destined to New Orleans, La., and points beyond, with interchange at St. Louis, Mo. The 85 percent circuity limitation promulgated in the majority report is to be applied from origin to destination over the route including the TOFC movement. But which origin and destination? Which "route" is to be used to determine whether a particular TOFC movement satisfies the percentage limitation?

I am not convinced that a percentage limitation is the proper answer to the problem.

The fundamental distinction between Plan I and Plan V operations is that the tariff rules covering Plan I service include a specific holding out by the motor carrier to perform an all-highway service at the election of the shipper, whereas the rates provided in Plan V tariffs are applicable only over joint intermodal routes and no option is extended. Since the basic holding out (that which the shipper can demand) under Plan I is for an all-highway service, it necessarily follows that Plan I rates should be compensatory over the all-highway service route. Moreover, a requirement that Plan I rates must be compensatory over authorized service routes would afford adequate protection against unduly circuitous and wasteful operations.

The rationale of the foregoing discussion is, of course, equally applicable when carriers use open-tariff TOFC service but not when the holding out is limited to joint intermodal service as under Plan V. There is no sound basis for the imposition of a circuity limitation on a Plan V operation since each participating carrier operates in its own right over its own routes and no all-highway service is held out to the public. Since there is no real problem of circuitous operations in connection with contract carriers, no worthwhile purpose is served by including them in a rule. I would adopt the following rule instead of the one promulgated by the majority:

5(a) Motor and water common carriers shall not participate in Plan I joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and shall not utilize open-tariff TOFC service unless the rates for such service are compensatory over the all-highway or all-water service routes.

I disagree with rules 6(a) through 8(e) respecting the placing and securing of trailers, tariff publication, and billing and notification. The majority report does not adequately explain the necessity for adding new rules to our present tariff and other requirements. These additional, complicated, and burdensome rules, which will needlessly retard the growth of TOFC service, appear to be based on fear of "potential discrimination." However, as recognized in the majority report, no shippers are complaining of unfair treatment.

VICE CHAIRMAN WEBB, dissenting:

Piggybacking is the brightest star in the transportation firmament. Its remarkable growth has been due to voluntary intermodal coordination, carrier-shipper cooperation, and a form of regulation which, until today, minimized compulsion and maximized competition. Viewing the dynamic growth of piggybacking in the light of the novel and onerous restrictions now decreed by the Commission, carriers and shippers may well conclude that nothing fails like success.

Transportation has many serious problems, but piggybacking is not one of them. Piggybacking is not an economic problem, one reason being that it has eluded the rigorous regulation applied to older and more conventional forms of surface transportation. Stated differently, the conventional forms of regulation, because of regulatory lag and for other reasons, could not be adapted immediately and completely to rapidly changing trailer-on-flatcar (TOFC) rates and services. As a result, no other form of regulated surface transportation has enjoyed so much freedom.

The Commission's regulation of TOFC service has been influenced, of course, by factors other than regulatory lag. The end result has been regulation that is flexible, mild, empirical, and, on the whole, quite perceptive. The Commission's new approach to TOFC regulation substitutes complusion for voluntarism; conformity for diversity; rigidity for flexibility; confusion for clarity; complexity for simplicity; and, most likely, failure for success.

A majority of the rules promulgated in this proceeding merely restate generally accepted principles and practices.[1] Since these rules are established in Commission decisions or in less formal publications, their inclusion in appendix IV of the report was not necessary.[2] These non-controversial rules will not deflect the

[1]Rules 1, 4(b), 4(c), 4(f), 5(b), 6, 7(b), 7(c), 7(d), 7(e), 8(a), 8(c), 8(d), and 8(e)(1). Although the time period specified in Rule 8(c) should be "within a 24-hour period" rather than "one calendar day," the rule permits carriers to publish any different period they desire.

[2]A number of the objectionable rules contain superfluous provisions. For example, Rule 3(a) ostensibly accords to freight forwarders the right to use rail open-tariff TOFC rates. The fact is that forwarders are required by Part IV of the act to utilize the services and open tariffs of rail and motor common carriers. The rules are also padded by the inclusion of water contract and water common carriers. Almost all of the movements that would be involved in any substantial water-rail TOFC service would be performed in part in so-called fishyback service. Such service is beyond the scope of the rules set forth in appendix IV.

present course of TOFC regulation, although they will impart an undesirable rigidity. However, the absence of objection to a majority of the rules promulgated should create no presumption that the remaining rules will not materially harm carriers and shippers.

The remaining rules, the majority asserts, are intended to foster the growth and development of piggybacking. But with one possible exception,[3] all of the rules in question impose some new restriction or prohibition.[4] Obviously, the Commission believes that more regulation will stimulate the expansion of TOFC service. In my opinion, TOFC service will shrink and deteriorate in direct proportion to the Commission's willingness and ability to enforce the rules prescribed in this proceeding.

Rules 2 and 3 will be considered together since the latter implements the former. In my judgment, the prescription of open-tariff TOFC service is rash, contrary to law, and harmful to carriers of all modes and shippers of all sizes. In addition, the compulsory open-tariff rule has ramifications which extend far beyond the realm of piggybacking. Pressed to its logical conclusion, rule 2 would revolutionize transport regulation to the detriment of all concerned.

The general concept of open-tariff TOFC service was embodied in the President's Transportation Message to the Congress of April 5, 1962,[5] in a recommendation designed to:

> Assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers.

That recommendation was singular in that it called for increased regulation of surface transportation. All the other recommendations in the President's Message, insofar as they related to the Commission's economic authority, were designed to equalize competitive opportunities under diminished regulation. The Commission opposed all of the President's deregulation proposals. It now adopts the only recommendation in the President's Message which called for an enlargement of Commission authority. Two

[3] Rule 4(e) makes it clear that a motor common carrier may participate in Plan I TOFC service even though the motor movement is limited to terminal areas.

[4] Rules 8(b) and 8(e)(2), (3), and (4) impose restrictions not contained in the rules as initially proposed or as recommended by the examiners. I am unable to estimate their severity.

[5] H. Doc. No. 384, 87th Cong., 2d Sess. (1962).

differences between the Commission's action and the President's recommendation must be noted. First, the President recommended that compulsory open-tariff TOFC service be accomplished by amending section 216 of the Interstate Commerce Act. The Commission would achieve the same result without benefit of legislation. And secondly, the President's recommendation was advanced without the benefit of the views of all affected interests. The Commission, on the other hand, has had the benefit of the record developed in four Congressional Committee hearings in two Congresses.[6] That record shows that legislation to require the performance of open-tariff TOFC service attracted virtually no support.

When this proceeding was instituted, compulsory open-tariff TOFC service was not included in the rules proposed. However, proposed Rules B-4 and B-5, although similar in certain respects to the compulsory open-tariff rule adopted by the Commission, were less extreme. Nevertheless, proposed Rules B-4 and B-5 were opposed by rail carriers, freight forwarders, and the overwhelming majority of shippers. Although several segments of the trucking industry endorsed the proposed rules, the American Trucking Associations, Inc., conceded in its exceptions that the rules were "by no means essential to proper functioning of coordinated transportation, the end product of joint-intermodal TOFC service."

The examiners recommended that proposed Rules B-4 and B-5 not be adopted. The Commission concludes that the examiners were right. However, the Commission's agreement with the examiners is somewhat inconsistent with its promulgation of Rule 2.

In oral argument, compulsory open-tariff TOFC was opposed by rail carriers, freight forwarders, and several motor carriers. Shippers and shipper organizations urged the Commission not to adopt any rule which would diminish the flexibility and variety of TOFC service. It was also disclosed at oral argument that motor carriers making the greatest use of TOFC service were opposed to any compulsory open-tariff rule.[7] In this connection, it should

[6] *Hearings before the Senate Committee on Commerce on S. 3242*, 87th Cong. 2d Sess. (1962); *Hearings before the Surface Transportation Subcommittee of the Senate Committee on Commerce on S. 1062*, 88th Cong. 1st Sess. (1963); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 11584*, 87th Cong. 2d Sess. (1962); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 4701*, 88th Cong. 1st Sess. (1963).

[7] Counsel for the American Trucking Associations, Inc., said in oral argument: "I feel it incumbent upon me to state that the Regular Common Carrier Conference which I speak for also is of the view that the motor carrier cannot use an open tariff."

be noted that the American Trucking Associations, Inc., recently opposed legislation in the Congress to establish the concept of equal TOFC charges for motor carriers and shippers.[8]

The Commission's concept of "equal TOFC charges for all" is unsound. Rule 2 erroneously assumes that the traffic of a carrier does not differ in kind from the traffic of a shipper. No rational concept of discrimination can be applied to groups of persons as dissimilar as carriers and shippers. Preferential rail rate treatment of one group (*e. g.*, motor carriers) could not possibly disadvantage the other group (shippers). Conversely, it is impossible for a shipper to derive from any rail rate any competitive or other advantage over a motor carrier. And finally, no amount of word jugglery can conceal the obvious fact that a trucker arriving at a railroad ramp with a trailerload of other people's property that he has undertaken to transport for compensation, as a part of his holding out to the general public, is a common carrier by motor vehicle, not a shipper.

Rule 2 thus embodies a spurious, abstract notion of equality. The Commission has attempted to force that concept of equality upon the transportation industry, although it is virtually unanimous in its opposition. Even if this action were not proscribed by law, it would be irresponsible in view of the meager supporting evidence of record.

Throughout this expression the open-tariff provision, Rule 2, has been called "compulsory." The report of the Commission is misleading because of the majority's effort to sugarcoat the compulsion. For example, the report states:

> We conclude that when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers. * * *

The truth, of course, is that rail carriers do not want to be required to offer all-rail TOFC service to the public generally but only to the shipping public. And if regulated motor carriers must be regarded as shippers for the first time in history, the railroads do not want to be required to serve them. The implications involved in treating motor carriers as shippers will be discussed later in these remarks. Whatever the status of motor carriers, however, the fact of compulsion remains. At another place in its report, the Commission states:

[8] *Hearings on H.R. 4701, op. cit. supra*, note 6 at 212.

However, to say that we would be requiring the establishment of through routes merely by finding that it is lawful for a motor carrier to use the open-tariff TOFC rate of a rail carrier overlooks the fact that such a finding would involve no complusion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it.

Obviously, the compulsory nature of a rail carrier's participation in a through route is not altered by the fact that its motor carrier competitors may either use the route or operate entirely over the highway. What the majority appears to be saying in the above-quoted passage, and in complete disregard of the economic facts of life, is that the through routes created by Rule 2 would not be compulsory because the railroads have a choice as to whether or not they will provide all-rail TOFC service. A similar choice was presented to patrons of a carrier who operated in England in the early 17th century. The carrier's name was Thomas Hobson.

We are not in George Orwell's *1984*. Hence, there should be no reluctance to say that compulsion is compulsion; and certainly we are not required to say that coercion is freedom.

As indicated in the Commission's report, a through route may exist without a corresponding joint rate. In my opinion, Rule 2 violates section 216(c) of the act by compelling railroads to establish through routes with their motor carrier competitors. As here pertinent, section 216(c) reads as follows:

Common carriers of property by motor vehicle *may* establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water. * * * [Emphasis added.]

Neither the Commission nor any party to this proceeding contends that "may" means "shall."

Rule 3, which implements Rule 2, is intended to create a form of substituted rail-for-motor service. Rule 4 also embraces substituted rail-for-motor service, that is, Plan I TOFC service.[9] The Commission finds that the Plan I TOFC service embraced in Rule 4 constitutes a through route arrangement within the meaning of section 216(c) of the act.

[9] Plan I TOFC service is service performed by a railroad in substitution for motor common carrier service to, from, and between named points over the motor carrier's route, at the option of the motor carrier, unless otherwise directed by the shipper, the traffic moving from initial origin to final destination at all-motor rates and on motor carrier bills of lading under an arrangement or an agreement between the two modes of transportation.

What is the difference, then, between the through routes created in the performance of Plan I substituted service under Rule 4 and the through routes that would be created in the performance of substituted service under Rules 2 and 3? Both Plan I substituted service and the open-tariff form of substituted service are governed by the circuity limitations of Rule 5. If Rule 3 is compared with Rule 4, it will be seen that both the conventional and the open-tariff substituted services are subject to tariff publication and other requirements that are identical in every respect save one. The only difference is that the through routes involved in Plan I substituted service are established with the rail carriers' consent, whereas the through routes involved in open-tariff substituted service are established without their consent.

Even if compulsory open-tariff TOFC service did not violate section 216(c), the Commission could not require rail carriers to provide such service in the absence of statutory authority. The Commission finds such authority in section 2 of the act. If any such authority existed, Rule 2 would be superfluous. The authority does not exist.

Over the years sections 2 and 3 of the Interstate Commerce Act have coalesced. In the early history of regulation, the section 2 prohibition against unjust discrimination was deemed to be absolute. *Wight* v. *United States*, 167 U.S. 512 (1897). Later, however, the exigencies of competition were recognized as a defense against a charge of unjust discrimination. *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1 (1943). As a result, the primary objectives of section 2, at least insofar as the transportation of property is involved, have been subsumed under section 3. I am not aware of any case decided during the past quarter century where unjust discrimination under section 2 was not, or could not have been found to be, undue preference and prejudice under section 3. Accordingly, the Commission's power to promulgate Rule 2 must be viewed in the light of both section 2 and section 3.

The substantial overlap of sections 2 and 3 was recognized by the Congress at least as long ago as 1935. Thus, when section 216(d) was enacted into law by the Motor Carrier Act of 1935, the language of that section was copied largely from section 3(1), but language corresponding to section 2 was not thought to be necessary. Section 216(d) reads in pertinent part as follows:

* * * It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway,

locality, region, district, territory * * * or to subject any particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3(1) reads as follows, the proviso having been added by the Transportation Act of 1940:

It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Prior to 1935, the Commission had held that it was doubtful whether section 3(1) could be interpreted as applying to discrimination between common carriers. *Okla.-Ark. Teleph. Co. v. Southwestern Bell Teleph. Co.*, 183 I.C.C. 771, 774 (1932). However, the above-quoted proviso was added to section 216(d) because the Congress wanted to make clear that it was concerned only with discrimination between shippers. Thus, the provisions of section 216(d) were described by Senator Wheeler as "substantially the same as those in Section 3(1) of the I.C.C. Act which has been in effect since 1887 and have always been interpreted as covering unjust and unequal treatment *by a carrier of its patrons.*"[10] (Emphasis added.) The proviso to section 216(d) was described by Senator Wheeler as making "doubly sure" that no rail carrier could base a claim of discrimination on the pricing practices of their motor carrier competitors.

The same proviso was included in section 3(d) by the Transportation Act of 1940 in the interest of equality of regulation,[11] and for the obvious purpose of making "doubly sure" that no motor carrier could base a claim of discrimination on the pricing practices of their rail competitors. After the proviso was added to

[10] 79 Cong. Rec. 5856 (1935).

[11] Committee Print of the House Committee on Interstate and Foreign Commerce on *Omnibus Transportation Legislation*, 76th Cong., 3rd Sess. p. 25 (1940).

section 3(1) by the Transportation Act of 1940, the Commission recognized that the section was not applicable to traffic of another carrier and that such alleged discriminations must be dealt with under section 3(4). *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, 220. Section 3(4) forbids discrimination between "connecting lines," which lines are defined as the connecting line of any railroad subject to Part I of the act or that of any common carrier by water subject to Part III.

The use of the word "discrimination" in the proviso to section 3(1) is most significant. The word "discrimination" appears in section 2 but not in the language of section 3(1) preceding the proviso. The use of that word in the proviso to section 3(1) was designed to preclude the Commission from finding a discrimination as between carriers under section 2.

The Commission's interpretation of section 2 leads to this astonishing conclusion: that "discrimination" as between carriers, which is expressly permitted under section 3(1) and its counterpart section 216(d), is condemned by section 2. The Commission's conclusion is also diametrically opposed to the conclusion reached in its landmark case on piggybacking which was subsequently affirmed on appeal. *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, *aff'd sub. nom. Cooper-Jarrett, Inc.* v. *United States*, 32 U.S. L. Week 2413 (W. D. Mo. 1964). On page 50 of its report in the *Eastern Central* case, the Commission said:

> It should be observed, also, that sections 2 and 3(1) are intended to protect shippers, not competing carriers.

The Commission's disregard of statutory language and clear legislative intent contrasts sharply with the respect for the law shown by the Executive Branch. The President, in advocating his open-tariff TOFC proposal in 1962, asked that the Interstate Commerce Act be amended. No extenuating circumstance justifies the Commission's free-wheeling interpretation of the act. The effect of that interpretation is to create a gross inequality by permitting motor carriers to "discriminate" at will against the traffic of rail carriers, while forbidding to rail carriers the right to "discriminate" against the traffic of motor carriers. Furthermore, the Commission's bizarre interpretation of the act makes section 3(4) utterly superfluous.

Not only does the Commission lack authority to promulgate Rule 2, but its report gives no reason for the action. (See that section of the Commission's report entitled, "Open-Tariff TOFC Service.") A large part of the discussion in that section of the report relates to Commission decisions in which *voluntary* open-tariff TOFC service was found or said to be repugnant to the act. *E. g., Substituted Freight Service,* 232 I.C.C. 683 (1939). The Commission ends its discussion of voluntary open-tariff TOFC service with the following conclusion:

> We can see no justification, either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariffs, it can substitute another's service for its own in this way.

All this, however, has nothing to do with compulsory open-tariff TOFC service. Rule 2 cannot be justified by any substantial evidence of record because that evidence and the arguments based thereon show that any form of compulsory open-tariff TOFC service would be a transportation tragedy. Evidently, the majority found explication of the reasons for adopting Rule 2 too difficult a task. I would find the task impossible.

Because of its aversion to the TOFC plan number terminology, the Commission is able to avoid the application of Rule 2 to specific types of TOFC service. It should not be supposed, however, that the only TOFC service provided by rail carriers under open tariffs is the Plan III service.[12] Plan II TOFC service,[13] modified Plan II TOFC service,[14] and Plan IV TOFC service[15] are also provided under open tariffs.

Since Rule 2 encompasses both Plan III and Plan IV TOFC service, it may very well destroy the freight forwarding industry. One of the longest nails in the coffin is the Commission's finding that the performance of some all-highway service between

[12] Plan III TOFC service involves ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

[13] In Plan II TOFC operations, the railroad performs a door-to-door transportation service utilizing its own trailers or containers.

[14] Modified Plan II TOFC service, sometimes referred to as Plan 2 1/2, may involve rail pickup at origin but shipper delivery of the railroad trailer or container at destination, or shipper delivery of the railroad trailer or container to the TOFC loading ramp and rail carrier delivery to the consignee.

[15] In Plan IV TOFC operations, the shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

assembly and distribution points would exclude motor carriers from the statutory definition of a freight forwarder in section 402(a)(5) of the act. Although Rule 2 is apparently designed to place motor carriers in a position of equality with forwarders in the use of all-rail TOFC service, a greater regulatory inequality would be hard to imagine.

In the first place, forwarders, unlike motor carriers, are prohibited from performing line-haul transportation but must utilize the services of regulated line-haul carriers. Obviously, the more complete service of the motor carrier-"forwarder" would be far more attractive to shippers. Moreover, because of the forwarder's unique dual status of carrier and shipper, forwarders are prohibited from making through route and joint-rate arrangements with other common carriers. *Acme Fast Freight, Inc. v. United States*, 309 U. S. 638 (1940). The motor carrier's "forwarding" operations under Rule 2 would not be similarly restricted. In short, Rule 2 would confer upon motor carriers all of the advantages flowing from the forwarder's status as a shipper but would impose none of the correlative disadvantages set forth in Part IV of the act.

No doubt the motor carrier industry would be pleased to capture the traffic presently being moved by freight forwarders. To the credit of the industry, however, it does not desire to capture that traffic in the manner proposed by the Commission.

At no stage of this proceeding were the parties advised that the Commission would consider any type of compulsory open-tariff TOFC service involving Plan II rates and charges.[16] However, Rule 2 encompasses Plan II TOFC service. Numerous motor carriers will be in a position to demand that railroads pick up freight at motor carrier terminals, load it, transport it, and deliver it to consignees on the same terms that such freight is handled for shippers. Such service will probably not be demanded except for freight which is difficult to handle or which moves at depressed rates.

Apparently, Rule 2 was drafted primarily with a view toward compelling rail carriers to make Plan III TOFC rates available to motor carriers. The rule reflects the superficial notion that since the physical service performed for motor carriers and

[16] In the Commission's Notice of Oral Argument, dated November 8, 1963, the parties were requested to comment on whether "all ramp-to-ramp TOFC service should be provided at the same published rate or charge***". Plan II is not a ramp-to-ramp TOFC service.

shippers is the same, rail carriers are arbitrary in refusing to provide the service at a uniform charge. The Commission, I think, has confused its cost standards for judging the minimum reasonableness of rates with the broader considerations involved in the establishment of rates by carrier management.

In establishing Plan III TOFC rates to meet the needs of a particular shipper or shippers, rail management must consider such factors as regularity of movement, frequency of movement, shipper return loads, the feasibility of private carriage for the shipper, the prospects of obtaining from the shipper additional traffic, and the shipper's financial responsibility. Some or even all of these factors may be entirely different with respect to the traffic tendered from time to time by a host of motor carrier competitors. As a result, Plan I TOFC[17] charges may be either higher or lower than Plan III rates and charges depending upon whether the traffic of motor carriers or shippers makes the most favorable showing under the transportation factors enumerated above. And that is why rail charges for Plan I TOFC service vary as between motor carriers. The physical identity of the ramp-to-ramp service, which is all the majority can see, is but one of many factors that must be considered in carrier ratemaking.

There is no evidence in this record, however, that any railroad has arbitrarily refused to enter into joint intermodal service arrangements with any motor carrier on the same general terms and conditions applicable to the similar traffic of any other motor carrier. As indicated, Plan I TOFC charges are sometimes lower than Plan III rates. Thus, no need has been shown to protect motor carriers against "discrimination" by providing the ramp-to-ramp TOFC charges to them shall not exceed those assessed to shippers under Plan III open tariffs.

On the contrary, the record shows that rail and motor carriers have been able to negotiate, with increasing frequency, charges for Plan I TOFC service and divisions of Plan V TOFC[18] rates that are tailored for the particular intermodal service involved. The huge success of these purely voluntary rail-motor arrangements is incontestable. It is attested by the dramatic growth of both Plan I and Plan V TOFC service.

The Commission concludes, without explanation, that the rail carriers' fears of a diminution of their inherent advantages is

[17] Plan I TOFC service is defined in note 9, *supra*.

[18] Plan V TOFC service is that performed under published joint rail-motor rates over through routes with certificated motor common carriers.

misplaced. I think their fears are justified. Plan III open-tariff TOFC rates will probably not be utilized by motor carriers to any considerable extent on traffic originating in the terminal area of the loading ramp and destined to the terminal area of the unloading ramp except to the extent necessary to divert traffic from freight forwarders. Rather, these rates will be used primarily as the middle leg of a movement from other origins to other destinations. It is both unconscionable and destructive of the rail carriers' inherent advantages to attach to rate adjustments for their patrons the peril of short-hauling and of additional competition between unknown origins and unknown destinations.

The effect of Rule 2 is to transform the voluntary and viable patnership between rail and motor carriers into a master-servant relationship. The servant, it should be noted, was the inventor of the better mousetrap. However, the Commission believes that the mousetrap should be placed to a considerable extent under the control of the inventor's foremost competitors. Again it is to the credit of the motor carrier industry that it does not seek transportation dominance by the method proposed by the Commission.

Shipper opposition to compulsory open-tariff TOFC service is easy to understand. The major threat to rail carriers posed by Rule 2 involves Plan III open-tariff rates. Apparently, a majority of these rates are lower than rail charges for Plan I TOFC service.[19] In some instances it may be possible for rail carriers to minimize the threat to their revenues by increasing Plan III rates and charges to the level of Plan I charges. In other instances, the threat might be reduced by cancelling Plan III TOFC rates and requiring shippers to use Plan II TOFC service. Plan II rates and service may not be so well-suited to the shippers' needs but the open tariffs under which Plan II service is performed are less usable by motor carriers.

It seems to me, however, that the trucking industry stands to lose as much as rail carriers and shippers. In the long run, the combination of intermodal competition and private carriage will compel rail carriers to perform Plan III TOFC operations on a very substantial scale. Rule 2, however, destroys the rate floor for such operations. Whether or not the motor carrier

[19] A serious deficiency in the record and in the Commission's report is the lack of information respecting the general levels of Plan I and Plan III TOFC charges. For that reason, only rough approximations can be made as to impact of Rule 2 on carriers and shippers.

beneficiaries of reduced Plan III rates and charges have standing to protest is beside the point. They will have little or no incentive to do so. In this connection, the following testimony of the witness for the American Trucking Associations, Inc., in opposition to open tariff TOFC legislation merits serious consideration:

> While we strongly endorse this objective, the proposal itself is seriously defective. Modern piggyback service which is the innovation responsible for this recommendation involves some rather complex and complicated carrier-shipper relationships. It is far easier to recognize a need for broadened use of the service than to enunciate a proper solution of the problem created. Among other things to be considered is the maintenance of carriers as carriers and not to dilute their position by forcing them into a behavior pattern which is basically shipper oriented. We earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers as carriers.

The Commission knows, of course, that motor common carriers also publish open tariffs. For many years, they have published tariffs in which they undertake to provide the motive power for hauling trailers owned or leased by shippers. More recently, they have published such tariffs in order to provide shippers a terminal-to-terminal service corresponding to the rail carriers' ramp-to-ramp TOFC service: *E. g., Automobile Parts and Other Articles, Central Territory*, 316 I.C.C. 143; *Powdered Iron, Camden and Pennsauken, N.J., to Dayton*, 321 I.C.C. 499. I should imagine that in the first appropriate proceeding, the Commission will find that one motor carrier, under conditions similar to those set forth in Rule 3, must be accorded the right to use the open tariffs of another motor carrier. Since the Commission in this proceeding has compelled rail carriers to deal with motor carriers they deem to be unreliable, the Commission can hardly decline to compel motor carriers to perform open tariff service for their undesirable brethern. Thus, the Commission's compulsory open-tariff concept, grounded on the false premise that carriers and shippers are two peas in a pod, can be used to establish in a limited way mandatory through routes and joint rates between motor carriers. The establishment of such through routes and joint rates is the subject of legislative recommendations made to the Congress in our last three annual reports, 75 I.C.C. Ann. Rep. 186 (1961); 76 I.C.C. Ann. Rep. 201 (1962); 77 I.C.C. Ann. Rep. 19(1963).

[20] *Hearings on H.R. 4701, op cit. supra.* note 6 at 212.

Another threat to the motor common carrier industry arises from the fact that open-tariff TOFC service is not in fact substituted rail-for-motor service. True, the Commission has decked out open-tariff TOFC service in the trappings of substituted service. But if, as the Commission contends, the open tariff rate is not a joint rate, and if the motor carrier is really a shipper, the circuity limitations imposed by Rule 5 are illogical and arbitrary. That is, if the traffic which moves under an open tariff moves solely on the rail rate, the requirement of underlying motor carrier authority cannot be defended on any logical ground.

In my comments thus far on Rule 2, I have assumed that the rule does not require Plan I TOFC charges and Plan III open-tariff rates to be the same where the same ramp-to-ramp service is involved. In other words, I have attempted to estimate the *minimum* impact of the rule. Rule 2 is ambiguous. It seems to me, however, that the more natural construction is that all ramp-to-ramp TOFC service, Plan I as well as Plan III, must be performed at the same charge where the same physical service is involved. This construction, of course, leads to results which are more pernicious than I have indicated.

The most natural construction of Rule 2 is that the first two words, "TOFC service," are generic and are not qualified by the succeeding phrase set off in commas. Thus, if any ramp-to-ramp TOFC service is offered in an open-tariff publication, then all ramp-to-ramp TOFC service, Plan I as well as Plan III, "shall be made available at a charge no greater and no less than that received from any other person * * *."

I shall not attempt to depict the revolution in transport regulation that would result from construing the word "person," wherever it appears or is implied in the Interstate Commerce Act, to include carriers as well as shippers. Nevertheless, it is not idle to speculate upon the consequences of permitting rail carriers, in their capacity as shippers, to use the open tariffs of other railroads to avoid divisional agreements thought to be unfavorable, or upon the consequences of granting to railroads free access to all motor carrier open tariffs. Further speculation might begin with the most spectacular use of the open tariff privilege. I refer to Jay Gould's shipments of cattle over the lines of the New York Central.

Rule 4 is confusing because of the Commission's antipathy toward the use of TOFC plan numbers. The examiners, on the other hand, recognized that a clear differentiation of Plan I and

Plan V TOFC service required the use of those numbers in the rules prescribed. By avoiding the numbers, the Commission blurs the differences between the two types of intermodal TOFC service. Such a blurring apparently was felt to be necessary in order to overcome the freight forwarders' argument that Plan I TOFC service, unlike Plan V, is not a through route, joint-rate arrangement and is, therefore, unlawful.

Recognition of the marked differences between Plan I and Plan V TOFC service may lead to the conclusion that the former does not involve through routes and joint rates. The major differences are three in number. First, under Plan V, but not under Plan I, a motor carrier may hold itself out to perform service jointly with a rail carrier to points beyond the scope of its operating authority. Secondly, the flat charges per trailer involved in Plan I TOFC service bear little or no resemblance to divisions of joint rates such as those involved in Plan V service. And finally, the rail carrier participating in Plan I TOFC service, unlike the rail carrier participating in Plan V, does not know the identity of the shipper or the contents of the trailer tendered by the motor carrier.

If the above-described differences mean that Plan I TOFC service does not involve through routes and joint rates—and it most certainly does not in any conventional sense—I would still have no difficulty in finding Plan I TOFC service to be lawful. In other words, if necessary, I would follow the rationale of the Commission's recent decision in *National Auto. Transporters Assn. –Declaratory Order*, 91 M.C.C. 395. However, I would not, either in Rule 3 or Rule 4, interject into transportation law such nebulous phrases as "in lieu of" and "in addition to" in lieu of or in addition to such well-understood terms as Plan I TOFC service and Plan V TOFC service. A good example of the resulting confusion is the Commission's repudiation in its report of the rationale of the decision in *Rubber Articles, Philadelphia to Ill., Ky., Mich. and Mo.*, 319 I.C.C. 632, and the Commission's failure to indicate clearly in Rule 4(e) whether the result reached in that case is or is not sound.

Rule 4(d) produces a result that is absurd. The problem may best be illustrated by the following example. Let us suppose that Motor Carrier A, common or contract, is authorized to transport widgets from Chicago, Ill., to all points in Florida over irregular routes serving no intermediate points. Carrier A desires to participate in Plan I TOFC service by transporting the widgets

to Cincinnati over the highway, transferring the trailer to Rail Carrier B at Cincinnati for movement in TOFC service to Atlanta, and receiving the trailer back at Atlanta for movement over the highway to destinations in Florida.

Although Carrier A is authorized to operate over highway routes paralleling the rail line of Carrier B from Cincinnati to Atlanta, and although Carrier A does not desire to pick up or deliver widgets from or to customers at either Cincinnati or Atlanta, Rule 4(d) would require Carrier A to obtain motor carrier operating authority in order to move its trailers *by rail* from Cincinnati to Atlanta. Obviously, no new motor carrier service would be created either at Cincinnati or at Atlanta. As indicated, Carrier A already holds operating authority to transport widgets over direct highway routes between Cincinnati and Atlanta. It is inconceivable that any other carrier, rail or motor, could be injured by Carrier A's substitution of rail for motor service for the movement between Cincinnati and Atlanta. This is how the Commission explains the absurdity:

> It is our opinion, however, that the facts of record in this proceeding do not warrant any departure from the long-established practice of this Commission prohibiting a motor carrier from interchanging traffic at points other than its authorized service points. *Gilbert Carrier Corp. Extension—Kearney, N. J.*, 72 M.C.C. 204.

The statement cannot be accepted as true. The *Gilbert* case is not a long-established precedent. In fact, the *Gilbert* case was overruled *sub silentio* in *National Auto. Transporters Assn.—Declaratory Order, supra.* Moreover, the *NATA* case was an entire Commission decision, whereas the *Gilbert* case was a report of division 1. The issue was fully briefed in the *NATA* case, but the *Gilbert* case was a "fluke" arising out of an unopposed application in which the issue involved was neither briefed nor discussed. And finally, no case clearly presenting the issue was decided between or after the *Gilbert* and *NATA* cases.[21]

Even if Plan I TOFC service is treated as a through route and joint-rate arrangement, it is so different from Plan V that the Commission need not fasten upon the former the common point of service requirement. Contract carriers would thereby be permitted to participate in joint intermodal TOFC service. As indicated, no carrier can derive any benefit from the requirement. If the

[21] But see *Houff Transfer, Inc., Ext.—Staunton*, 92 M.C.C. 702, 704-5 (1963) (concurring opinion).

requirement were not imposed, the Commission would be furthering its stated purpose of fostering the growth of TOFC service.

But if motor carriers in the position of Carrier A in the example above are going to be required to obtain operating authority, a way must be found to distinguish the certificates issued to them from those issued in response to a public need shown for service over the highway. I suggest that the certificates to be issued might be called griffin certificates in recognition of their grotesque and hybrid character.[22]

Rule 4(d), insofar as it relates to Plan I TOFC service, is required by no law except Parkinson's.

Commissioner Hutchinson in his separate expression has pointed to certain practical difficulties in the enforcement of Rule 5 and has suggested that a percentage limitation on circuity may not be the proper answer to the problem. I am in general agreement with those observations. Nevertheless, I would be willing to approve Rule 5 on an experimental basis were it not for the majority's retroactive and harsh application of the rule.

The examiners recommended that the circuity limitation rule operate only prospectively. They were concerned, and rightly so, by the fact that numerous motor carriers have participated for many years in TOFC operations which do not conform to the new circuity rule. However, no carriers or shippers have complained about these operations and rates applicable thereto have been permitted to go into effect. At the very least, the Commission should have found that such operations are *prima facie* lawful.

Instead, on and after the effective date of the Commission's order, numerous TOFC operations, not heretofore challenged by anyone, will automatically become unlawful. Each day of continued operations will build up a record of "unfitness." But because the operations have served a public need over a long period of time, immediate discontinuance of such operations may entail severe financial losses for the motor carriers involved.

Throughout its report, the majority says again and again that the expansion of TOFC service is its primary aim. I do not understand its refusal to further that objective with a small dispensation of mercy.

Rule 7(a), although containing much of the language of the examiners' rule, is far from the relatively harmless provision

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[22] The griffin, in Greek mythology, was a fabulous monster, usually having the head and wings of an eagle and the body of a lion.

recommended. Far reaching language not considered by the parties has been injected. The leasing provisions, in the form recommended by the examiners, lacked any requirement for publication of the leasing charges of rail affiliates and subsidiaries, and would have been ineffective. Realizing this, the majority has simply added language which includes affiliates. However, the provision which the majority uses to close the loophole is both unlawful and inequitable.

To begin with, the Commission possesses no authority over the rates and charges of non-carriers. Of course, the separate corporate entities involved could be disregarded if it could be shown that the Commission was being frustrated in its efforts to put down widespread, clearly established transportation abuses, and that these abuses persisted by virtue of the separate identities of rail carrier subsidiaries. *Cf. Schenley Corp.* v. *United States*, 326 U.S. 432 (1946). However, the record in this proceeding falls far short of such a showing. Generalized allegations of abuses were not buttressed with actual shipper complaints. The real abuses are yet to come, and they will come primarily from the rule itself.

The effect of Rule 7(a) will be to promote leasing by non-regulated companies, including motor carrier affiliates and subsidiaries. The non-regulated leasing companies will be able to undercut the published leasing charges of rail carriers and the latter will be unable to respond promptly. One side effect of the rule will be to jeopardize the New York Central's $16,700,000 investment in Flexivan equipment. Although other railroads can handle conventional equipment leased to shippers by non-regulated concerns, the Central will be faced with the necessity of making a costly adjustment in its TOFC operations.

It may be that with the record herein so barren on the subject, the majority feels that the Commission requires information about carrier leasing practices and charges. If so, this need could have been met in a less disruptive manner by merely requiring the carriers to file their master lease agreements.

In conclusion, this proceeding demonstrates the danger of attempting to solidify and to mechanize the law on a subject as fluid as piggybacking. A code of rules is appropriate for motor carrier safety regulation and for other transportation subjects which are fairly static in nature. But the problems rising from the turbulent arena of intermodal competition cannot be obviated by economic planning, or jammed into hard and fast policy molds,

or resolved by the writing of ordinances. Such problems can be solved fairly and intelligently only by a form of case-by-case adjudication which reflects the spirit and the genius of the common law. If this is not so, the Commission should institute immediately an ex parte proceeding to lay down, through formal rules, policy guidelines for the interpretation and application of section 15(a)(3) of the act in intermodal competitive rate controversies.

I would promulgate no rules in this proceeding.

APPENDIX I

Parties filing exceptions or replies

A. Parties filing both exceptions and replies:

1. The Eastern Railroads.
2. Class I Railroads of the Western District except the Illinois Central and and the Gulf Mobile and Ohio Railroads (Western Railroads).[1]
3. Railroads operating in the Southern Freight Association Territory except the Southern Railway System and the St. Louis-San Francisco Railway Company (Southern Railroads).
4. New York Central Railroad Company.
5. Southern Railway System.
6. American Trucking Associations, Inc., and a number of affiliated associations and member motor carriers (A.T.A.).
7. National Automobile Transporters Association.
8. Freight Forwarders Institute and a number of individual freight forwarders.
9. Seatrain Lines, Inc.
10. National Industrial Traffic League (NITL).
11. Bureau of Inquiry and Compliance, Interstate Commerce Commission.

B. Parties filing exceptions only:

1. Contract Carrier Conference of American Trucking Associations, Inc.
2. Local and Short Haul Carriers National Conference.
3. Wisconsin Motor Carriers Association.[2]
4. Clipper Carloading Company.
5. Growers and Shippers League of Florida, Florida Citrus Commission, Florida Canners Association, Florida Citrus Mutual, and Florida Fruit and Vegetable Association (Florida Shippers).
6. John Morrell & Company, The Rath Packing Company, Geo. A. Hormel & Company, and Oscar Mayer & Company.

C. Parties filing replies to exceptions only:

1. Illinois Central Railroad Company.
2. Private Carrier Conference, Inc.
3. The Motor Convoy, Inc., and Motor Convoy Company.
4. Transamerican Freight Lines, Inc.
5. Manufacturing Chemists Association, Inc.
6. Acme Steel Company and 13 other interested shippers.
7. United States Department of Defense.

[1]Where it is deemed necessary, the name of a party is followed by an appropriate short title, in parentheses, by which it is designated in the report.

[2]The exceptions of the Wisconsin Motor Carriers Association were late filed, but were accepted as a petition for reconsideration and have been considered.

APPENDIX II

Proposed TOFC rules distributed at the prehearing conference October 9, 1962

A. Definitions.

1. "Trailer-on-flatcar (TOFC) service" means the transportation in interstate or foreign commerce, of any freight-laden highway truck, trailer, semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) on a rail car, and/or the return transportation, in interstate or foreign commerce, of any empty highway truck, trailer, or semitrailer (or the demountable container portion thereof) on a rail car.

2. "Joint intermodal TOFC service" means any transportation of property (the motor and/or water transportation of which is subject to economic regulation under the Interstate Commerce Act) jointly provided by a railroad or railroads subject to part I of the act and a motor common carrier or carriers subject to part II of the act or a water common carrier or carriers subject to part III of the act, and which includes for the whole[1] or any part of the line-haul movement, the performance of TOFC service as defined in (1) above, except that the term "joint intermodal TOFC service" does not include the transportation of property moving under contract rates as set forth in section 409 of the act.

3. "All-rail TOFC service" means any transportation, other than transportation embraced in (2) above, provided by a railroad or railroads subject to Part I of the act, which transportation includes the performance of TOFC service as defined in (1) above.

B. Rules governing joint intermodal TOFC service.

1. Tariffs embracing joint intermodal TOFC rates or charges shall set forth the service covered by the published rates or charges, the routes over which such service will be performed, and the names of the carriers participating therein.

2. Tariffs embracing joint intermodal TOFC rates or charges may be published only by rail, motor, or water common carriers, or their agents, on commodities subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

3. Motor carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 90 percent of the distance between such points over the motor carrier's authorized highway route, except as may be permitted by the Commission upon consideration of an appropriate application filed by the motor carrier in which it seeks relief from the percentage provisions of this section. [Example: In connection with a shipment originating at A and destined to D, a motor common carrier holding authority to transport such shipment from A to D (a distance of 300 miles by its authorized highway

[1] See rule B-7 below.

routes), serving the intermediate points of B and C, participates in joint intermodal TOFC service in lieu of its authorized over-the-road service in the following manner: The shipment is transported from A to B by the motor carrier over its authorized highway route (a distance of 100 miles), at which point it is placed on a rail car for TOFC movement to C (a distance of 80 miles over the rail route used as compared to 100 miles over the motor carrier's authorized highway route), and at C the shipment is returned to the originating motor carrier for ultimate delivery at D (a distance of 100 miles over the motor carrier's authorized highway route). Although the rail line distance (80 miles), between B and C is less than 90 percent of the motor carrier's authorized highway route between the same points (100 miles), the above rule allows this operation inasmuch as the combined motor-rail-motor route between A and D (280 miles) is more than 90 percent of the motor carrier's authorized highway route (300 miles) between A and D.

4. The railroad or railroads providing TOFC service jointly with motor or water common carriers shall receive no greater compensation or charge for its or their portion of the total intermodal movement than it or they would receive under any all-rail TOFC terminal-to-terminal rates or charges maintained for like service between the same points.

5. Any railroad which provides TOFC service jointly with any motor or water common carrier shall not refuse to enter into a like arrangement with other motor or water common carriers under similar circumstances and conditions, except that such railroad shall have the duty of ascertaining whether the connecting motor or water carriers hold appropriate authority to transport the involved commodities. If the connecting motor or water carriers do not hold such authority, no joint intermodal TOFC sevice shall be performed with respect thereto.

6. The billing carrier participating in joint intermodal TOFC service may refuse to reveal the indentities of the shippers or consignees to its connecting carriers, in which event the billing carrier shall assume, with respect to the shippers or freight forwarders, full responsibility for the complete movement.

7. Tariffs embracing joint intermodal TOFC rates or charges may provide for TOFC service for the entire line-haul movement. [Note: Although this rule is in apparent conflict with Commission decisions in *Substituted Freight Service*, 232 I.C.C. 683, and *Interchange of Traffic at Point of Origin*, 46 M.C.C. 623, it is intended to represent what appears to be a widespread practice under present plan I operations.]

8. Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

9. Nothwithstanding its participation in joint intermodal TOFC service, a motor or water common carrier shall continue to render reasonably adequate and continuous transportation service at all points authorized to be served by it.

10. A rail, motor, or water common carrier participating in joint intermodal TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

11. Railroads participating in joint intermodal TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

C. Rules governing all-rail TOFC service.

1. Rates or charges for all-rail TOFC line-haul service, and for any transportation or auxiliary service in connection with all-rail TOFC service, shall be provided for in tariffs published, posted, and filed by a railroad or its agent, in either of the following ways:

(*a*) Publish rates or charges which specifically include pickup from shipper and/or delivery to consignee by the railroad or railroads.

(*b*) Publish rates or charges which are limited specifically to apply only from and/or to designated railroad terminals when all service and equipment is provided by the railroad.

2. (*a*) Each carrier performing or holding out to perform all-rail TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and rules governing storage, demurrage, detention of highway vehicles, cartage, switching, floating, literage, wharfage, weighing, diversion, reconsignment, icing, refrigeration, heat, c.o.d. services, transit services, absorptions, allowances, and other special or accessorial services or practices, and an explicit statement of all other charges and rules which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of the service to the shipper.

(*b*) All tariffs containing rates for the all-rail TOFC transportation of property shall specify whether such rates do or do not include pickup or delivery services.

(*c*) When charges for pickup or delivery service are in addition to line-haul TOFC transportation charges, they shall be published in tariffs as provided in paragraph (*a*) of this rule.

(*d*) The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in tariffs as provided in paragraph (*a*) of this rule. It will be sufficient to state that pickup and delivery service will be performed at all places or locations within the limits of the incorporated cities, towns, or villages, from, to, or between which the rates apply, if that is the only application intended. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*e*) All tariffs containing rates for the all-rail TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of the property from the highway vehicle by the carrier (including the number of laborers to be used). When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in tariffs as provided in paragraph (*a*) of this rule.

(*f*) If the shipper, freight forwarder, and/or consignee directly or indirectly renders any service connected with such transportation (such as

ramping, deramping, and tiedown of trailers on cars), or furnishes any equipment or other instrumentality used therein (such as a trailer, semitrailer or car), the charge or allowance paid to the shipper, freight forwarder, and/or consignee therefor shall be published as provided in paragraph (*a*) of this rule.

3. Railroads or persons under common control with railroads shall not for use in TOFC service lease, directly or indirectly, highway trucks, trailers, or semitrailers, and/or rail cars, to or from shippers or freight forwarders.

4. A railroad providing all-rail TOFC service shall not act as the agent of a shipper or freight forwarder in arranging for transportation by other carriers subject to the Interstate Commerce Act without providing therefor in tariffs filed with the Commission.

5. Railroads providing all-rail TOFC service shall assume full responsibility for the safe loading and securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for unloading them from rail cars.

6. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges provided for in rule C-2 above.

7. The handling by a railroad of a motor or water carrier's trailer, empty or loaded with commodities the motor and/or water transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible under all-rail TOFC tariffs.

D. Billing and notification rules.

1. No shipment shall be transported in or in connection with TOFC service until the origin carrier has issued a bill of lading therefor and received from the shipper or freight forwarder any manifest used in connection therewith.

2. Certification as to the weight and contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) shall be made by the shippers or carriers at the time of its tender to a railroad or connecting carrier.

3. Unless otherwise provided for and made available to other shippers and carriers, two or more highway trucks, trailers, or semitrailers (or demountable container portions thereof) shall be tendered on the same day in order to qualify for a rate for the movement of multiple highway vehicles (or the demountable container portions thereof).

4. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement.

5. All-freight (all-commodity) rates that are restricted to apply only when not more than a designated percent of the shipment consists of one article or commodity shall be made subject to the following tariff provision:

> Rates subject hereto apply only when shipper certifies on shipping order and bill of lading at time of shipment as follows:
>
> "Not more than____percent of the articles (or commodities) in this shipment consists of an article or articles embraced

by the commodity description of a single item of the current Uniform Freight Classification."

If the certificate has not been signed at the time when the bill of lading is issued such all-freight (all-commodity) rates do not apply; and the applicable rate on the shipment will be_____.

[In the blank space there must be inserted a specific statement of the rate or charge that will apply, such as, for example: "the class 45 rate applicable over the route of movement subject to a minimum weight of 30,000 pounds."]

APPENDIX III

The hearing examiners' recommended rules

1. "Trailer-on-flatcar (TOFC) service" means the transportation, in interstate or foreign commerce, of any freight-laden or empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer or semitrailer having a demountable chassis) on a rail car.

2. "Plan I TOFC service" is service performed by a railroad in substitution for motor common carrier service to, from, and between named points over the motor carrier's route, at the option of the motor carrier, unless otherwise directed by the shipper, the traffic moving from initial origin to final destination at all-motor rates and on motor carrier bills of lading under an arrangement or an agreement between the two modes of transportation.

3. "Plan V TOFC service" is that performed under published joint rail-motor rates over through routes with certificated motor common carriers.

4. "Joint intermodal TOFC service" includes Plan I and Plan V TOFC services as defined above.

5. "All-rail TOFC service" means any transportation, other than transportation embraced in Plans I and V above, provided by a railroad or railroads subject to Part I of the Interstate Commerce Act, which transportation includes the performance of TOFC service.

6. Tariffs embracing joint intermodal TOFC rates or charges, or Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the routes over which such service will be performed or the origin, destination, points of interchange between modes of transportation and rail routes; and the names of the carriers participating therein.

7. Tariffs setting forth rates or charges for joint intermodal TOFC transportation may be published only by rail, motor, or water common carriers, or their agents, on commodities the transportation of which is subject to economic regulation throughout their entire movement, and shall show appropriate concurrences of all carriers participating in the movement.

8A. Motor common carriers shall not participate in Plan I TOFC service which is to be provided in lieu of their authorized over-the-road service where the combined distance from origin to destination over the intermodal route is less than 85 percent of the distance between such points computed

(1) if a regular-route carrier, over its authorized regular route, or (2) if an irregular-route carrier, through any gateway point which it is required to use; except as may be permitted by the Interstate Commerce Commission upon consideration of an appropriate application filed by a motor common carrier or a railroad in which relief is sought from the percentage provisions of this rule.

8B. Motor common carriers participating in Plan I TOFC service which comes within the 85-percent circuity provision provided in part (A) of this rule, shall file with the Interstate Commerce Commission, on the same date that tariffs or substituted service directories are filed, information showing the name of the rail carrier to be used, the total mileage from origin to destination over its all-motor route, the points between which TOFC service of the rail carrier is to be used, and the total mileage from origin to destination over the joint motor-rail-motor route to be used.

9. Any railroad or railroads may provide TOFC service jointly with any motor or water common carriers, *provided* that the common carriers by railroad, motor, and/or water shall have the duty of ascertaining whether it or its connecting common carrier hold appropriate authority from the Interstate Commerce Commission to render the service contemplated before the effective date of such joint arrangements. If the origin or connecting common carriers do not hold such authority, no joint intermodal TOFC service shall be performed with respect thereto.

10. Tariffs providing for Plan I TOFC rates or charges, or Substituted Service Directories, if used, may provide for plan I TOFC service for the entire line-haul movement, *except* to the extent such service may be prohibited under rule 8A above.

11. Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

12A. Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff or agreement between the parties, shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof,) on rail cars and for removing them from rail cars.

12B. Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portion thereof) which do not conform to the motor carrier safety regulations prescribed by the Interstate Commerce Commission.

13. No allowance shall be payable to any shipper, freight forwarder, and/or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless: (1) such service or instrumentality is the obligation of the carrier under the applicable rate designated by the shipper, and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

14. Each railroad performing, or holding itself out to perform, TOFC service shall publish, post, and file tariffs (by itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to or from shippers, freight

forwarders, and/or consignees and other special or accessorial services or practices, including charges for pickup and/or delivery service when such charges are in addition to line-haul transportation charges.

15. The area within which pickup or delivery service will be performed shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Interstate Commerce Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Interstate Commerce Commission in a formal proceeding.

16. All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

17. Highway vehicles and/or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage and/or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

18. The handling by a railroad of a motor or water carrier's trailer, loaded with commodities the motor transportation of which is not subject to economic regulation under the Interstate Commerce Act, is permissible only under all-rail TOFC tariffs.

19. No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor, and where a manifest is used by the shipper or freight forwarder, such manifest shall be delivered to the originating carrier not later than 24 hours after the shipment reaches the destination ramp.

20A. Certification as to the weight of a highway truck, trailer, semitrailer (or demountable container portion thereof) shall be made by the shipper at the time of its tender to the originating carrier.

20B. Shippers shall certify at the time of tendering a shipment to the originating carrier, whether or not the contents of a highway truck, trailer, or semitrailer (or the demountable container portion thereof) consists of (1) any commodity which is prohibited from movement in TOFC service by the carrier's tariff, and (2) explosives or other dangerous articles.

21. In order to qualify for a rate applicable on the movement of multiple highway vehicles (or the demountable container portion thereof), two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered to the carrier within the time period, not to exceed one calendar day, specified in tariffs on file with the Interstate Commerce Commission.

22. Arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail car used for the movement; *except* that shipments containing explosives or other dangerous articles shall *not* be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment com-

plies with the Interstate Commerce Commission's regulations governing explosives and other dangerous articles as described in 49 C.F.R. 71-78.

23. All freight (all commodity) rates that are restricted to apply only when not more than a designated percent of the weight of the shipment consists of one article shall be made subject to tariff provisions describing in clear and explicit terms the conditions under which such rates apply.

APPENDIX IV

49 CFR 500. *Practices of for-hire carriers participating in trailer-on-flatcar service*

500.1 *Definition of TOFC service.* – Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

500.2 *Availability to all of TOFC service.* – TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.* –

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

500.4 *Joint intermodal TOFC service.* –

(*a*) Except as otherwise may be prohibited by these rules, any rail carrier or carriers subject to part I of the act may enter into through-route and joint-rate arrangements with any motor common carrier subject to part II of the act or any water common carrier subject to part III of the act, wherein TOFC service is to be provided either in lieu of, or in addition to, the authorized all-highway or all-water service of such motor or water common carrier.

(*b*) Motor or water common carriers may participate in joint intermodal TOFC service in lieu of their authorized all-highway or all-water service only if their tariff publications give notice that such service may be provided at their option, but that the right is reserved to the user of their services to direct that in any particular instance such TOFC service not be provided.

(*c*) Tariffs embracing joint intermodal TOFC rates or charges, including Substituted Service Directories, if used, shall set forth the service covered by the published rates or charges; the points of interchange between modes of transportation; and the names of the carriers participating therein.

(*d*) Carriers participating in joint intermodal TOFC service shall interchange traffic only at a common point of service.

(*e*) Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement.

(*f*) Tariffs setting forth through rates or charges for joint intermodal TOFC transportation may be published only with respect to commodities the transportation of which is subject to economic regulation throughout the entire movement provided for in such tariffs.

500.5 *Circuity limitations.* –

(*a*) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route; *provided, however,* that the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

(*b*) For the purpose of paragraph (*a*) of this part the distance from origin to destination over the motor or water carrier's authorized route shall be computed (1) if a motor carrier operating over regular routes, over its authorized regular service route, (2) if a motor carrier operating over irregular or a combination of regular and irregular routes, through any gateway point which it is required to observe, and (3) if a water carrier, over the most direct available all-water route.

500.6 *Responsibility for placing and securing trailers.* –

(*a*) Railroads participating in TOFC service shall assume responsibility for the safe securing of highway trucks, trailers, or semitrailers (or the demountable container portions thereof) on the rail cars when moving over their lines; and, unless otherwise provided for by tariff, or in the case of connecting common carriers by agreement, railroads shall also assume responsibility for the safe placing of highway trucks, trailers, or semitrailers (or the demountable container portion thereof) on rail cars and for removing them from rail cars.

(*b*) Railroads participating in TOFC service have the right to refuse to accept for transportation in such service any highway trucks, trailers, or semitrailers (or the demountable container portions thereof) which do not conform to the motor carrier safety regulations prescribed by the Commission.

500.7 *Tariff publication regulations.*—

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service or instrumentality is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to provide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

500.8 *Billing and notification rules.*—

(*a*) No shipment shall be transported in or in connection with TOFC service until the originating carrier has issued a receipt or bill of lading therefor.

(*b*) Carriers by tariff publication shall require that where a manifest or a statement of the weight or nature of a TOFC shipment is needed to determine the TOFC freight charges, such manifest or a certification by the shipper as to the weight or the nature of the shipment shall be delivered to the originating carrier within 24 hours after the shipment reaches its destination; *provided, however,* that where the weight of a loaded highway truck, trailer, or semitrailer (or the demountable container portion thereof) or the weight of the contents

thereof is needed to determine rail TOFC charges, the rail carrier shall not relinquish possession of the shipment until it has received certification from the shipper as to such weights or has itself ascertained them.

(*c*) Unless a rail carrier by appropriate tariff publication specifically provides otherwise, in clear and unequivocal terms, two or more highway trucks, trailers, or semitrailers (or the demountable container portions thereof) shall be tendered within one calendar day in order to qualify for any rate for the movement of multiple highway vehicles (or for the demountable container portions thereof).

(*d*) Carriers by tariff publication shall require that arrangements for the movement of highway trucks, trailers, or semitrailers (or the demountable container portions thereof) containing explosives or other dangerous articles shall be made by a shipper or carrier with a railroad in sufficient time to permit the latter properly to placard and position the rail cars used for the movement and that shipments containing explosives or other dangerous articles shall not be transported in TOFC service unless the shipper, at the time of tender to the originating carrier, certifies that the shipment complies with the Interstate Commerce Commission's regulations governing explosives, and other dangerous articles as described in 49 C F R 71-78.

(*e*) All-freight (all-commodity) rates that are restricted to apply only when not more than a designated proportion of a shipment consists of a single article shall be made subject to tariff provisions which (1) shall describe in clear and explicit terms the conditions under which such rates apply, (2) shall contain or refer to a commodity classification, such as the current Uniform Freight Classification or a designated tariff, from which it can be determined what constitutes a "single article" for purposes of the all-freight rate, (3) shall require certification by the shipper of the percentage which the weight of a given article bears to the weight of the entire shipment, and (4) shall specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate because it contains more than the designated proportion of one article.

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TITLE 49 — TRANSPORTATION
CHAPTER 1 — INTERSTATE COMMERCE COMMISSION
SUBCHAPTER E — INTERMODAL TRANSPORTATION
PART 500 — PRACTICES OF FOR-HIRE CARRIERS OF PROPERTY PARTICIPATING IN TRAILER-ON-FLATCAR SERVICE

EX PARTE NO. 230

SUBSTITUTED SERVICE — CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS
(Piggyback Service)

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 16th day of March A. D. 1964.

It appearing, That the Commission, by notice and order entered June 29, 1962, instituted the above-entitled proceeding under Parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act for the purpose of investigating the manner and methods of performance and use of coordinated or substituted trailer-on-flatcar (piggyback) service; of ascertaining the desirability, feasibility, and lawfulness of the operational practices and facilities of rail, motor, and water carriers, freight forwarders, and express companies subject to the Interstate Commerce Act; and of determining what rules and regulations, if any, should be adopted;

It further appearing, That the said notice and order entered June 29, 1962, invited the participation of all interested parties to submit representations setting forth the extent of their participation in trailer-on-flatcar service and their practices connected therewith; and that notice to all interested parties was given through publication of the said notice in the Federal Register of July 7, 1962 (27 F.R. 6434);

It further appearing, That the Railroads Operating in the Southern Freight Association Territory, except the Southern Railway System and the St. Louis-San Francisco Railway Company,

have included in their exceptions to the examiner's recommended order motions to strike certain portions of the verified statements of the Bureau of Inquiry and Compliance, Interstate Commerce Commission, and certain other parties, and also filed a request, on April 2, 1963, to cross-examine the Director of the Bureau of Inquiry and Compliance;

And it further appearing, That the Commission, on the date hereof, has made and filed its report on oral argument herein, setting forth its conclusions and findings and its reasons therefor, which report is hereby referred to and made a part hereof:

It is ordered, That the motions and request described in the third appearing paragraph hereof be, and they are hereby, denied for the reasons set forth in the said report;

It is further ordered, That title 49 CFR be, and it is hereby, amended by adding to chapter 1 thereof subchapter E, Intermodal Transportation, part 500, Practices of For-Hire Carriers of Property Participating in Trailer-on-flatcar Service, containing the regulations set forth in Appendix IV to the said report;

It is further ordered, That this order shall become effective on July 6, 1964, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the office of the Secretary of the Interstate Commerce Commission, Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

[24 Stat. 383 as amended, 49 U.S.C. 12(1); 52 Stat. 1237, 49 U.S.C. 304(a)(6); 54 Stat. 933, 49 U.S.C. 904(a); 56 Stat. 285, 49 U.S.C. 1003(a); 60 Stat. 237, 5 U.S.C. 1003.]

By the Commission.

HAROLD D. McCOY,

(SEAL) Secretary.

JAN 17 1966

JOHN F. DAVIS, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN,
Appellant,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

GEORGE S. DIXON,
Attorney for Appellant,
Suite 1700—One Woodward Avenue,
Detroit, Michigan 48226;

JOSEPH M. SCANLAN,
Of Counsel,
111 West Washington Street,
Chicago, Illinois 60602.

Interstate Brief & Record Co., 356 Congress St. E., Detroit, Michigan 48226

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants
v.
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

The National Automobile Transporters Association of Detroit, Michigan, Intervening Defendant in the proceeding in the United States District Court for the Northern District of Illinois, Eastern Division, appeals to the Supreme Court of the United States from the final judgment and order entered in this action on August 20, 1965. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 244 F. Supp. 955 (adv. sheets), and copies of the opinion and judgment are attached to the Jurisdictional Statement of the American Trucking Associations, Inc. et al., as Appendix A of that Statement. A copy of the Interstate Commerce Commission's report and order in *Substituted Service—Piggyback,* 322 I.C.C. 301, is attached to the Jurisdictional Statement of the American Trucking Associations, Inc., et al., as Appendix C of that Statement. In the Appendix to that Statement (hereinafter referred to as "Appendix") and in references herein, the pagination of the official Commission report is used.

JURISDICTION

This suit was brought under 28 U.S.C. §1336 to enjoin and set aside in part the report and order of the Commission. (Appendix C) The judgment of the District Court was entered on August 20, 1965 and notice of appeal was filed by this Appellant in that court on October 25, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Drum,* 368 U.S. 370 (1962); *American Trucking Associations, Inc. v. United States,* 364 U.S. 1 (1960); *Frozen Food Express, Inc. v. United States,* 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§1, 301, 901 and 1001; and Sections 2, 3(1) and 216(c) of the Interstate Commerce Act, 49 U.S.C. §§2, 3(1), 316(c), are set forth verbatim in Appendix B.

QUESTIONS PRESENTED

1. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff TOFC service, 49 C. F. R. 500.2, 500.3, 500.5), issued by the Commission in Ex Parte No. 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, are not authorized by Sections 2 and 3 of the Interstate Commerce Act, 49 U.S.C. §§2 and 3?

2. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff TOFC service), violate the internal structure of the Interstate Commerce Act and are specifically forbidden by the provisions of Sections 216(c), 402(a)(5), 410(a)(1) and 410(c), 49 U.S.C. §§316(c), 1002(a)(5), 1010(a)(1) and 1010(c)?

3. Did the District Court err in setting aside the Commission's report and order insofar as it issued and prescribed Rules 2 and 3?

STATEMENT

On June 29, 1962, the Interstate Commerce Commission, on its own motion, issued a notice of proposed rule-making instituting an investigation into trailer-on-flatcar or piggyback service. The stated purposes of the investigation were:

> ". . . ascertaining and determining, in the light of the national transportation policy, and the provisions of the Interstate Commerce Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided and utilized by or for rail, motor, and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers, and of taking such other and further action as the facts and circumstances may justify or require."

The notice listed certain specific issues, among others, to be considered and determined, and named all railroads, motor carriers, water carriers, express companies and freight forwarders of property operating in interstate or foreign commerce, subject to the Interstate Commerce Act, as respondents. A prehearing conference was held October 9, 1962, at which proposed rules (reproduced at 322 I.C.C. 301, 406-410, Appendix C) were distributed. No oral hearings were held, but opportunity was given to all parties to file representations, verified statements, and reply statements, which numerous parties did.

In a report and recommended order served August 23, 1963, two hearing examiners proposed the adoption of certain rules (reproduced at 322 I.C.C. 301, 410-413, Appendix

C). In its report and order, the Commision promulgated eight rules intended to regulate trailer-on-flatcar service. (322 I.C.C. 301, 413-416; 49 C.F.R. 500.1 to 500.8) For convenience, the rules were simply referred to as Rules 1 through 8 in the District Court's opinion and will be so designated here.

On complaint, the District Court set aside the Commission's report and order insofar as it prescribed Rules 2 and 3, the "open-tariff" rules, and entered its judgment on August 20, 1965.

THE QUESTIONS ARE SUBSTANTIAL

1. The questions presented upon this appeal—involving the validity of certain rules promulgated by the Interstate Commerce Commission relating to trailer-on-flatcar (TOFC) service—are of great importance to the national transportation system in general and to Appellant National Automobile Transporters Association in particular. Transportation of loaded highway trailers on railroad flatcars is not a new development, but TOFC service did not flourish until the last decade. A majority of the Commission called piggyback service "probably the most significant recent development in transportation" (322 I.C.C. 301, 303) and described the growth of piggyback service in the five years preceding the report as "explosive" (322 I.C.C. 301, 305). In his dissenting opinion, Vice Chairman Webb declared that "piggybacking is the brightest star in the transportation firmament." 322 I.C.C. 301, 386. This particular proceeding is of singular importance because it constitutes the Interstate Commerce Commission's first general investigation of piggyback service. Here, for the first time, the Commission examined every aspect of TOFC

operations and re-examined existing precedents and practices on the basis of a factual record.

The primary issue in this appeal is the validity of Rules 2 and 3 promulgated by the Commission. Rule 2 and the essential part of Rule 3 are set out in full later in this Statement, but the essence of these Rules is that they require a railroad offering TOFC service on an open-tariff basis to make that service available on the same terms without discrimination to motor carriers acting in that capacity in hauling freight and they authorize the motor carriers to substitute the rail TOFC service for all or a portion of their authorized highway transportation. The Court below set aside the Commission's report and order insofar as they prescribed Rules 2 and 3, holding that these Rules are not authorized by specific provisions of the Interstate Commerce Act, are in violation of the internal structure of the Act, and are specifically forbidden by Part IV of the Act dealing with freight forwarders.

The Rules struck down by the District Court are of crucial importance to this Association because of the type of operating authority issued to the Association members by the Commission. These members are motor carriers, both common and contract, who are primarily engaged in the transportation of motor vehicle traffic under grants of authority by the Interstate Commerce Commission. In this one area of motor carrier transportation, carriers originating motor vehicle traffic at factory or assembly points must hold what is called "initial movement" authority in order to perform such transportation. Any movement of motor vehicle traffic other than from a point of manufacture or assembly requires possession of what is known as "secondary movement" authority. *Administrative Ruling No. 75; Classification of Motor Carriers of Property,* 2 M.C.C. 703; *Clark—Extension of Operations,* 16 M.C.C. 535; *Associa-*

ted Transports, Inc—Common Carrier Application, 26 M. C.C. 789; *Complete Auto Transit, Inc.—Extension—St. Louis,* 12 M.C.C. 365; *Dealers Transport Co., Inc.—Common Carrier Application,* 16 M.C.C. 31; *Complete Auto Transit, Inc.—Extension of Operations,* 22 M.C.C. 301; *Anchor Motor Freight, New York Corp., Contract Carrier Application,* 41 M.C.C. 132; *Commercial Carriers, Inc.—Extension—Automobile Bodies,* 46 M.C.C. 826.

With the development of TOFC service it became either mandatory or advisable in many instances for motor carriers of automobile traffic to participate with rail carriers in TOFC movement of this traffic. It thus became necessary to determine the nature of this coordinated service—if it constituted a through route, joint rate situation, the motor carrier would require initial movement authority in some instances and secondary movement authority in all instances. If it constituted a mere substitution of rail service for a portion of the transportation undertaking, a motor carrier with initial movement authority originating traffic at point of manufacture or assembly could participate in TOFC movements without the necessity of holding secondary movement authority.

The nature of this coordinated service was the subject of two separate proceedings before the Commission—one involving a Petition for Declaratory Order filed by this Association, assigned Docket MC-C-3024, one an investigation of an operation by a contract carrier member of the Association who was utilizing the Plan III TOFC service of a rail carrier as a shipper, assigned Docket MC-C-3077. These proceedings led to separate hearings and separate Examiner's reports, but the two dockets were consolidated by Division 1 of the Commission and eventually the Commission determined that the issues involved were of general importance and set the joint proceeding for oral argument before the Commission.

These proceedings culminated in the issuance of a report by the full Commission on October 15, 1962, a report which to this date has never been judicially reviewed. In the Declaratory Order proceeding, the Commission found that motor carriers of automobile traffic lawfully could substitute rail TOFC service for a portion of their motor carrier highway service without thereby creating a joint line situation which would necessitate possession of secondary movement authority. The Commission dismissed the investigation proceeding with suggested guidelines as to how motor carriers lawfully could substitute rail TOFC service for a portion of their contract carrier undertaking. The Commission made it clear, however, that its findings and conclusions were without prejudice to any findings and conclusions which might be reached in *Ex Parte No. 230.*

The Rules promulgated by the Commission in *Ex Parte No. 230* were consistent with their findings and conclusions in the earlier proceedings, but the District Court would strike these Rules down. If the District Court's Order is upheld, then motor carriers of automobiles cannot lawfully participate in TOFC service without creating a joint line situation. This raises all the problems discussed above and discourages coordinated motor-rail service. Both the motor carriers of automobiles and the shipping public would be adversely affected by such a decision.

2. As previously indicated, the primary issue in this appeal is the validity of Rules 2 and 3 promulgated by the Commission. The essential part of these Rules is as follows:

> 500.2 *Availability to all of TOFC service*—TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing

for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation*—(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

These Rules are based upon the Commission's premise "that all persons desiring to use TOFC service should be able to do so with the charges for the same service being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers." 322 I.C.C. 301, 319. This premise stems from the nature of the common carrier status itself—common carriers are under a duty to serve all the public on equal terms. The District Court acknowledged this common carrier duty to serve all on equal terms when it said that "the Rules are invalid as in conflict with the Act * * * if the congressional enactment is read to excuse the railroads from a duty to serve motor carriers equally with ordinary shippers." (Appendix, Page 34)

Having recognized this duty of railroads as common carriers, the Court erred in requiring the citation of specific provisions of the Act explicitly authorizing Rules 2 and 3. Instead, the Court should have demanded that it be shown some provision expressly exempting railroads from this acknowledged duty.

The Court concluded that the Commission relied upon Section 2 of the Act in promulgating Rules 2 and 3, be-

cause the section of the Commission's report dealing with these Rules refers specifically only to Section 2. The Court should have referred to 322 I.C.C. 301, 324, where the Commission set out the statutory authority for all of its prescribed rules. There the Commission rejected the same argument made in the District Court—that some of the prescribed rules, particularly those that "may be said to implement the broad provisions of existing legislation," were illegal. The Commission answered this argument as follows:

> "Under Parts II, III and IV of the act, we are given a general rule-making power by Sections 204(a)(6), 304(a) and 403(a), respectively; and in Section 12 we are 'authorized and directed to execute and enforce' the provisions of Part I. The Courts have recognized our rule-making authority. See, for example, *Assigned Car Cases*, 274 U.S. 564, 575 et seq. (1927) which arose under what is now Part I of the act; *American Trucking Assns. v. U.S.*, 344 U.S. 298, 308-313 (1953), which arose under Part II; *United States v. Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945) in which the Supreme Court pointed out that the act since its inception
>
> > 'has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and a fair national transportation system.'" 322 I.C.C. 301, 324.

Thus, the Commission specifically relied upon its broad rule-making authority in promulgating Rules 2 and 3. The Court rejected reliance on Section 12 of the Act because

"the Rules in question here must stand or fall with the interpretation of the Act itself, regardless of all the circumstances in the transportation industry." (Appendix, Page 34) Nevertheless, the Court recognized that Rules 2 and 3 are valid under Section 12 if the Commission's interpretation of the Act is correct. Appellant submits that Rules 2 and 3 are consistent with the general structure of the Act and are authorized by Sections 2 and 3 as well as by Section 12 of the Act.

The Court below admitted that Sections 2 and 3 are plainly complementary and to be read *in pari materia,* but said that Section 2 deals only with discrimination in rates and that Section 3 is inapplicable because of its proviso. The Court rejected as "inconclusive" the legislative history of this proviso. This history shows that the proviso was intended to safeguard the *rates* of other carriers against claims that they were unduly prejudiced to the traffic of the rail carrier. When Sections 2 and 3 are read in the context of the Act as a whole and with knowledge of the legislative history of these sections, they provide ample authority for the issuance of Rules 2 and 3. The Court's listing of "practical problems" and "anomalies" that would arise under the Commission's interpretation of the Act (Appendix, pages 37-40) ignores reality. If the Commission has the power to promulgate the Rules, it certainly has the power to control abuses of them. In any event, the practical problems in administering rules and regulations promulgated by an agency are more properly the concern of the agency itself than of the court of law which reviews the question of the agency's authority to promulgate the rules.

3. The Court below also found that Rules 2 and 3 were inconsistent with earlier Commission and court decisions

to the effect that a motor carrier may not act as a shipper free from discrimination. It should be noted initially that no provision of the Act prohibits a motor carrier from acting as a shipper entitled to equal treatment along with other shippers. The Court relied upon the Commission's decision in *Substituted Freight Service*, 232 I.C.C. 683 (1939), in which the Commission said:

> "To act as a common carrier by motor vehicle and as a shipper by rail as to the same service is * * * repugnant to the Act."

The Court said that this interpretation of the Act had been confirmed "in an unbroken line of Commission decisions, in judicial precedent, and in executive and legislative understanding" and therefore that there was "no room for the Commission to alter the settled meaning." (Appendix, page 51) In finding the Commission's decision in *Substituted Freight Service* controlling, the Court ignored the careful examination of this decision by the Commission at 322 I.C.C. 301, 332-334. There the Commission demonstrated that the conclusion that a person may not be both a shipper and carrier with respect to the same service was unnecessary to the determination of the case, explaining that this language was directed at the use of open-tariff service by a carrier not acting in the proper role of carrier, but acting instead as a shipper or forwarder. The Court also ignored the fact that the Commission in the *Substituted Freight Service* case cited no authority whatsoever for its conclusion that it is repugnant to the Act for a motor carrier to act as a common carrier by motor vehicle and shipper by rail as to the same service.

The Court regarded the earlier case of *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435, where a contrary result had been reached, as being overruled by *Substituted Freight Service*. Of the cases cited by the Court as constituting the "unbroken line of decisions of the Commission" following the Commission's holding in *Substituted Freight Service*, only *Movement of Highway Trailers by Rail* (the so-called *New Haven* case), 293 I.C.C. 93 (1954) involved a consideration of the entire field of TOFC transportation. The Commission's decision in the *New Haven* case, a decision rendered without a factual record and at a time when the tremendous growth in TOFC service was only beginning, should not prevent the Commission from carrying out its stated purpose of re-examining existing precedents and practices so that the Commission might adopt rules and regulations "necessary to regulate coordinated and substituted service transportation in the public interest." 322 I.C.C. 301, 303.

Having re-examined the entire scope of TOFC service on a factual record, the Commission should be allowed to reconsider, reappraise and update its interpretation of the provisions of the Interstate Commerce Act in the light of existing transportation circumstances. It is well established law that an administrative agency is not precluded by an initial interpretation of an Act from changing this interpretation subsequently. See discussion in 2 *Am. Jur.* 2d Par. 236-40 (Pages 63-66), and cases cited therein. Therefore, the question is whether or not such substantial changes have occurred in the national transportation system to justify a re-examination of these initial interpretations.

TOFC service is a unique development in the transportation system. It is a hybrid of rail transportation and motor

transportation; therefore, it cannot be pigeon-holed into one of the separate modes of transportation under which the District Court demands that it be characterized. The Court erred when it ignored the inherent nature of all TOFC service, regarding it as rail service and consequently regarding the question as being whether or not the motor carrier "could lawfully avail themselves of this service." (Appendix, Page 40.)

The Commission recognized that all TOFC service is inherently bimodal. In answering the argument of certain rail carriers that the proposed rules would allow motor carriers to "exploit" the railroads' "acknowledged inherent advantages," the Commission said the following:

> "What they overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: The railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speeds; and the motor carrier's ability to provide door-to-door and, if necessary, job- or farm-site pick up and delivery." 322 I.C.C. 301, 329.

Thus, the Commission recognized what the Court refused to recognize—that motor carriers utilizing TOFC service do not "exploit the inherent advantages" of railroads any more than railroads "exploit the inherent advantages" of motor carriers. What the Commission sought to do was to foster the development of the combination rail-motor service which utilizes the inherent advantages of each of the different modes of transportation. The Court below would thwart this effort by insisting that all transportation must fall within a particular compartment under the Act or constitute a voluntary through route under Section 216(c) of the Act. The latter argument will be considered

in a moment; first it should be noted that if each mode of transportation is limited to the movement of for-hire transportation by that particular mode, then the railroads should not be able to utilize bimodal service except with the establishment of a through route, either. A railroad engaging in TOFC service utilizes a highway vehicle to achieve its door-to-door movement without the transfer of lading; therefore, it does not confine itself to "railroad transportation."

4. The Court below held that the exclusive method for providing a coordinated service between motor carriers and rail carriers was by establishing through routes and joint rates pursuant to Section 216(c) of the Act. In so holding, the Court ignored the definition of a through route and disregarded transportation practices approved by the Commission for many years. The Commission has defined a through route as "a continuous line of railway formed by an arrangement, express or implied, between connecting carriers." *Through Routes and Through Rates*, 12 I.C.C. 163, 168 (1907). This Court considered the definition of a through route in *Thompson v. United States*, 343 U.S. 549 (1952), and set out the following test (at page 557):

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service."

When a motor carrier tenders a shipment under a rail open tariff, the railroad is not holding itself out as offering a through transportation service. The holding out in its bill of lading covers only the portion of the movement under the open-tariff provision, and the railroad is subject to no contractual liability to the original shipper. All that

is provided for under the rules regarding open-tariff service is the substitution of rail TOFC service by a motor carrier for a portion of the motor carrier's operation.

Through all the years of rail carriage, the railroads have used vehicular equipment other than rail cars as a part and parcel of railroad service without the necessity of establishing through routes and joint rates. They have treated the entire transportation operation as a rail operation, rather than as a through route, joint rate arrangement. The Commission has long recognized the legality of this rail carrier substitution of motor carrier service without the necessity of establishing through routes and joint rates. In Rules 2 and 3 which it has promulgated, the Commission has attempted to provide that motor carriers in a similar manner may substitute rail service for a portion of their overall motor carrier service. The Commission's purpose was to make coordinated motor carrier-rail carrier service available to the shipping public in the interest of efficient and economical transportation. Under the District Court's holding, however, no coordination of motor carrier service and rail carrier service is possible without the establishment of through routes and joint rates under Section 216(c) of the Act. The result is that the rail carriers are in a position to eliminate all coordinated service by refusing to enter into through route, joint rate arrangements with any motor carrier. This establishes inequality as to the use of coordinated service by rail carriers and motor carriers, and it discourages the use of such service, contrary to the public interest.

5. Having concluded that the only valid coordinated motor-rail service would be a through route arrangement, the Court below concluded that Rules 2 and 3 violated Section 216(c) of the Act because they are compulsory. Obviously, Section 216(c) is permissive only, but since

a through route situation is not involved here (see discussion in Part 4, *supra*), there is no question of compulsion under Section 216(c). In addition, none of the rules promulgated by the Commission in *Ex Parte No. 230* compels the rail carriers to publish any rate arrangements whatsoever. The holding out by the railroads under Plan III of a terminal-to-terminal service is entirely voluntary on the part of the railroads. Consequently, the only question of compulsion is whether a railroad, having voluntarily elected to hold out an open-tariff service, may be compelled to hold out a service to all of the public on equal terms or whether it may select only that segment of the public which it chooses to serve. The railroads' apparent intent is to limit the service offered so as to make it economically feasible for them to offer the shipping public an attractive rate and thus attract more business. Since the rates are published to attract traffic, it is difficult to understand why the railroads are so vigorously opposed to the tender of any such traffic to them by motor carriers, unless the railroads seek to establish a monopoly, not only of the available traffic, but also of the decisional power to determine under what circumstances the traffic will be accepted.

6. The District Court also found that the open-tariff rules promulgated by the Commission were in conflict with the freight forwarder provisions in Part IV of the Act. In so holding the Court erred, because as long as the motor carrier is performing assembly and distribution *as a motor carrier* he is excluded from the definition of "freight forwarder" in Section 402(a)(5) of the Act, 49 U.S.C. 1002 (a)(5). The Court ignored the fact that assembly and distribution of small-lot shipments are not uniquely attributes of freight forwarders and are functions also performed by the railroads for many years with Commission approval. The Court also erroneously assumed that a motor carrier operating or utilizing bimodal TOFC service is not operating as a motor carrier.

CONCLUSION

In holding that the rules promulgated by the Commission were invalid, the District Court refused to examine the nature of the TOFC service itself. Declaring that "These rules break new ground," (Appendix, page 32), the District Court looked for some express statutory provision which had been interpreted by the Commission in the past as authorizing coordinated motor-rail service without the establishment of a through route under Section 216(c). Thus, the District Court ignored the revoluntionary development in the activities which the Commission by its rules must regulate. The Commission should not be foreclosed by its decision in *Movement of Highway Trailers by Rail,* 292 I.C.C. 93 (1954) from acting in response to this development. In that case the Commission, without a record of past TOFC operations, approved railroad use of TOFC. Through the use of TOFC service, the railroads have been able to provide a service predicated upon door-to-door movement of freight in the same vehicle. But by limiting rail service under Plan III to a terminal-to-terminal operation and thus fostering provision of private carriage in the necessary highway pick-up and delivery service, the railroads have been able to put the motor carriers in a position of competitive disadvantage. *Movement of Highway Trailers by Rail* has thus allowed the railroads to bar motor carrier use of this service at their will. The rules promulgated by the Commission, adopted after a careful examination of the entire scope of TOFC service upon a factual record, provide only that this invaluable rail-motor service will be equally open to railroads and motor carriers. Not only is this the only equitable arrangement between the railroads and motor carriers, but it is also

the arrangement which the Commission has found will do the most to encourage coordinated motor-rail service in the public interest.

For the foregoing reasons, the questions presented upon this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. Upon consideration of the questions on their merits, Appellant, National Automobile Transporters Association, urges that the judgment of the District Court be reversed and the case remanded to that Court for disposition consistent with this Court's opinion.

Respectfully submitted,

GEORGE S. DIXON,
Attorney for Appellant,
Suite 1700—One Woodward Avenue,
Detroit, Michigan 48226;

JOSEPH M. SCANLAN,
Of Counsel,
111 West Washington Street,
Chicago, Illinois 60602.

DUE DATE: January 17, 1966

DATED: January 11, 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court[1] is reported at 244 F. Supp. 955. The report of the Interstate Commerce Commission[2] is printed at 322 I.C.C. 301.

JURISDICTION

This was a proceeding under 28 U.S.C. 1336, 2284, 2321–2325, to set aside orders of the Interstate Com-

[1] Printed as Appendix A to the Jurisdictional Statement in *American Trucking Assns.* v. *Atchison, Topeka and Santa Fe Ry.*, No. 908, this term.

[2] Reproduced as Appendix C to the Jurisdictional Statement in *American Trucking Assns., supra.*

merce Commission promulgating certain rules. The final judgment of the three-judge district court[3] was entered on August 20, 1965. The notice of appeal was filed on October 18, 1965, by the United States and the Interstate Commerce Commission. This Court has jurisdiction under 28 U.S.C. 1253 and 2101 (b) to review the judgment of the district court on direct appeal. *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

QUESTION PRESENTED

Whether the Interstate Commerce Commission has authority to promulgate rules providing (1) that railroads which offer piggyback[4] service on an open-tariff basis[5] must make that service available on the same terms to motor carriers, and (2) that, subject to certain restrictions, motor carriers may utilize rail open-tariff piggyback service in the performance of all or any portion of their authorized service.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to pro-

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[3] Appendix A, *supra*, pp. 55–56.

[4] Also known as "TOFC" (trailer-on-flatcar).

[5] *I.e.*, to the regular shipping public, including freight forwarders.

mote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 2 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49, U.S.C. 2, provides:

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar

> circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 12(1) of the Act, 24 Stat. 383, as amended, 49 U.S.C. 12(1), provides in part:

> * * * The Commission is hereby authorized and required to execute and enforce the provisions of this part * * *.

STATEMENT[6]

On June 29, 1962, the Interstate Commerce Commission, on its own motion, commenced its "first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service." *Ex Parte No. 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 303. Under existing practice, piggyback shipments move under either "joint intermodal" plans wherein the rail and motor carrier join in offering a single rate for the piggyback movement, "open tariff" plans, which the railroads offer to conventional shippers and freight forwarders but rarely to motor carriers, or "all rail" plans in which the railroad, using its own trucks, offers a complete door-to-door service (see 322 I.C.C. at 304–305, 309–312, 319). Against this background, the Commission considered, among other things, the extent to which motor carriers should be permitted to participate in open-tariff rail rates and services offered by the railroads for piggyback move-

[6] We limit this statement to the portions of the Commission's proceeding that are at issue in this appeal.

ments, and concluded that there was a need for greater coordination between rail and motor carriers in the performance of piggyback service and that appropriate rules should be promulgated to achieve this end (322 I.C.C. at 327–337). Rule 2 (322 I.C.C. at 336–337, 49 C.F.R. 500.2), adopted by the Commission on March 16, 1964, provides that "TOFC [piggyback] service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The core of Rule 3 (322 I.C.C. at 337, 49 C.F.R. 500.3) is a provision that motor carriers "may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier."

Appellees (railroad companies and freight forwarders) brought this action in a three-judge district court to challenge these rules. The district court concluded that Rules 2 and 3 exceeded the Commission's authority, and set them aside, thereby upholding the absolute right of a rail carrier to refuse to carry a trailer offered to it by a motor carrier under the rail carrier's general tariff, available to the public at large, governing carriage by piggyback (244 F. Supp. 955). It held, first, that there was no affirmative statutory basis for the rules. The court deemed Section 2 of the Interstate Commerce Act, on which the Commission had relied, inapplicable on the ground that

the section was limited to discrimination in rates. Section 3(1), which expressly forbids some service discriminations, the court also deemed inapplicable, on the ground that discrimination between carriers was exempted. The court further held that the rules contravened express provisions of the Act, including those related to freight forwarders and a provision (Section 216(c), 49 U.S.C. 316(c)) that authorizes motor carriers to enter into joint rates and through routes with rail carriers but does not empower the Commission to compel such arrangements.

THE QUESTION IS SUBSTANTIAL

This case involves the legality of rules issued by the Interstate Commerce Commission to govern fundamental aspects of piggyback service—the movement of truck trailers on railroad flatcars. The decision below, holding the rules invalid, curtails the Commission's regulatory authority radically, and we submit erroneously, in an area of basic importance to the future of the transportation industry. Plenary consideration is accordingly warranted.

1. Since the early 1950's, piggyback—theretofore an insignificant method of transportation—has grown explosively, and its rapid growth continues unabated today.[7] The reason for the dynamic growth and enormous potential of piggyback is that it success-

[7] The railroads' piggyback revenues now exceed $300 million annually (ICC Bur. of Econ., *Transport Economics*, November 1965, p. 1); this may well be only the beginning. In 1955, the 32 railroads that reported offering piggyback had a total of 168,150 piggyback car loadings (322 I.C.C. at 309); in 1965, 63 railroads reported, and their total was 1,031,000 (Assn. of Am. R.R., Car Service Div., Cir. CS-54A, January 1, 1966).

fully combines the most efficient features of rail and motor transportation. Railroad transportation is highly economical for the movement of freight over long hauls,[8] but most shippers and consignees are not located directly on a railroad track, and their goods must be picked up from, and delivered to, the railheads. For this, trucks, with their speed and flexibility for pick-up and delivery, are necessary. To combine truck transportation for the short haul with rail transportation for the long haul, however, normally requires first unloading the truck at one railhead and there re-loading the goods into a railroad car, and then unloading at the destination railhead and re-loading onto a truck. Piggyback eliminates these costly rehandling operations.

At present piggyback, though a union of rail and motor transport, is dominated by the railroads. Since the motor carrier can itself provide only the truck portion of the service, it cannot offer a complete piggyback service without the railroad's cooperation. The railroad, in contrast, by operating its own trucks directly or through a trucking subsidiary or by leasing them back to the shipper, can offer a complete piggyback service without calling on a motor carrier; or it can enter into arrangements for through routes with such motor carriers as it wishes. As a direct result of the railroads' strategic position in piggyback, a minimum of 42 percent of all piggyback shipments now move under plans in which the rail-

[8] It has been found that the cost of transporting a truck trailer by railroad flatcar is only ⅓ that of transporting the trailer over the highway. See Meyer, Peck, Stenason, and Zwick, *The Economics of Competition in the Transportation Industries* (1959), pp. 150–151.

roads perform (or provide indirectly) the *entire* service, door to door, using their own trucks.[9] Motor carriers participate in only about 28 percent[10]—and then only on the railroads' terms.

The Commission conducted this comprehensive rulemaking proceeding to explore the propriety of permitting the railroads to have such unrestricted control over the participation of franchised motor carriers in piggyback operations. It concluded (see *e.g.*, 322 I.C.C. at 329–330) that the railroads' conduct was incompatible with the National Transportation Policy (49 U.S.C., preceding Section 1) which Congress has directed the Commission to follow in administering the Interstate Commerce Act. That directive is "to provide for fair and impartial regulation of all modes of transportation," "to recognize and preserve the inherent advantages of each [mode]," to "promote * * * adequate, economical, and efficient service," and to "encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices"—all "to the end of developing, coordinating, and preserving a[n adequate] national transportation system by water, highway, and rail." As the Commission found, the existing piggyback situation is antithetical to the congressional goal of a genuinely coordinated national transportation system. It is

[9] See ICC Bur. of Econ., *Transport Economics*, November 1965, p. 1. Of course, there is *some* railroad participation in 100% of piggyback movements.

[10] *Transport Economics*, *supra*, p. 1.

contrary to the National Transportation Policy in several respects.

First, unrestricted railroad control over motor carrier participation in piggyback service is inconsistent with "economical and efficient service" because it retards maximum utilization of rail carriage for the long haul. A long-haul motor carrier excluded by the railroads from participation in piggyback is forced—unless he is willing to abandon long-haul shipping altogether—to use his trucks for the long-haul as well as short-haul portions of all his movements, even those where piggyback would be a more efficient method (see pp. 6–7 and n. 8, *supra*). And using trucks to move shipments over distances for which rail transportation is far more efficient and economical involves a significant misallocation of transportation resources.

Second, railroad domination of piggyback is anti-competitive.[11] Motor carriers, if afforded access to rail flatcars for the line-haul movement of their trailers, could compete effectively with railroads offering their own door-to-door piggyback service. The railroads' refusal to offer their open-tariff plans to motor carriers prevents such competition, particularly with respect to the trucking segment of the piggyback service. The motor carrier who is not permitted to participate in piggyback, and must therefore use trucks for the entire shipment, is at a marked competitive disadvantage vis-à-vis a railroad that offers

[11] Preserving competition and preventing monopoly are, of course, goals implicit in the National Transportation Policy. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 86–87.

a complete door-to-door piggyback service. As a result, even though motor carriers are plainly no less able efficiently to perform the trucking services required in piggyback movements than railroads that have their own trucks, the railroads are in a position to monopolize the entire service—its truck as well as its rail portions.[12]

Third, railroad domination of piggyback is a fertile source of discrimination among motor carriers. Those who, being favored by the railroads, are permitted to participate in piggyback movements have a distinct competitive edge—unrelated to superior efficiency—over other motor carriers. Such favoritism is not conducive to fair and constructive competitive practices in the motor carrier industry, and the promotion of alliances between railroads and a few favored carriers must in the long run weaken competition between railroads and motor carriers generally.

Finally, it is contrary to "fair and impartial regulation of all modes of transportation" for railroads to be permitted to offer a complete door-to-door piggyback service, using trucks, while motor carriers may

[12] As in the classic tying arrangement (see, *e.g.*, *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1), the leverage which flows from the railroad's complete control of the vital rail segment of the piggyback movement enables it to extend its monopoly power from one market (the rail segment of the piggyback movement) to another market (truck transportation to and from railroads in piggyback movements) and thereby destroy competition in the second market from equally efficient carriers—the independent motor carriers.

not offer the same service, using the rails. Piggyback joins the inherent advantages of both modes and should therefore be available to either.

The basic thrust of the Commission's rules here in issue is to require the railroads to transport truck trailers tendered by motor carriers on the same terms and rates that they transport trailers tendered by shippers. If upheld, the rules would open up competition for piggyback traffic to all motor carriers by enabling them to utilize the railroad's flatcar service at the same rates as other shippers and would thereby prevent railroads from either dealing with certain favored motor carriers to the exclusion of others or refusing to participate in an integrated rail-motor service altogether. The rules would also foster the maximum efficient utilization of rail transportation for long hauls—for no longer would a motor carrier be compelled to move by highway shipments which, because of the distance involved, could be moved more economically by rail.[13]

2. There can be, we think, little doubt of the economic wisdom and desirability of the Commission's rules, their responsiveness to a perceived evil, their importance to the nation's transportation goals, and their conformity with the policies that Congress has

[13] At the same time, the rules protect the legitimate economic interests of the railroads in the rail portions of piggyback service. The rules do not require the railroad to accord motor carriers any special or favored treatment; it is free to charge them as much as it charges shippers. Therefore, since its rates are required to be compensatory, it cannot suffer by being required to carry the motor carriers' truck trailers at shippers' rates.

directed the Commission to follow in administering the Interstate Commerce Act. The more serious question is whether, as we believe, the Commission has authority to promulgate such rules.

If specific and express statutory basis be required for directing the railroads to offer their open-tariff piggyback rates to motor carriers as well as conventional shippers, it may be found in Section 2 of the Act, 49 U.S.C. 2, which provides that it shall be unlawful for any carrier, by any special rate or other device, to demand greater compensation from any person than it demands from any other person for performing a like service in substantially similar circumstances. This provision, in our opinion, would clearly forbid a railroad to charge a motor carrier more for carrying his truck trailer than it charged a conventional shipper for the same shipment. Whoever tenders the trailer—shipper or motor carrier—the service performed by the railroad is not only substantially similar but completely identical. Cf. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144, 166. And since the statute protects all persons, not merely shippers, the railroad cannot look to the person of the sender and charge a higher rate because he happens to be a competing carrier. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 225 U.S. 326, 342; see, also, *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740; *Kansas City S. Ry.* v. *United States*, 282 U.S. 760; cf. *Interstate Commerce Commission* v. *Delaware, L. & W.R.R.*, 220 U.S. 235.

Admittedly, to sustain the Commission's rules under Section 2, a further step must be taken: the section must be read to embrace not only a refusal to render like service to all at the same price, but a refusal to render service to some at any price. Since the practical economic effects of a flat refusal to serve and of a prohibitively high rate are the same, a ban against the greater discrimination is, we think, implicit in the express prohibition of the lesser discrimination. See *Smith* v. *Northern Pac. R. Co.*, 1 I.C.C. 208, 212. The section is aimed broadly at unjust discrimination, and the discrimination here is especially harmful. Moreover, if it were not forbidden by Section 2, a gaping hole would be opened in the Act. For the only other section addressed to discrimination, Section 3(1), 49 U.S.C. 3(1), has been held to be limited to discrimination between competitors [14]—as Section 2 is not (*National Spring & Wire Co.* v. *Director General*, 60 I.C.C. 564, 566). At all events, if there are doubts as to the scope of Section

[14] See, *e.g.*, *Osborne McMillan Elevator Co.* v. *Minneapolis, St. P. & S.S. M.R. Co.*, 306 I.C.C. 155; *Stanislaus County* v. *Atchison, T. & S.F. Ry.*, 302 I.C.C. 365; *United States* v. *Great Northern Ry.*, 301 I.C.C. 21, 26–27. There is accordingly no occasion to consider the scope of the proviso to Section 3(1) (which has no counterpart in Section 2) to the effect that the section "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." It seems likely, however, that the proviso was included solely to prevent a railroad from being able to complain that it was unlawfully prejudiced or disadvantaged by reason of lower rates charged by a competing mode of transportation. 79 Cong. Rec. 5656 (remarks of Senator Wheeler). Thus, it appears to have little relevance to the problem of this case.

2 here, they should be resolved in the Commission's favor, since its construction so clearly fulfills the National Transportation Policy. Cf. *Interstate Commerce Commission* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744, 762; *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83.

We need not rest with Section 2. This Court has already held, in a closely related context, that the Commission can require railroads to interchange their cars with water carriers so as to enable the latter to offer a type of integrated service analogous to piggyback, even though "[t]here is no language in the present Act which specifically commands that railroads must interchange their cars with connecting water lines." *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616. The Court held the "absence of specific language" not determinative, pointing out that the "very complexities of the subject" had led Congress to leave the details of administrative regulation to be spelled out by the Commission "in the light of the Congressional purpose to foster an efficient and fair national transportation system," and that the interchange requirement imposed by the Commission was required to carry out the National Transportation Policy (*id.* at 616–617).[15]

[15] In *American Trucking Assns.* v. *United States*, 344 U.S. 298, the Court again upheld rules whose purpose was "to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system" (344 U.S. at 310), albeit the practices were not specifically forbidden in any provision of the Act. The Court held that the Commission was authorized to impose requirements not specified in the Act, where necessary to correct evils endangering the scheme of regulation. *Id.* at 310–312. See, also, *Assigned Car Cases*, 274 U.S. 564.

As we have seen, the railroads' domination of piggyback has consequences—such as inefficient use of transportation resources, unfair exclusion of motor carriers from competition with railroads in providing piggyback service, and promotion of discrimination among motor carriers [16]—of the kind that the National Transportation Policy directs the Commission to prevent. Moreover, it is an axiom of common carrier regulation that such a carrier has a duty to serve all on equal terms,[17] and this duty is breached where a railroad, in order to insulate itself from the competition of motor carriers, claims the right unilaterally to decide which, if any, such carrier, and on what terms, shall be permitted to transport its trailers on the railroad's flatcars.

Thus, in promulgating rules on the basis of "clear and adequate evidence of evils attendant on" the railroads' piggyback practices, the Commission here was attempting, not to "expand its power arbitrarily" (*American Trucking Assns.* v. *United States,* 344 U.S. 298, 310), but to correct "conditions which may directly frustrate the success of the regulation under-

[16] In the *Pennsylvania R. Co.* case, *supra*, the Court expressly noted that the railroads' picking and choosing among water carriers to determine who among them should enjoy the competitive benefits of being able to offer an integrated rail-water service was contrary to the National Transportation Policy and a basis for the Commission's exercise of its enforcement authority (323 U.S. at 617).

[17] This underlies not only Sections 2 and 3(1) of the Act, but also Section 1(4), which states that it is the duty of the railroads "to provide and furnish transportation upon reasonable request therefor."

taken by Congress" (*id.* at 311). The Commission's rules should therefore be sustained.

3. The opinion of the district court reflects an unduly restrictive view of the scheme of the Interstate Commerce Act and of the Commission's function. This is apparent in the court's expressed concern with certain "anomalies" that it feared the Commission's rules would produce. These dangers are unreal.[18]

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[18] A few examples must suffice:

(a) In finding that the logic of the Commission's rules would "permit a carrier which had received freight from another to exercise the same right by tendering the same freight immediately back to the original carrier," thereby creating an impasse, the court overlooked the fact that a carrier who did this—or who attempted to "shunt its unprofitable traffic onto a competing railroad"—would, if its conduct was unreasonable, violate its duty of carriage under Section 1(4) of the Act (see n. 17, *supra*). Further, since the rates of carriers subject to the Interstate Commerce Act are by law compensatory, no motive would ordinarily be present for refusing business unless it could be handled more economically by another carrier or mode.

(b) The court's fear that a motor carrier, by using Plan II (door-to-door piggyback service offered by a railroad), could "abandon any pretense of performing services as a carrier," is also groundless, since a motor carrier which refused to provide "continuous and adequate service" would violate Section 204 (a)(4) of the Act, 49 U.S.C. 304(a)(1), and its certificate could be revoked for dormancy (49 U.S.C. 312(a)).

(c) The court thought that giving the motor carrier a choice between Plan III (open tariff) and Plan I (through route and joint rate with the railroad) would create an unjust discrimination in violation of Section 2, assuming that section were applicable. Plan I, however, simply contemplates the joint offer by motor carrier and railroad of a single rate applicable to both the motor and rail segments of the piggyback movement. The motor carrier, under Plan I, is not buying a service from the railroad but selling a service in partnership with the railroad; it pays the railroad a rate only

Moreover, possible problems that may arise in the implementation of rules that have not been permitted to become effective are no ground for invalidating the rules on their face—especially since the Commission expressly stated that its rules were not the "final and definitive word" but, rather, were subject to modification as experience might require (322 I.C.C. at 325).

The district court also went astray in insisting upon finding an exact statutory predicate for the Commission's rules—just the kind of "section-by-section search" rejected by this Court in *American Trucking Assns.* v. *United States,* 344 U.S. 298, 309 (see p. 14, n. 15, *supra*)—and in emphasizing prior decisions of the Commission which to some extent are inconsistent with the present rules. The Commission has an ongoing responsibility to re-examine its precedents in the light of changed conditions in the transportation industry; such re-examination was properly conducted here in a comprehensive rule-making proceeding in which the Commission, for the first time, was able to view the piggyback problem whole upon a complete record.[19] Further, the court's view that the four parts of the Interstate Commerce

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under Plan III. There is no unjust discrimination in the railroad's receipt of different compensation under two so different plans. See further, pp. 19–20, *infra.*

[19] This Court, and distinguished commentators, have urged administrative agencies to formulate policy as much as possible in comprehensive rule-making proceedings, as here, rather than through piecemeal litigation. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; Friendly, *A Look at the Federal Administrative Agencies*, 60 Col. L. Rev. 429, 437 (1960).

Act establish a principle of rigid separation among the various modes of transportation and deprive the Commission of all power to require coordinated transportation except where expressly authorized by a specific statutory provision is wholly opposed to the National Transportation Policy laid down by Congress as the authoritative guide to interpreting and applying the Act.

Nor is there merit to the court's view that the Commission's rules are in conflict with certain provisions of the Act, such as the freight-forwarder provisions (Part IV). A carrier does not, as the court thought, become a freight forwarder merely because, like a forwarder, it utilizes the services of another carrier. Section 402(a)(5) of the Act, 49 U.S.C. 1002(a)(5), expressly excludes from the statutory definition of a forwarder one who, "as a carrier," "utilizes for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." To be sure, a motor carrier would cease to operate as a carrier if it utilized piggyback to ship goods between points not specified in its certificate, but this the Commission's rules expressly forbid (see 322 I.C.C. at 362–364). In addition, a motor carrier that used Plan II (door-to-door service by the railroad) otherwise than as an incident to or in conjunction with the performance of a certificated service would expose itself to severe sanctions (see p. 16, n. 18, *supra*).

Neither do the Commission's rules violate Section 216(c) of the Act, 49 U.S.C. 316(c), which permits

rail and motor carriers to join in through routes but does not authorize the Commission to require them to do so. The court below read the provision as embodying a congressional decision to withhold from the Commission the authority to promulgate rules like those in suit. However, the term "through route" is applicable only to an arrangement whereby the motor and rail carriers "hold themselves out as offering" a joint service. *Thompson* v. *United States,* 343 U.S. 549, 557. An open-tariff regulation—the only arrangement reached by the challenged rules—merely entitles a motor carrier to use the railroad's lines on the same terms as shippers, and involves no holding out of a joint service.

It is not as if Section 216(c) expressed a congressional determination—in flat contradiction to the National Transportation Policy—to deny the Commission power to require any manner of coordination of rail and motor services. That section (enacted in 1935, long before piggyback emerged as a significant mode of transportation) was intended to enlarge the scope of voluntary coordination between different modes, not preclude the Commission from correcting abuses stemming from refusals to cooperate. While Congress rejected a proposal to empower the Commission to compel motor carriers to enter into through routes with rail carriers, it did so for a reason peculiar to through routes and inapplicable to piggyback—the fear expressed by some motor carriers that they would be weakened if forced into such arrangements with powerful railroads. 79 Cong. Rec. 5655 (remarks of Senator Wheeler). The Commission's rules, in

fundamental contrast to compulsory through-route requirements, do not compel any motor carrier to join in an offer of service with a railroad (or *vice versa*), and they do not regulate the terms upon which the motor carrier may ship on the railroad's flatcars or prescribe divisions of revenue from a piggyback movement in which both a motor and rail carrier participate; they merely permit the motor carrier to ship under certain tariffs.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
RICHARD A. POSNER,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
RICHARD A. WEGMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Associate General Counsel,
ROBERT S. BURK,
Attorney,
Interstate Commerce Commission.

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SUPREME COURT, U. S.
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Nos. 666, 916 and 924

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

AMERICAN TRUCKING ASSOCIATION, INC., ET AL.,
Appellants
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

MOTION OF FREIGHT FORWARDER APPELLEES TO AFFIRM

D. ROBERT THOMAS
GEORGE H. LEONARD
F. N. MELIUS, JR.
THEO. R. SCHNEIDER
GILES MORROW
Attorneys for Appellees
Acme Fast Freight, Inc., et al.

Of Counsel:
SIDLEY, AUSTIN, BURGESS & SMITH
11 South La Salle Street
Chicago, Illinois 60603

March, 1966

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

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AMERICAN TRUCKING ASSOCIATION, INC., ET AL., *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 916

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 924

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

MOTION OF FREIGHT FORWARDER APPELLEES TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the freight forwarder appellees, listed in the Appendix hereto, move that the final decree and judgment of the District Court herein be affirmed.

The numerous freight forwarder appellees were parties in the Interstate Commerce Commission proceeding and were intervening plaintiffs in the District Court. In this motion we shall refer primarily to the freight forwarding aspect of the case; the railroad appellees will discuss the other aspects in their motion to affirm.

The freight forwarding aspect of the case was explicitly an independent ground stated for the unanimous decision of the three-judge District Court (244 F. Supp. 955, 967-8) and, accordingly, is an independent ground for affirmance. We respectfully submit that the carefully reasoned opinion of the court below is clearly correct and that plenary consideration is not warranted.

The opinion of the District Court (244 F. Supp. 955) is reproduced in Appendix A to the jurisdictional statement of American Trucking Association, Inc. (No. 908). The report of the Commission, including the dissenting and concurring opinions, is also attached to that jurisdictional statement and is printed at 322 I.C.C. 301.

STATEMENT

The Interstate Commerce Commission's revolutionary new Rules 2 and 3, which the court below found were contrary to the policy and terms of the Interstate Commerce Act, are of vital concern to the nation's freight forwarders. As the Vice Chairman of the Commission stated in his dissenting opinion, the rules "may very well destroy the freight forwarding industry" (322 I.C.C. at 394). The statutory provisions that would be violated by the rules reflect a deliberate Congressional purpose to preserve the freight forwarding industry by protecting it against the invasion from other carriers which the proposed rules would permit. That policy and the pertinent statutory provisions are ignored or inadequately described in the jurisdictional statements.

Freight forwarders are quite small as compared to motor carriers, but the forwarders nevertheless have offered constant competition to the motor carriers in serving the shipping public. The total gross intercity freight revenues of Class I motor carriers alone totalled more than six billion

dollars in 1964 while the total gross revenues of freight forwarders were less than one-twelfth of that amount (79th Annual Report of the Interstate Commerce Commission, pp. 162, 170).

Heretofore, throughout the more than twenty-year history of federal regulation of freight forwarding, the Commission has recognized and held that the Interstate Commerce Act prohibits the motor carriers from engaging in the forwarders' authorized practice of shipping the customers' goods by rail. The proposed new rules, however, would permit the motor carriers to initiate a direct invasion of the freight forwarding business, shipping their freight by rail under the rail tariffs for the transportation of trailers on flatcars. If such permission were to go into effect, the prospects for continuation of the vigorous competition which the forwarders now offer to the giant motor carrier industry would be bleak. Congress, however, has expressly directed the Commission *not* to grant freight forwarding permission to any common carrier by motor vehicle and the District Court accordingly has found the proposed permission to be invalid. The jurisdictional statements show no grounds for reversal of that conclusion. Indeed, the jurisdictional statements of the Government and of the American Trucking Association, Inc. fail even to mention that statutory prohibition.

Freight forwarders are common carriers, authorized and regulated in Part IV of the Interstate Commerce Act (49 U.S.C. 1001 *et seq.*). A freight forwarder collects and consolidates relatively small individual shipments and then ships the consolidated load by a physical or line-haul carrier (usually a railroad) to a destination point. The freight forwarder then separates the individual shipments and distributes them to the consignees. Some forwarder shipments by rail are made by trailers-on-flatcars (TOFC) and

some by boxcar. As a shipper by rail the freight forwarder pays the railroad tariff rates.

The distinctive feature of the freight forwarding business is that a forwarder ships assembled goods between the origin and destination terminals rather than itself performing the line-haul transportation service. This distinctive feature is based on the statutory provision in Part IV of the Act defining a freight forwarder as a carrier which, among other things, "utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." (Sec. 402(a)(5); 49 U.S.C. 1002(a)(5)). There is no parallel provision permitting carriers by motor vehicle, rail or water to ship between terminals by other carriers, *i.e.*, over each other. The freight forwarder, however, while granted the distinctive right to ship over other carriers, is limited in its authorized activities. The forwarder is not authorized "to conduct any direct railroad, water or motor-carrier operations" except within the respective terminal areas (Sec. 410(h); 49 U.S.C. 1010(h)). The forwarder also has not been empowered as are motor carriers (Sec. 216(c); 49 U.S.C. 316(c)) to make through routes or joint rates with other common carriers.

In 1942 when Congress enacted Part IV of the Act, it included an express provision to remove the possibility that motor carriers might enter the business of freight forwarding:

> "No such permit [for freight forwarding] shall be issued to any common carrier subject to part I, II, or III of this Act . . ." (Sec. 410(c); 49 U.S.C. 1010(c)).

The declared policy of Congress regarding motor carriers, water carriers and railroads, in relation to freight forwarding, was "the policy" of permitting them to control

freight forwarder subsidiaries but "of not permitting them to engage directly in the freight-forwarding business" (H.R. Rep. No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15). In accordance with that policy and with the terms of the Act, the Commission (until its action in this case) had uniformly held that it is unlawful for a motor carrier to ship its customers' goods by rail, either by making TOFC shipments or by making boxcar shipments. Those Commission decisions are referred to by the District Court (244 F. Supp. at 968-9).

The core of the Commission's new rules is contained in Rule 3(a). This rule would permit motor carriers and water carriers as well as freight forwarders to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (322 I.C.C. at 337). No one questions that under this rule motor carriers would be allowed to engage directly in the business of freight forwarding.* After having assembled and consolidated their shipments, motor carriers would be allowed to ship them by rail to themselves at a destination area, there breaking down the consolidated shipments into the individual shipments and distributing them to the consignees.

The District Court held that the proposed rules would be counter to the provisions of Part IV of the Act and to the policy of Congress referred to above (244 F. Supp. at 967-8). The Court found no merit in an argument that a phrase in the statutory definition of a freight forwarder

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* For convenience, we refer herein principally to motor carriers although the rules would also permit water carriers to act as forwarders by rail instead of performing their authorized water transportation. The water carrier would not need to go even near the water.

should be construed as meaning that Congress, in 1942, had granted blanket permission to motor carriers to engage in freight forwarding operations. Such a construction would have been at odds with the Congressional action in prohibiting the granting of freight forwarding permits to such carriers. The District Court stated:

> "To keep faith with Congress, to give reasonable effect to its commands, we are obliged to eschew word-play and to read the statutes in the light and spirit of their purpose." (244 F. Supp. at 967).

The Commission's order proposing to put the new rules into effect was therefore set aside.

ARGUMENT

1. Part IV of the Interstate Commerce Act, regulating freight forwarding, was enacted in 1942. Three years prior to that date, the Commission had made it clear that a motor carrier could not lawfully act "as a forwarder or shipper" by rail of the freight it was handling for its customers. *Substituted Freight Service,* 232 I.C.C. 683, 690 (1939). As the District Court in the present case stated, the Commission in 1939 "plainly held that a motor carrier could not lawfully substitute rail service for its authorized highway service for a part of the line haul. . . . This interpretation of the Act was followed and affirmed in an unbroken line of decisions of the Commission in the intervening years. . . . For twenty-five years, until the decision here under review, the Commission had adhered to this interpretation of the act directly in conflict with its newly announced views" (244 F. Supp. at 968).

When Congress enacted Part IV it considered whether motor carriers, water carriers and railroads should be permitted to engage in freight forwarding. Consistent with the Commission's decision of 1939, Congress expressly

concluded that such carriers should *not* be permitted to engage in freight forwarding. The House of Representatives Committee Report regarding the bill to regulate freight forwarding stated:

> "The provisions of this subsection [Sec. 411(g)], as well as those of section 410(c), are intended to carry out *the policy* of permitting such carriers to engage in freight forwarding indirectly, through control of subsidiary corporations, but *of not permitting them to engage directly in the freight-forwarding business.* It is believed that this policy will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted." (H.R. Rep. No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15).*

To be absolutely sure that the Congressional policy against freight forwarding operations by motor carriers and other physical common carriers must be followed by the Commission in its administration of the Act, Congress included in Part IV the specific prohibition ordering the Commission not to grant any freight forwarding permit to any of the common carriers that are subject to Parts I, II, or III of the Act (Sec. 410(c); 49 U.S.C. 1010(c), quoted at page 4 above). Those common carriers, of course, include motor carriers. And Congress also included in Part IV the provision that "No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service. . . ." (Sec. 410(a); 49 U.S.C. 1010(a)). This is the permit that Congress told the Commission not to give to motor carriers and other common carriers.

In the present case, the District Court described the bills that were introduced in Congress in 1962 and again

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* Italics herein are ours.

in 1963 to achieve precisely the result of the Commission's rules here in issue (244 F. Supp. at 969-70). Under those bills, motor carriers would have been allowed to make rail shipments of trailers-on-flatcars. Congress, however, was not persuaded by the proponents; the bills were not enacted.

One of the witnesses who appeared at the hearings on those recent bills was a representative of the freight forwarders. He pointed out the drastic shift in Congressional policy that was being proposed, stating in part: "And every motor carrier in the United States would be given a wide-open invitation to enter the freight forwarding business without a permit" (Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 4700 and H.R. 4701, 88th Cong., 1st Sess., May 9, 1963, p. 519). Congress declined to extend that invitation or permission to the motor carriers. When the Commission then undertook to grant that permission by adopting Rule 3(a), to allow motor carriers to operate as forwarders rather than as transporters, the Commission's action was directly opposed to the policy of Congress and to the terms of the Act.

2. The appellants offer no arguments worthy of plenary consideration to support the proposal to permit motor carriers and water carriers to engage in freight forwarding by making rail TOFC shipments.

The jurisdictional statements of the Government and of American Trucking Association, Inc. completely omit any mention of the statutory prohibition in Section 410(c) against granting permission to motor carriers, water carriers and railroads to engage in freight forwarding. They also fail to mention the Congressional "policy . . . of not permitting them to engage directly in the freight-forwarding business." The prohibition against freight for-

warding by motor carriers was an express and independent ground for the decision of the District Court (244 F. Supp. at 967-8), and the failure of the Government and of ATA to refer to the prohibition reflects the lack of merit in the appeals.

ATA, in its one-paragraph discussion of freight forwarding, asserts that trailer-on-flatcar service is not "rail service" (ATA J.S. p. 21). ATA evidently overlooks the fact that the Commission itself admitted otherwise in its report in this case. The Commission stated:

> "In the *New Haven* case, *supra* [293 I.C.C. 93], it was found, properly we think, that *'trailer-on-flatcar transportation is in fact transportation by railroad,'* and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.'" (322 I.C.C. at 343)

When a railroad holds itself out by tariff publication to carry goods from origin to destination, the service under that rail tariff plainly is rail service regardless of whether the goods consist of boxes or articles to be carried in a boxcar or whether they consist of loaded or empty trailers to be carried on a flatcar.

ATA mentions, as if in rebuttal, that a motor carrier is authorized to assemble shipments at the origin point and to distribute them at the destination (ATA J.S. p. 21). Such authority is unquestioned when that service is being provided as a part of the motor carrier's authorized motor vehicle service, but it is irrelevant here. The motor carrier is *not* authorized to act as a forwarder, tendering a shipment to a railroad for rail transportation, rather than either transporting the shipment itself or entering into a voluntary joint rate under Section 216(c). If the motor carrier, after having assembled the shipments, merely forwards the shipments by shipping them by rail like an ordi-

nary rail shipper, the motor carrier would be engaging directly in the freight forwarding business, in violation of the statute and of the policy of Congress. As the District Court stated:

> "No reason is suggested why we should suppose that Congress meant to allow a motor carrier to perform only the services of a freight forwarder, not as an incident to furnishing transportation, merely because the carrier holds a bare unexercised authority to furnish transportation, while at the same time Congress prohibited the licensing of motor carriers as freight forwarders." (244 F. Supp. at 967)

For any shipments that would be assembled and consolidated at the origin terminal and then shipped by rail to the destination terminal, the motor carrier would be conducting a freight forwarding operation pure and simple, with a "bare unexercised authority to furnish transportation" by motor vehicles over public highways. The fact that a motor carrier is authorized to assemble and to distribute shipments as an incident to its authorized highway service, or the fact that the motor carrier might be properly exercising its authority by performing the actual transportation service for *other* shipments, would not justify it in engaging in the direct freight forwarding operation that would be permitted under the proposed new rules.

The Government argues that the Act should be interpreted as meaning that motor carriers can engage in freight forwarding between any and all of the points which they are authorized to serve by motor vehicles over public highways (Gov't. J.S. p. 18). Such an interpretation, however, would be in direct conflict with the declared Congressional policy and with the statutory prohibition against permitting motor carriers to engage in freight forwarding. Both the policy and the prohibition are comprehensive; neither of

them could reasonably be read to have an implied exception that would allow motor carriers to engage in freight forwarding between the points specified in their motor carrier certificates.

Moreover, since motor carriers are clearly authorized to form voluntary through routes and publish joint rates for motor vehicle service, the Government's theory and the proposed rules would permit the motor carriers (by forming through routes with each other) to engage in freight forwarding between any points in the country where piggyback rail service is offered in the rail tariffs.

The Government's reference to the statutory definition of "freight forwarder" in this connection affords no support for its contentions. That definition (Sec. 402(a)(5); 49 U.S.C. 1002(a)(5)) reads as follows:

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act."

The pertinent phrase in the parenthetical provision is the phrase "as a carrier." When a motor carrier interchanges trailers or other freight with a railroad under

an arrangement for a through route, pursuant to the authority in the motor carrier part of the Act (Sec. 216(c)), the motor carrier is acting "as a carrier subject to part . . . II . . . of this Act." But if a motor carrier were to tender a shipment to a railroad for transportation under a published tariff such as the tariffs for TOFC service, it would be acting as a forwarder or shipper, and not in any capacity subject to or authorized by Part II of the Act. Just three years *before* this definition of freight forwarder was enacted, the Commission had held that a motor carrier which tendered its assembled and consolidated shipments for transportation by a railroad was acting "as a forwarder or shipper" and was therefore exceeding its authority under the Act. *Substituted Freight Service,* 232 I.C.C. 683, 690 (1939). And three years *after* the definition was enacted, the Commission held that it would be unlawful for a motor carrier to ship its loaded trailers by rail, since the motor carrier "would be a shipper in its relation to the railroad." *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. Ry. Co.,* 263 I.C.C. 139, 141 (1945). The exemption that applies for various activities when a motor carrier is acting "as a carrier" subject to Part II clearly does not provide a loophole to defeat the Congressional purpose and directive that motor carriers shall not be permitted to engage in freight forwarding. As the District Court emphasized, reasonable effect is to be given to the commands of Congress, and statutes must be read "in the light and spirit of their purpose" (244 F. Supp. at 967).

The contentions of National Automobile Transporters Association of Detroit, Michigan, with respect to freight forwarding, are similar to the contentions of the other appellants, discussed above (NATA J.S. p. 17).

CONCLUSION

The District Court held that the Commission's new rules violated the provisions and purposes of Part IV of the Act. That holding is clearly correct and, accordingly, the judgment should be affirmed without further argument.

Respectfully submitted,

D. Robert Thomas
George H. Leonard
F. N. Melius, Jr.
Theo. R. Schneider
Giles Morrow
Attorneys for Appellees
Acme Fast Freight, Inc., et al.

Of Counsel:

Sidley, Austin, Burgess & Smith
11 South La Salle Street
Chicago, Illinois 60603
March, 1966

APPENDIX

List of Freight Forwarder Appellees on Whose Behalf this Motion to Affirm is Filed

Acme Fast Freight, Inc.
Century Carloading, Inc.
Clipper Carloading Company
International Forwarding Company
Lifschultz Fast Freight
Merchant Shippers Association
National Carloading Corporation
Ohio Fast Freight Corporation
Pacific & Atlantic Shippers
Sheldon Forwarding Company
Springmeier Shipping Co., Inc.
Western Carloading Company
Westland Forwarding Company

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~908~~ 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. ~~916~~ 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. ~~924~~ 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION OF RAILROAD APPELLEES TO AFFIRM

PAUL R. DUKE
1138 Transportation Center
Philadelphia, Penn. 19104
Attorney for Eastern Railroads

FRANCIS M. SHEA
WILLIAM H. DEMPSEY, JR.
734 Fifteenth Street, N.W.
Washington, D.C. 20005

WALTER J. MYSKOWSKI
1200 18th Street, N.W.
Washington, D.C. 20006

W. GRAHAM CLAYTOR, JR.
WILLIAM D. McLEAN
JAMES A. BISTLINE
Southern Railway Building
Washington, D.C. 20013
Attorneys for Southern Railway, et al.

THORMUND A. MILLER
205 Transportation Building
Washington, D.C. 20006

AMOS M. MATHEWS
J. D. FEENEY
280 Union Station Building
Chicago, Illinois 60606

ROBERT F. MUNSELL
888 Union Station Building
Chicago, Illinois 60606
Attorneys for Western Railroads

JAMES W. HOELAND
908 W. Broadway
Louisville, Kentucky 40201
Attorney for Southeastern Railroads

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 908

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 916

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 924

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION OF RAILROAD APPELLEES TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the appellees listed in the Appendix hereto move that this Court affirm the final judgment of the District Court on the ground that the judgment is so clearly correct that plenary review by this Court is not warranted.[1]

1. In *New York Central Railroad Company* v. *United States, et al.*, No. 909, the New York Central has appealed from another aspect of the judgment of the District Court—its affirmance of the validity of a Commission rule not brought into question in these appeals. The appellees who join in this motion have not appealed from that separate aspect of the District Court's judgment.

Questions Presented

In addition to the questions set forth by appellants, these appeals raise this further question:

Whether the action of the Interstate Commerce Commission should be sustained on the basis of findings of fact and conclusions of law not relied on in the Commission's opinion.

Statement

While the facts are adequately stated in the opinion of the District Court, it may be worthwhile emphasizing certain considerations that are particularly relevant to the question whether this litigation should be terminated now.

The existing pattern of railroad trailer-on-flatcar (TOFC) transportation was developed at the explicit command of the Commission based on the Commission's construction of the requirements of the Interstate Commerce Act. That pattern permits only shippers to utilize rail "open tariffs." Railroads and motor carriers coordinate their services under voluntary through route arrangements as connecting carriers.[2] In 1954, the Commission established legal guidelines for the development of TOFC in order "to enable carriers and shippers interested in undertaking or using this type of service to proceed with a degree of assurance as to the fundamental legal principles pertaining thereto." *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 111. In *New Haven*, the Commission, relying upon a long line of decisions beginning with the 1939 holding in *Substituted Freight Service*, 232 I.C.C. 683,[3] held that it would be "repugnant to the Act"

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2. There are hundreds of such through route arrangements in existence. See, in Ex Parte 230: General Summary of Piggyback Questionnaires; Examiners' Recommended Report, App. IV; and 322 I.C.C. 301, 306-307.

3. See also *Greer Broker Application*, 23 M.C.C. 417 (1940); *Stone's Express, Inc. Common Carrier Application*, 32 M.C.C. 525

for motor carriers to use, as shippers, the railroads' so-called TOFC "open tariffs" (p. 105). But in the case at bar, ten years and millions of dollars of railroad investment later, and despite what everyone concedes to have been a rapid growth of piggyback, the Commission seeks to discard *New Haven* and its antecedents by empowering motor and water carriers to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (Rule 3(a)). It is this about-face by the Commission that has produced this litigation.

The Commission's action represents not merely a radical departure from precedent; it also accomplishes by administrative fiat the very purpose that the Administration had unsuccessfully sought to achieve by legislation shortly before the Commission's decision. Thus, in 1962 and 1963 the Administration proposed an amendment to section 2 of the Act that would have placed the railroads under the same obligations now imposed by the rules.[4] The hearings, however, produced virtually no support for the proposal from either shipper or motor or water carrier representatives, and it died in committee.[5] Moreover, the Commission in

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(1942); *Ringsby Trucklines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139 (1945); *Savage Application*, 265 I.C.C. 157 (1947); *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157, 164 (1954).

4. H.R. Doc. No. 384, 87th Cong., 2nd Sess. The proposed legislation would have amended section 2 of the Act by adding the following: "Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated." S. 3242, H.R. 11584, 87th Cong., 2nd Sess; S. 1062, H.R. 4701, 88th Cong., 1st Sess.

5. See Hearings on bills described in note 4, *supra*, before Senate and House Commerce Committees in 1962 and 1963, and H.R. Report No. 1144, 88th Cong., 2nd Sess. pp. 6-8.

1961, 1962, and 1963 recommended to the Congress that it be given the authority to compel the establishment of through routes between railroads and motor carriers, but to no avail.[6]

Even though all of these legislative proposals failed, the Commission nonetheless undertook to reverse the "fundamental legal principles" it had set forth in *New Haven* for the "assurance" of the industry. Thus, the Government's assertion that the District Court's decision "curtails the Commission's regulatory authority radically" (J.S. p. 6) speaks to an assumed authority that the Commission for decades has disclaimed and that the Congress, though asked, has been unwilling to bestow. In these circumstances, we suggest that the decision of the District Court, which basically does no more than to reassert the principles asserted by the Commission itself in the *New Haven* case and to permit TOFC service to continue to develop in accordance with those principles, is both just and presumptively correct.[7] We show below that nothing in the jurisdictional statements detracts from that presumption.

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6. See the Commission's 77th Annual Report (1963) p. 19; 76th Annual Report (1962), p. 201; and 75th Annual Report, (1961), p. 186. Bills to amend the Act in this manner were introduced but were not passed. S. 3510 and H.R. 12362, 87th Congress, and S. 676 and H.R. 2088, 88th Congress.

7. For a comprehensive analysis of the legal issues see Note, "Piggyback" Service Under the Interstate Commerce Act, 66 Colum. L. Rev. 318 (1966). The author's conclusion was: "The District Court clearly seems correct in holding that the Commission's open-tariff rules are inconsistent with the Interstate Commerce Act," and that the Commission evidently "was attempting to create by fiat a power which Congress has thus far refused to grant —that of compelling establishment of rail-motor through routes." *Id.*, at 334.

ARGUMENT

These appeals present no question warranting plenary consideration by this Court. They involve only the District Court's refusal, based on well settled principles, to permit the Commission to expand its authority beyond the boundaries marked by twenty-five years of Commission and court decisions. We show below, first, that motor carriers are without statutory authority to use the TOFC "open tariffs" of railroads and that the rules in issue are incompatible with the through route-joint rate provision of Part II of the Act; second, that the railroads' refusal to permit the motor carriers the use of "open tariffs" does not contravene the statute; and, finally, that the policy contentions newly advanced by the Government do not impair the validity of the lower court's judgment.[8]

1. The District Court Correctly Concluded That Motor Carriers Must Perform Their Authorized Service By Operating Motor Vehicles Upon The Public Highways and Not By Shipping Their Trailers By Rail.

An unexceptionable method of providing coordinated motor-rail TOFC service is through the medium of through routes and joint rates. However, under section 216(c) of

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8. We do not in this motion discuss another independent ground upon which the District Court rested its judgment—that the rules are invalid because, contrary to section 410(c) of the Act, 49 U.S.C. 1010(c), they permit motor carriers to act as freight forwarders. This issue is thoroughly discussed in the motion to affirm filed by the freight forwarders.

While the Commission's rules apply both to motor and to water common and contract carriers, as American Trucking Associations has observed in its Jurisdictional Statement (p. 8 n. 3) the governing legal principles are substantially the same whether motor or water carriers are involved. In consequence, for convenience we refer in this motion only to motor carriers.

the Act, 49 U.S.C. 316(c), such arrangements between motor carriers and railroads must be voluntary. The District Court concluded, in consequence, that if the motor-rail service that would be performed under the Commission's rules would amount to through routes, the rules would be invalid because they involve compulsion (A.T.A. J.S. App. A, p. 44).[9] The correctness of this view is plain, for it obviously could not be maintained that the railroads would be acting "voluntarily" in permitting motor carriers to employ "open tariff" TOFC service when the railroads' only "option" would be to abandon that service entirely.

No appellant contests this aspect of the District Court's opinion. Rather, all appellants attempt to escape the force of the court's conclusion by asserting that the rules would not involve the establishment of through routes (Govt. J.S., p. 19; A.T.A. J.S., p. 12; N.A.T.A. J.S., p. 15). Putting aside for present purposes the obvious weaknesses in the reasoning advanced to support this assertion,[10] the threshold question is whether, in the absence of valid through route agreements, the motor carriers under the Act possess the authority to utilize the railroads' open tariffs to transport freight that is tendered by shippers to the motor carriers.

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9. The opinion of the District Court, which is reported at 244 F. Supp. 955, is reproduced as Appendix A to the Jurisdictional Statement of the American Trucking Associations. In this motion, we cite to that Appendix.

10. The Government's analysis, for example, seems to amount simply to the contention that there are no through routes where one of the parties does not agree to join in holding out the motor-rail service (J.S. p. 19). As the District Court observed, "By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route" (A.T.A. J.S. App. A, p. 44).

As to this fundamental issue, the appellants adopt different approaches. The American Trucking Associations asserts that the transportation by railroads of trailers on rail flatcars over rails is not really rail transportation, but rather is a type of transportation that the Associations sometimes characterizes as motor carrier service (p. 12) and sometimes as "neither an exclusive rail service nor an exclusive motor service" (p. 10), with the asserted result in either case being that motor carriers are free to perform TOFC transportation as part of their authorized service. This contention, which is simply an effort to resurrect an argument that was rejected by the Commission in the *New Haven* case, *supra,* requires little discussion. As the Commission held in *New Haven,* 293 I.C.C., at 100-101, it is perfectly clear that, when a railroad transports freight on a rail car over rail tracks, it is performing railroad transportation whether the freight is in a box car, a movable container, or a motor trailer. And, even more to the point, the Commission reaffirmed that holding in this very case.[11]

While the Government evidently is unwilling to adopt the fanciful argument of the American Trucking Associations, it does maintain that, in the absence of a through route, motor carriers are free to act *as shippers* in turning over their shippers' traffic to railroads for TOFC transportation. This contention was properly rejected by the District Court on the basis of the requirements of the Act as they have been interpreted by the Commission and the courts in a long and consistent line of decisions.

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11. "In the *New Haven* case, *supra,* it was found, *properly we think,* that *'trailer-on-flatcar transportation is in fact transportation by railroad,'* and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.'" 322 I.C.C. at 343. (Emphasis supplied.)

First, the plain implication of the through route section is, as the District Court held, that "[T]he through route permitted by Section 216(c) is the exclusive statutory authority for the use of rail transportation . . ." (A.T.A. J.S. App. A, p. 45). The Congress having committed the establishment of joint motor-rail service to the choice of the parties, there is no room for the establishment of such service by compulsion. As this Court stated in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 72: "The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers." See also *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D. N.Y. 1940), *aff'd* 309 U.S. 638.

The Government's argument that section 216(c) is not exclusive is that the Congress did not intend to "preclude the Commission from correcting abuses stemming from refusals to cooperate" (J.S. 19). But, inasmuch as the asserted "refusals to cooperate" (as to which there is no evidence in the record) obviously would consist of refusals to enter into through routes, it is clear that this is exactly the power the Congress withheld from the Commission when it denied the Commission the authority to compel motor-rail through routes.

Moreover, entirely apart from the significance of section 216(c), the fundamental structure of the Act evidences the Congressional intent that motor carriers are limited to operating by motor vehicle upon the public highways and may not simply, acting as shippers, arrange for the transportation of freight by rail. The Congress has, in the various parts of the Interstate Commerce Act, subjected the different modes of transportation to a comprehensive pattern of regulation and has defined the type of trans-

portation service to be performed by each. The plain implication is that each mode may act only within the scope of the Congressional grant of authority. Thus, with respect to the case at hand, the motor carriers, in proposing to use rail "open tariffs" to transport freight, must establish that they will be engaged in the service they are authorized to perform as motor carriers. There is no dispute as to this basic principle, nor could there be, since Rule 3 itself indicates that the premise of the rules is that, in hiring the railroads to perform TOFC service, the motor carriers would be engaged "in the performance of all or [a] portion of their authorized service."

But it is clear that, in acting as shippers in tendering freight to railroads, the motor carriers would *not* be performing "their authorized service," since the Congress has empowered motor carriers only to transport freight in motor vehicles and over the public highways. Thus, for example, "common carrier by motor vehicle" is defined as "any person which holds itself out to the general public to engage in . . . transportation by motor vehicle. . . ." 49 U.S.C. 303(a)(14). And "motor vehicle" is defined as any "trailer, or semitrailer . . . used upon the highways . . . but does not include any vehicle . . . operated exclusively on a rail or rails." 49 U.S.C. 303(a)(13).

The District Court, relying upon these and cognate provisions in Part II,[12] as well as upon the general statutory scheme, held:

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12. "The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passen-

"The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority con-

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ger transportation similar to street-railway service." 49 U.S.C. 303(a)(13).

"The term 'common carrier by motor vehicle' means *any person which holds itself out to the general public to engage in the transportation by motor vehicle* in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title." 49 U.S.C. 303(a)(14). (Emphasis supplied.)

"The term 'contract carrier by motor vehicle' means any person which engages in *transportation by motor vehicle* of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) . . ." 49 U.S.C. 303(a)(15). (Emphasis supplied.)

"Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business *by motor vehicle*, in interstate or foreign commerce, *on any public highway* or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property *by motor vehicle* in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person." 49 U.S.C. 303(c). (Emphasis supplied.)

"Except as otherwise provided in this section and in section 210a, no common carrier *by motor vehicle* subject to the provisions of this part shall engage in any interstate or foreign operation *on any public highway*, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . ." 49 U.S.C. 206(a)(1). (Emphasis supplied.)

> ferred on the carrier. Each mode of transportation is the subject of a separate formal part of the Act: Part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highway'.[13] (A.T.A. J.S. App. A, p. 41).

"13. Secs. 203(a)(1) and (c), 206(a)(1), 209(a)(1): 49 U.S.C. §§ 303(a)(1) and (c), 306(a)(1), 309(a)(1)."

This holding of the District Court, as it said, is "supported and confirmed by the consistent and repeated decisions of the Commission and the courts" (A.T.A. J.S. App. A, p. 47). In *Substituted Freight Service*, 232 I.C.C. 683 (1939), the Commission held that a motor carrier could not, acting as a shipper, lawfully substitute rail service for its authorized highway service in the absence of a valid joint rate, because to do so would be "repugnant to the Act" (A.T.A. J.S. App. A, p. 48). In a series of cases from that decision until *Ex Parte 230*, the Commission regularly adhered to this principle.[13]

The District Court found confirmation of these prior holdings of the Commission in a number of court decisions bearing upon the limits of *motor carrier authority*. Thus, the Court stated:

13. See cases cited at note 3, *supra*.

> ". . . [A] person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the 'grandfather' provisions of the Act. *Acme Fast Freight, Inc.*, v. *United States*, 30 F. Supp. 968 (D.C.N.Y. 1940), aff'd p.c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States*, 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. *The relevant premise of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad*" (A.T.A. J.S. App. A, p. 49). (Emphasis supplied.)

The common holding of the decisions cited by the court—as well as of *Andrews Van Lines, Inc.* v. *United States*, 240 F. Supp. 763 (Neb. 1965), *aff'd* 382 U.S. 67; *Moore* v. *United States*, 41 F. Supp. 786 (Minn. 1941), *aff'd* 316 U.S. 642; and *Kline* v. *United States*, 41 F. Supp. 577 (Neb. 1941)—is that a person to whom a shipper tenders freight does not perform the authorized service of a motor carrier when he ships that freight under an open tariff of a common carrier.[14] The Government's motion to affirm (pp. 4-5) in *Andrews Van Lines* correctly stated the law:

> "Section 203(a)(14) of the Act . . . defines 'common carrier by motor vehicle' as 'any person which holds itself out . . . to engage in . . . transportation by motor vehicle,' and Section 203(a)(13) . . . defines a motor vehicle as '. . . any vehicle, machine, tractor, trailer, or semitrailer . . . used upon the highways.' *Plainly*

14. See also *United States* v. *Maher*, 307 U.S. 148, 155-156 (1939) and *Consolidated Freightways* v. *United States*, 136 F.2d 921 (8th Cir. 1943), *cert. den.* 320 U.S. 781, which held that motor carrier authority and service cannot exist apart from identifiable or irregular highway routes over which the service must be performed.

the statute did not intend to treat carriage by ship, plane, or train as carriage by motor vehicle." (Emphasis supplied.)

So far as we can determine, there are no contrary decisions.

Under the rules here at issue the motor carriers would be permitted to perform their authorized motor carrier service in precisely the same fashion as the companies involved in these prior cases—*i.e.*, to hire railroads to transport freight tendered to the motor carriers. However, the decisions cited require the conclusion that the motor carriers, in arranging for this transportation, would not be performing motor carrier service. Therefore, the rules are invalid, for, as we have indicated, no appellant maintains that motor carriers are free to engage in any transportation service other than that of a motor carrier.

In sum, the District Court was plainly correct in holding that, both by virtue of the through route provision and the authorization provisions of the Act, the rules are invalid.

2. No Provision Of The Act Authorizes Rules 2 and 3.

Even if the authorization and through route provisions of the Act did not constitute a bar to the rules, the Commission's action could not be upheld unless the railroads are transgressing the Act in refusing to offer to competing motor carriers the TOFC service that they offer to shippers. The Commission found such a transgression by virtue of the anti-discrimination command of section 2, 49 U.S.C. 2, and the Government urges that the District Court erred in holding that section 2 was inapplicable.

The Government, however, is compelled to admit (p. 13) that sustaining the rules under section 2 requires reading that section's prohibition against rate discrimination as including a prohibition against service discrimination,

though the latter is independently proscribed by section 3(1).[15] For this position the Government offers no authority to offset the plain meaning of the statutory language. Indeed, it does not even assert that the statutory language is not plain.[16]

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15. Section 2 provides:

"*If any common carrier* subject to the provisions of this part *shall,* directly or indirectly, by any special rate, rebate, drawback, or other device, *charge, demand, collect or receive from any person* or persons *a greater or less compensation* for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, *than it charges, demands, collects, or receives from any other person* or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." (Emphasis supplied.)

Section 3 provides:

"(1) *It shall be unlawful for any common carrier* subject to the provisions of this part *to make, give, or cause any undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, *in any respect whatsoever;* or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (Emphasis supplied.)

16. The Government's citation of *Smith* v. *Northern Pacific R. Co.*, 1 I.C.C. 208, is clearly inapposite. That case involved no refusal to serve the general public or emigrants with passenger transportation. The complaint was that the railroad ". . . demands and receives from its ordinary passengers more for *the same service* . . ." (p. 212).

The Government says, however, that unless some basis can be found—the Government does not suggest what—for expanding section 2 to cover service discrimination (as well presumably as all other types of discrimination), a "gaping hole" would be opened in the Act. This "gaping hole" would arise, according to the Government, because of the inapplicability here of the section that obviously does cover discrimination in service—section 3, which "has been held to be limited to discrimination between competitors" (J.S. p. 13). But what the Government refers to as a "gaping hole" is simply the result of the unbroken line of decisions holding that section 3(1), the provision expressly directed to service discrimination, is confined to those situations in which there is competition between the favored and the disfavored.[17] What the Government seeks is to circumvent this limitation upon section 3 by constituting section 2 as a vehicle for dealing with the types of practices for which section 3 was expressly designed. And even were this not so, it would not be enough for the Government to point to what it regards as a defect in the statutory pattern; it must demonstrate, as it has not here, that there is some warrant for calling upon the judiciary instead of the legislature to do the patchwork.

Moreover, it should be noted that the District Court held, not only that section 2 is restricted to rate discrimination, but also that in any event neither that provision nor section 3(1) apply to "discrimination" by one carrier against another when the alleged "victim" is transporting a shipper's goods. Thus, the court stated: ". . . Sections 2 and 3 of the Act have never, so far as appears, been interpreted by the Commission or the courts to require one carrier to perform service as a substitute for another carrier, *qua*

17. See, e.g., decisions cited at page 13, note 14, of Government's jurisdictional statement.

carrier, as the Commission's new rules would command." This view of the reach of these provisions, as the court held, is based upon "settled interpretation of the Act by the Commission itself, as well as the courts" (A.T.A. J.S., App. A, p. 50).[18]

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18. The following cases, among others, support the proposition that sections 2 and 3 were "intended to protect shippers, not competing motor carriers." *Eastern Central M. Carriers Ass'n* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, 50 (1961), *aff'd sub nom. Cooper-Jarrett, Inc.* v. *United States*, 226 F.Supp. 318, 379 U.S. 6; *Atlantic Coast Line R.R. Co.* v. *Southern Rwy. Co.*, 302 I.C.C. 711, 716 (1958); *Chicago, M., St.P. & P. R. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 456 (1957), *aff'd*, 182 F.Supp. 81, 366 U.S. 745; *Consolidated Mining & S. Co. of Canada* v. *N. Y. Central R. R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 105 (1954); *Kansas City S. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I.C.C. 291, 296 (1935); *Nicholson Universal S. S. Co.* v. *Pennsylvania R. Co.*, 203 I.C.C. 637, 647 (1934); *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, 774 (1932).

The decisions cited by the Government (p. 12) are not to the contrary. Naturally, where a carrier legitimately acts as a shipper in tendering its own goods or equipment to another carrier, the anti-discrimination provisions apply, as was held in *Louisville & Nashville R. R. Co.* v. *United States*, 282 U.S. 740 (1931), and in *Kansas City S. Ry.* v. *United States*, 282 U.S. 760 (1931). The same result obtains where the goods are actually to be used by the carrier to whom they are sent. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 225 U.S. 326 (1912). In *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144 (1897), the Court merely held that a carrier may not justify a rate discrimination *among shippers* on the ground that, as to the favored shipper, it was matching a low rate of a competing carrier. And, finally, *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U.S. 235 (1911), held that freight forwarders must be afforded the same rates as other shippers; but of course freight forwarders, as distinguished from motor carriers, have always occupied the dual role of shipper *vis a vis* the carriers who perform

Moreover, the court's conclusion is confirmed by the plain meaning of the proviso to section 3(1), under which that section "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." And, it should be observed, this proviso has a direct bearing upon the proper construction of section 2, for this Court has stated: "[T]he provisions of §§ 2, 3 and 4 of the act being in *pari materia* require harmonious construction and therefore they should not be applied so that one section destroy[s] the others. . . ." *United States* v. *Louisville & N. R. R. Co.*, 235 U.S. 314, 325-326 (1914). As pointed out by Commissioner Webb in dissenting in the case at bar, the construction of section 2 sought by the Government would lead "to this astonishing conclusion: 'discrimination' as between carriers that is expressly permitted under section 3(1) and its counterpart 216(d) [applying to motor carriers], is condemned by section 2" (322 I.C.C. at 393). And, finally, as Commissioner Webb also observed, the view that section 2 was not meant to regulate "discrimination" by one carrier against another is further supported by the existence of section 3(4), 49 U.S.C. 3(4), which proscribes discrimination among carriers but which does *not* apply as between railroads and motor carriers. Thus, where the Congress intended to bar discrimination between carriers it knew how to do so, and it has done so to the extent that it considered such legislation desirable in the public interest.

The Government argues alternatively that it "need not rest with Section 2" (p. 14). This is an attempt to rewrite the Commission's report. That report refers to no other section as a basis for the rules, and Commission and Gov-

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the line haul and carrier *vis a vis* the freight forwarders' customers. See *United States* v. *Chicago Heights Trucking Company*, 310 U.S. 344 (1940); *Chicago, Milwaukee, St.P. & P. R. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949).

ernment counsel in the court below maintained that the rules did rest exclusively upon section 2. See Report, pp. 335-336; D.C. Op., A.T.A. J.S., App. A., pp. 34-35.[19] Accordingly, applying the principle firmly established by this Court in a long line of decisions,[20] the District Court "measure[d] the administrative action solely against the statutory ground invoked by the agency. . . ." *Id.*, at pp. 33-35.

Moreover, the Government's notion that the National Transportation Policy alone can substitute for specific statutory authority is erroneous. *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612 (1945), merely held that, using the Policy as an interpretive aid, specific sections of the Act should be construed to authorize the Commission's order in question. The Court concluded: "These sections provide sufficient authorization for the Commission's order." *Id.*, at 619. Similarly, in both *American Trucking Associations* v. *United States*, 344 U.S. 298 (1954), and *Assigned Car Cases*, 274 U.S. 564 (1927), the Court approved certain rules on the ground that they were necessary in order to prevent violations of various specific provisions of the Act. Thus in all three decisions specific statutory prohibitions—not the National Transportation Policy alone and not "axioms of common carrier regulation" (J.S. p. 15)—were the ultimate authority for the Commission's actions.

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19. See also the Government's brief below, in which counsel urged that "[a] reading of the Commission's report makes clear that it was this Section [section 2] upon which it relied" (p. 15).

20. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943); *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197 (1941); *Automatic Canteen Company* v. *FTC*, 346 U.S. 61, 81 (1953); *United States* v. *Chicago, M., St.P. & P. R. Co.*, 294 U.S. 499, 510-511 (1935).

3. The Policy "Findings" Advanced by the Government Do Not Impair the Validity of the District Court's Judgment.

In the preceding portions of this motion, we have dealt with the statutory provisions relevant to the authority of the Commission to promulgate the "open tariff" rules. Even the Government concedes that there is "serious question" respecting the Commission's authority (J.S. 12); but the Government suggests that plenary review is desirable because there is "little doubt of the economic wisdom and desirability of the Commission's rules" (p. 11). The Government's effort to escape the force of the District Court's reasoning by reliance upon the supposed findings respecting the National Transportation Policy should not, however, succeed. In the first place, the Government's assertions respecting the policy justification of the rules are not supported by any findings of the Commission nor by any evidence in the record. And in the second place, these speculations of appellate counsel about the economic desirability of the rules reflect a misapprehension of the requirements of the National Transportation Policy both as a matter of law and as a matter of fact.

a. *Policy "findings" newly advanced by the Government.* The Government states at some length four particular respects in which "the existing piggyback situation is antithetical to the congressional goal of a genuinely coordinated national transportation system" (J.S. 8-11). The quoted material is preceded by the words "as the Commission found." No citation to the Commission's report, however, is provided with respect to the Commission's "findings" concerning these four policy considerations. The reason for this omission is clear: The Commission made no such findings and the record would not have supported them had they in fact been made. Nowhere in the Commission's

report did the Commission find that "unrestricted railroad control over motor carrier participation in piggyback service is inconsistent with economical and efficient service" (J.S. 9). Nor did the Commission find that "railroad domination of piggyback is anticompetitive" or that the ability of the railroads to offer a door-to-door piggyback service while motor carriers cannot is "contrary to 'fair and impartial regulation . . .'" (J.S. 9-10). Nor is there a word in the report to support the contentions that the Commission found that "railroad domination of piggyback is a fertile source of discrimination among motor carriers" (J.S. 10).[21]

Thus, the Government's Jurisdictional Statement presents to this Court what the Government wishes the Commission's report had contained. But, as this Court has repeatedly held, administrative action must be tested solely on the grounds invoked by the agency, and not by "appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168.[22]

b. *Invalidity of the Government's policy arguments.* Had

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21. In the ten pages of the Report (pp. 327-337) dealing with the "open tariff" rules, the only passages discussing the National Transportation Policy consist of a rebuttal of the contention of the railroads that the rules would transgress the Policy by permitting the motor carriers to benefit by the inherent advantages of long haul rail transportation. The Commission concluded by stating: "[I]t seems obvious to us that the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination, and that encouragement of such coordination is in the public interest." While this doubtless indicates that the Commission thought its rules would promote "coordination," it could hardly be asserted that this single, highly generalized "finding" is merely shorthand for the detailed "findings" set forth in the Government's Jurisdictional Statement.

22. See also decisions cited in note 20, *supra*.

the Commission's Report contained the findings set forth in the Government's Jurisdictional Statement, the lower court litigation naturally would have followed quite a different path, for we would vigorously have attacked the findings as devoid of support in the record—as they are—and as based upon misconceptions of law—as they also are.

The Government asserts that it is "contrary to 'fair and impartial regulation of all modes of transportation' for railroads to be permitted to offer a complete door-to-door piggyback service, using trucks, while motor carriers may not offer the same service, using the rails," and, similarly, that the motor carrier "is at a marked competitive disadvantage vis-a-vis a railroad that offers a complete door-to-door piggyback service" (J.S. pp. 9, 10). It is plain that the "door-to-door" service to which the Government refers is Plan II, under which railroads perform trucking pickup and delivery, since that is the only "door-to-door" TOFC service and also since motor carriers are in a position to perform the trucking segment of piggyback service in connection with the other four plans. Thus, under Plans I and V, the motor carrier performs this service; and under Plans III and IV, where the shipper arranges for the trucking segment of the service, motor carriers are free to solicit that business.

If the Government's generalizations about the competitive damage being inflicted unfairly upon motor carriers are tested against this single fact—that all that is involved is the terminal trucking performed under Plan II by the railroads—the emptiness of the Government's argument becomes evident. In the first place, the record contains no evidence indicating that this terminal trucking performed under Plan II is of any consequence to the economic well being of motor carriers, and it would be surprising if it were. But more important is the fact that this pickup and

delivery service is explicitly sanctioned by section 202(c) of the Act, 49 U.S.C. 302(c), and is therefore obviously consonant with the National Transportation Policy, as this Court said in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 67 (1945). The Government evidently regards this statutory provision as "anti-competitive"; but surely that is an irrelevant contention when addressed to this Court rather than to the Congress.[23]

The Government also asserts that there may be "discrimination among motor carriers" by virtue of the railroads' right to enter into through routes with motor carriers only where the parties mutually agree (J.S. 10). Once again, the Government supplies no reference to any facts of record indicating there has been discrimination among motor carriers in establishing Plan I or Plan V services. But the more critical deficiency of the Government's contention is that, as in the case of the terminal trucking service question, the alleged "evil" exists by virtue of the decision of the Congress. Section 216(c) of the Act, as we have noted, puts motor-rail through route arrangements on a voluntary basis; and this Court stated in *Parker* both that 216(c) affords the only means of rail-motor coordination and also that arrangements resulting from that provision's

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23. See *American Trucking Associations* v. *United States*, 364 U.S. 1, 15 (1960):

> "Appellees say that these safeguards are no longer needed, because independent trucking is no longer an 'infant industry.' This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress."

The cited case involved an attempt by railroads to justify a broader incursion into the motor carrier field on the argument that changed conditions warranted lesser restrictions on rail affiliated motor carriers.

principle of voluntariness are harmonious with the National Transportation Policy. 362 U.S. at 72-73. In view of *Parker*, and indeed in view of the obvious implications of section 216(c), it cannot be said that the existing TOFC arrangements are offensive to the Policy where they have the incidents that the Congress has deliberately permitted.

The Government's remaining policy contention is that the inability of motor carriers to demand the use of rail "open tariffs" is "inconsistent with 'economical and efficient service' because it retards maximum utilization of rail carriage for the long haul" (J.S. p. 9). This argument, which represents a prediction respecting the impact of the "open tariff" rules, is wholly unsupported by the record. Moreover, it is fallacious on its face.

At the outset, it should be noted that under the rules the TOFC plans would have to be directly available to shippers before they could be used by motor carriers. Thus, the rules would not be opening a hitherto unavailable service to the shipping public.

Next, a determination respecting the extent to which motor carriers would utilize TOFC "open tariffs" turns essentially upon a finding as to the circumstances in which it would be to the motor carrier's—not to the shipper's—interest to do so, since under the rules the option whether to employ TOFC is exclusively the motor carrier's. There are many situations in which the motor carrier could use TOFC to its advantage and the railroads' disadvantage.

Between innumerable pairs of points the flow of traffic is unbalanced. Under such circumstances, motor carriers, water carriers, and railroads compete for the traffic and endeavor to handle the traffic with a minimum empty return of equipment. Under Rules 2 and 3, motor and water carriers would be enabled to operate a balanced service

over the road or waterway, tender the unbalanced portion of their traffic to the railroads, and thus cause the railroads' normal empty return problems to be aggravated as its competitors' problems are solved. The railroads' cost of performing TOFC service would be increased in proportion to the increased empty return problem.

In a similar fashion, the railroads' competitors would be enabled to solve their problems due to seasonal peaks in traffic, to winter or other unfavorable weather conditions, to mountainous or other difficult segments of their operations, to the tender of low density or other undesirable freight by shippers, and to many other problems. In each instance TOFC service would be shouldered with the motor carriers' ordinary operating burdens. This might increase the efficiency of the motor carriers but hardly of the TOFC service. "In short, the result . . . would be to protect the motor carrier from a form of competition beneficial to the shipping public while taking the benefits of the competitive struggle from the shipper and donating them to the motor carrier." Note, "Piggyback" Service Under the Interstate Commerce Act, 66 Colum. L. Rev. 318, 335 (1966).

Finally, it should be noted that, if the jurisdictional statements carry any implication that the motor carriers' economic health requires that they be authorized to use the railroads' "open tariff" TOFC service, such an implication would be without foundation. Between 1939 and 1960 the record shows that the railroads' proportion of the intercity freight ton-miles dropped from 62.34% to 43.51%, whereas the motor carriers' proportion increased from 9.72% to 22.50%. Moreover, the motor carriers' share of traffic was the more valuable. Thus in 1959 the total freight revenues of motor carriers reporting to the Interstate Commerce Commission was 80.27% of the total freight, mail and express revenues of all the railroads of the United States,

whereas the total ton-miles of such motor carriers were only 17.40% of the total railroad ton-miles. (Verified Statement 13-A-2, Kroll, Ex. 1, pp. 1, 5.)

CONCLUSION

The judgment of the District Court, insofar as it annulled, and enjoined enforcement of, Rules 2 and 3, should be affirmed.

Respectfully submitted,

PAUL R. DUKE
Attorney for Eastern Railroads

FRANCIS M. SHEA
WILLIAM H. DEMPSEY, JR.
WALTER J. MYSKOWSKI
W. GRAHAM CLAYTOR, JR.
WILLIAM D. MCLEAN
JAMES A. BISTLINE
Attorneys for Southern Railway, et al.

THORMUND A. MILLER
AMOS M. MATHEWS
J. D. FEENEY
ROBERT F. MUNSELL
Attorneys for Western Railroads

JAMES W. HOELAND
Attorney for Southeastern Railroads

APPENDIX

NAMES OF RAILROAD APPELLEES

Western Railroads

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago & North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Great Northern Railway Company; The Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Soo Line Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; The Western Pacific Railroad Company.

Eastern Railroads

The Baltimore & Ohio Railroad Company; Boston and Maine Company; The Chesapeake & Ohio Railway Company; Erie-Lackawanna Railroad Company; Grand Trunk Western Railroad Company; the New York, New Haven and Hartford Railroad Company; Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; Western Maryland Railway.

Southern Railway Company and Affiliates

The Alabama Great Southern Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; New Orleans and Northeastern Railroad Company; Georgia Southern and Florida Railway Company; Carolina and Northwestern Railway Company.

Southeastern Railroads

Atlanta & West Point Railroad Company; Atlantic Coast Line Railroad Company; Clinchfield Railroad Company; Florida East Coast Railway Company; Georgia Railroad; Gulf, Mobile and Ohio Railroad; Illinois Central Railroad; Louisville and Nashville Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railroad Company; The Western Railway of Alabama.

FILED
MAR 28 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~[illegible]~~ 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

REPLY TO MOTIONS TO AFFIRM

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
4112 San Jacinto Street
Dallas, Texas

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN
RICHARD R. SIMMON
1111 E Street, N. W.
Washington, D. C. 20004

Attorneys for Appellants

Of Counsel:

RICE, CARPENTER AND CARRAWAY
1111 E Street, N. W.
Washington, D. C. 20004

PETER T. BEARDSLEY
HARRY J. JORDAN
WILLIAM R. RUBBERT
F. G. FREUND
R. EDWIN BRADY
1616 P Street, N. W.
Washington, D. C. 20036

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C. 20004

JAMES E. WILSON
1785 K Street, N. W.
Washington, D. C. 20005

GUY H. POSTELL
1375 Peachtree Street, N.E.
Atlanta 9, Georgia

FERDINAND BORN
708 Chamber of Commerce Bldg.
Indianapolis, Indiana

GEORGE D. MICHALSON
P.O. Drawer 647
Kansas City 41, Missouri

Press of Byron S. Adams, Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 908

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

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REPLY TO MOTIONS TO AFFIRM

Pursuant to the provisions of Rule 16(3) of this Court, appellants American Trucking Associations, Inc., et al., file this reply to the motions to affirm filed by The Atchison, Topeka and Santa Fe Railway Company, et al. (railroad appellees) and by Acme Fast Freight, Inc., et al. (freight forwarder appellees).

1. The Court below struck down *two* rules promulgated by the Interstate Commerce Commission (Com-

mission), referred to as the "open-tariff" rules. This preliminary statement is necessary because both groups of appellees, while seeking affirmance of the rejection of both rules, devote their arguments to attempts to justify only the District Court's striking down the Commission's Rule 3, while ignoring Rule 2. The freight forwarder appellees say that the "core" of the Commission's rules is contained in Rule 3(a).[1] However, it is obvious that it is Rule 2 which embodies the Commission's stated goal "that TOFC service be made available to all at equal charges" (322 I.C.C. at 328)[2] and that Rule 3 is but a special application of that principle to motor and water carriers. Contrary to the freight forwarder statement, the core of the rules is Rule 2. The District Court acknowledged that "in considerable part the Commission's Rule 2 is merely a paraphrase of" Section 2 of the Act. (J.S. p. 35) However, it struck down both rules, primarily on the basis of the arguments by appellees which were not in fact directed to the content of Rule 2. On the basis of arguments about intermodal competition, the District Court rejected a rule which does not mention carrier relations, but merely restates the fundamental principle that common carrier service be made available to all at equal charges. In their motions to affirm, appellees chose to ignore this fundamental error in the District Court's opinion which is a basic issue in this appeal.

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[1] Although the railroad appellees refer to both Rule 2 and Rule 3 by number, their entire argument is concerned with Rule 3.

[2] A copy of the Commission's report is attached to appellants' jurisdictional statement as Appendix C. In that appendix and in references herein, the pagination of the official Commission report is used.

Appellees persist in their view, which the District Court adopted, that TOFC service is a rail service and that, therefore, motor carriers may not participate in it. Both motions to affirm quote out of context the statement in the Commission report that it had found in the *New Haven* case (*Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954)) that "trailer-on-flatcar transportation is in fact transportation by railroad."[3] Manifestly the Commission, in the quoted sentence, had reference only to a portion of the total TOFC transportation service because it clearly stated its view that—

> "*all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportaiton: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery." (322 I.C.C. at 329. Emphasis in original.)

Appellees' arguments that the "open-tariff" rules would permit motor carriers to invade a field of transportation not open to them under the structure of the Interstate Commerce Act are premised on this failure to recognize the bimodal nature of TOFC transportation. It colored their interpretation, and that of the District Court, of the Commission's holding in *Substituted Freight Service,* 232 I.C.C. 683 (1939), in which

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[3] Railroad motion to affirm at p. 7; freight forwarder motion to affirm at p. 9. This is a curious citation from the freight forwarders since it comes from that portion of the Commission decision which affirms the lawfulness of Plan I TOFC transportation, which the forwarders are appealing in Civil Action No. 4-355, *Lone Star Package Car Company* v. *United States* (N.D. Texas).

the Commission first stated that a person could not act as both carrier and shipper as to the same service. The Commission discussed *Substituted Freight Service* and the cases following it (322 I.C.C. at 331-34) and concluded that that statement was not intended to proscribe the type of substituted service intended by Rule 3:

> "What this language was directed at, as we understand it, was the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. Such a situation might occur were a carrier to tender a shipment to another carrier for transportation to a point it cannot serve or over a route it cannot use, or without providing in its tariff for the substitution." (322 I.C.C. at 333)

When a motor carrier is holding out as a carrier to perform its authorized service and provides in its tariff that, at its election but subject to shipper veto, it may substitute TOFC service for all or a portion of its line-haul service, it is not acting as a shipper or forwarder.

The Commission's rules require motor carriers to hold out only service that they are authorized to perform. In so doing, the motor carriers are not, by definition, holding out or engaging in freight forwarding service. The freight forwarder motion to affirm attemps to show a Congressional policy against the "open-tariff" rules. (pp. 6-9) The one clear expression of policy in Part IV of the Act is the definition of the term "freight forwarder" in Section 402(a)(5), 49 U.S.C. § 1002(a)(5), which excludes from its cover-

age a person holding out as a carrier subject to Part I, II, or III of the Act. Congress did not intend to embrace in the term "freight forwarder" a motor carrier, holding out as such and holding out only service it is authorized to perform, merely because it substitutes TOFC service for part of its line-haul.

Both groups of appellees refer to the failure of Congress to enact certain legislative proposals in 1962 and 1963 as indicating Congressional policy with respect to "open-tariff" TOFC service. (Railroad Motion to Affirm 3-4; freight forwarder Motion to Affirm 7-8). The District Court also referred to this "legislative inaction" as recognition and acceptance of a settled interpretation of the Act. (J.S. 50-51) Neither of the motions to affirm or the District Court opinion cites anything from the legislative history to show the reason for the legislative inaction. Congress did not give its reason or reasons. However, the failure to enact the proposed legislation may well have been occasioned by Congressional recognition that this proceeding was pending, a fact which was brought to the legislature's attention during the hearings.[4]

2. The railroad appellees contend that certain "policy justification" for the "open-tariff" rules discussed in the Government's jurisdictional statement are not supported by any findings by the Commission nor by any evidence of record. (p. 19) This

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[4] *Hearings Before Surface Transp. Subcom., Senate Com. on Com.*, 88th Cong., 1st Sess., sec. 43, pt. 2, at 801; *Hearings on HR. 4700 and HR 4701 Before House Comm. on Int. and For. Com.*, 88th Cong., 1st Sess., pt. 1, at 32.

"policy" argument ignores the factual context of the Commission's decision and the very purpose of its embarking upon the instant proceeding. As we noted in our jurisdictional statement (pp. 5-6), the recent sudden development of TOFC transportation had been without the benefit of Commission consideration of this combination rail-motor service on a factual record. For this reason, one of the stated purposes of this proceeding was a re-examination of the pronouncements of prior decisions in the light of modern developments. (322 I.C.C. at 322) The Commission stated that this proceeding afforded the opportunity to explore differences of opinion which had arisen as to the wisdom and correct application of past decisions and to consider some abuses in the performance of piggyback (TOFC) service which had been revealed. (322 I.C.C. at 323) Based upon the record developed, the Commission concluded that "it would be in the public interest to lay down, through formal rules, certain guidelines for TOFC service and practices." (322 I.C.C. at 323-24)

All four of the "policy considerations" assailed by the railroads relate to the matter of railroad domination of TOFC service, a fact that is evident in the report and which arose from past Commission decisions which permitted railroads to exploit this inherently bimodal service, while allowing them to exclude motor carriers from participation. The railroads contend that there is nothing in the report to support a conclusion that railroad domination of TOFC service is a fertile source of discrimination among motor carriers (p. 20), echoing their earlier statement that there is no evidence of record on railroad "refusals to cooperate." (p. 8) However, there are numerous examples of record of railroads refusing to hold out

Plan I arrangements with motor carriers,[5] holding such arrangements out only to their subsidiary motor carriers,[6] or holding them out only to certain specialized types of carriers[7] or under special conditions.[8]

This railroad domination of TOFC service and their ability to limit or exclude motor-carrier participation, which the District Court opinion would perpetuate, is anticompetitive. Appellees do not dispute the Commission's finding, supported by the record, that the railroads have used TOFC transportation to divert a substantial volume of traffic from other modes of transportation. (322 I.C.C. at 307, 322) As long as railroads retain the right to exploit this bimodal rail-motor service and the power to exclude motor carrier participation, they will continue to exclude motor carriers entirely, to exclude all but their own subsidiaries, or to permit motor-carrier participation only on a non-competitive basis.

The final railroad argument is a contention that, if the "open-tariff" rules were approved, motor carriers

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[5] See the Representations filed by Southern Railway Company, p. 1; Kansas City Southern Railway Co., p. 2; Chicago, Milwaukee, St. Paul & Pacific R. Co., p. 2; and the Verified Statements of New York Central R. Co., (Baylis), p. 15; Baltimore & Ohio R. Co., (Rettburg) p. 3; Western Maryland Ry., (Shafer) p. 2; Southern Railway, (Kirkman) pp. 8, 9 and (Burke) p. 2.

[6] See Representations filed by Chicago, Burlington & Quincy R. Co., p. 1; Denver & Rio Grande W.R. Co., p. 3; Saint Louis-San Francisco Ry. Co., p. 2.

[7] See the Representations of Atchison, Topeka and Santa Fe Ry. Co., p. 1 (only to auto haulers); Union Pacific R. Co., p. 2 (only to auto haulers).

[8] See the Representations of Southern Pacific Co., pp. 3-4 (only offered where there is no rate competition with Plan II).

would be able to aggravate the railroad peak traffic problem. (pp. 23-24) This is a highly speculative argument and the motion to affirm does not offer any factual support for its surmises about motor carrier action under the rules. In addition, this railroad argument represents an attempt to persuade the courts to furnish a judicial solution to an inherent operating problem in transportation. All transportation is subject to fluctuating demand or imbalanced movements which lead to peaks and valleys in traffic flow. The railroads already have this situation with respect to TOFC transportation and the adoption of the "open-tariff" rules would not aggravate it. Freight forwarders and shippers' associations are now permitted to use "open-tariff" TOFC service and in so doing are not obligated to observe the railroad traffic flow patterns. In large measure, the railroads are speaking of a situation which they, as well as all other carriers, are faced with today in varying degrees. The adoption of the "open-tariff" rules will not bring about any great infusion of new traffic to unsettle old patterns; it will merely give the motor carriers the opportunity to participate in this inherently bimodal service, which under prior Commission decisions the railroads and freight forwarders have been permitted to exploit to the motor carriers' detriment. Nothing in the Interstate Commerce Act justifies a common carrier refusing to handle certain traffic or selecting the members of the public it will serve in an effort to achieve a balanced traffic pattern.

The District Court acknowledged that Rule 2 is in effect a restatement of Section 2 of the Act and nothing in its decision or in the motions to affirm offers any justification for striking down a rule admittedly em-

bodying such a basic concept of common-carrier law. Rule 3 is no more than a special application of the Rule 2 concept to motor and water carriers. In order to sustain the rejection of Rule 3, it is necessary to show either that the basic rule is unlawful or that the Commission erred in adapting the basic premise to the carriers' relationship. This has not been done. Neither the District Court nor the appellees justify the rejection of Rules 2 and 3 by showing that the fundamental concept embodied in those rules is wrong. Nor have they shown that the Commission, in Rule 3, incorrectly applied this basic concept to motor and water carrier use of open TOFC tariffs.

The motions to affirm ignore the basic purpose of the Commission's proceeding and the justification given for its rules. The Commission recognized that trailer-on-flatcar service is inherently a bimodal service which permits the blending of both rail and motor service. In the *New Haven* case, *supra,* without a factual record to guide it, the Commission permitted railroads not only to engage in this bimodal service, but to control its use by motor carriers. Appellees do not dispute the Commission's finding that through the exploitation of TOFC service railroads have been able to divert a substantial volume of traffic from other modes of transportation, including motor carriers. Appellees seek to continue this rail domination of TOFC service which, if permitted will continue to be used to capture motor carrier traffic. The Commission's rules would do no more than give motor carriers the freedom to participate in this combination rail-motor service, not at the sufferance of their railroad competitors, but according to their ability to use it to provide efficient and economical transportation service to the public.

For the reasons stated, appellants respectfully request the Court to deny the motions to affirm and to give plenary consideration with briefs and oral argument.

Respectfully submitted,

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
4112 San Jacinto Street
Dallas, Texas

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN
RICHARD R. SIGMON
1111 E Street, N. W.
Washington, D. C. 20004

Attorneys for Appellants

PETER T. BEARDSLEY
HARRY J. JORDAN
WILLIAM R. RUBBERT
F. G. FREUND
R. EDWIN BRADY
1616 P Street, N. W.
Washington, D. C. 20036

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C. 20004

JAMES E. WILSON
1735 K Street, N. W.
Washington, D. C. 20005

GUY H. POSTELL
1375 Peachtree Street, N.E.
Atlanta 9, Georgia

FERDINAND BORN
708 Chamber of Commerce Bldg.
Indianapolis, Indiana

GEORGE D. MICHALSON
P.O. Drawer 647
Kansas City 41, Missouri

Of Counsel:
RICE, CARPENTER AND CARRAWAY
1111 E Street, N. W.
Washington, D. C. 20004

DATED: March 28, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

JOINT BRIEF
OF
AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
APPELLANTS IN NO. 57,

AND

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN,
APPELLANT IN NO. 59.

OPINIONS BELOW

The opinion of the District Court (R. 17) is reported at 244 F. Supp. 955. The report of the Interstate Commerce Commission (R. 795) appears at 322 I.C.C. 301.[1]

JURISDICTION

The judgment of the District Court was entered on August 20, 1965 (R. 44-45). American Trucking Association, Inc., et al., appellants in No. 57, filed their joint notice of appeal on October 15, 1965 (R. 46-49). National Automobile Transporters Association of Detroit, Michigan, appellant in No. 59, filed its notice of appeal on October 20, 1965 (R. 52-53). This Court noted probable jurisdiction on April 18, 1966. 384 U.S. 902 (R. 54). The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001, and sections 2, 3(1), and 216(c) of the Interstate Commerce Act, 49 U.S.C. §§ 2, 3(1), 316(c), are set forth verbatim in the Appendix, *infra,* pp. 41-43.

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission has the authority to promulgate rules providing (1) that trailer-on-flatcar or piggyback service offered under railroad open-tariff publications[2] must be made avail-

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[1] A copy of the Commission's report is incorporated in the record at p. 795. Citations to the report herein are to the page number in the report.

[2] That is, held out by lawfully published and filed tariff to the general shipping public.

able on the same terms to all who wish to use them, including motor and water common and contract carriers, and (2) that motor and water common and contract carriers may, subject to certain conditions, utilize trailer-on-flatcar or piggyback service under open rail tariffs in the performance of their authorized service.

STATEMENT[3]

The proceeding before the Commission represented that agency's "first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service."[4] (322 I.C.C. 303) On June 29, 1962, the Commission, on its own motion, issued a notice of proposed rulemaking (R. 55) instituting an investigation into trailer-on-flatcar (TOFC) or piggyback service, and named as respondents all railroads, motor carriers, water carriers, express companies, and freight forwarders, of property operating in interstate or foreign commerce, subject to the Interstate Commerce Act. The notice of proposed rulemaking made clear that the investigation was to be broad in scope, with the stated purpose of:

> ". . . ascertaining and determining, in the light of the national transportation policy, and the provisions of the Interstate Commerce Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided

[3] This statement is limited to those portions of the Commission's proceeding that are in issue in this appeal.

[4] The only prior consideration given by the Commission to the entire field of trailer-on-flatcar transportation, *Movement of Highway Trailers By Rail*, 293 I.C.C. 93 (1954), was a decision rendered without a factual record and before the recent dramatic growth of this form of transportation, discussed *infra*.

> and utilized by or for rail, motor. and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers, and of taking such other and further action as the facts and circumstances may justify or require." (R. 55-56)

The notice listed certain specific issues to be considered and determined, including, among others:

> "The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] TOFC rail rates and service in their operations." (R. 56)

A prehearing conference was held October 9, 1962, at which proposed rules (reproduced in Appendix II of the Commission's report, 322 I.C.C. 406-10) were distributed. No oral hearing was held, but opportunity was given to all parties to file representations, verified statements, and reply statements. An Examiners' report issued (R. 605 *et seq.*), and numerous parties filed exceptions to the report and replies to those exceptions. (Appendix I of the Commission report, 322 I.C.C. 405) After oral argument the Commission rendered its decision March 16 (served April 3), 1964. (R. 795)

Piggyback or TOFC service is defined as the movement on a railroad car of a freight-laden highway motor vehicle or the incidental empty movement of the highway vehicle on a railroad car. (Rule 500.1, Appendix IV of the Commission report, 322 I.C.C. 413.) Piggyback service permits the door-to-door movement of freight in a highway motor vehicle using transportation over steel rails, without the necessity of transferring the freight from the highway vehicle to a rail car and

back again. The freight is loaded into the highway vehicle—usually a semi-trailer—at the shipper's place of business, and is drawn over the streets and highways by a motor-vehicle tractor to the nearest railroad piggyback yard. There the trailer is detached from the tractor and loaded onto the rail flatcar, usually by means of a ramp. The trailer-laden flatcar is moved by rail to a piggyback ramp near the destination, where the reverse procedure occurs and the freight-laden trailer is moved over the streets and highways to the consignee's place of business for unloading.

As found by the Commission, piggyback service has developed in terms of five numbered plans[5] into two

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[5] The Commission's capsule definitions of these five plans (322 I.C.C. 304-05) are:

Plan I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

Plan II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

Plan III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

Plan IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

Plan V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

major classifications: (a) joint intermodal trailer-on-flatcar service in which traffic is moved jointly by a rail carrier and a motor or water common carrier pursuant to a negotiated agreement for the division of revenues, and (b) all-rail or open-tariff TOFC service which includes any piggyback service in which traffic moves exclusively at rail rates and on rail billing. (322 I.C.C. 319)

By use of open-tariff or all-rail TOFC service, both railroads and freight forwarders may provide the shipper with a door-to-door transportation service[6] without the necessity of unloading and reloading in transit. As a result, whereas the provision of a door-to-door service has historically been an identifying characteristic of motor carrier transportation, "all three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar." (322 I.C.C. 330)

Since all trailer-on-flatcar service, as the name indicates, involves a movement in part over steel rails, the railroad is a necessary party to the service and dominates and controls it. Under the open-tariff plan II,

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[6] Although plan II is the only open-tariff plan in which the railroad holds out by tariff to furnish more than a ramp-to-ramp service, the Commission noted that even though plans III and IV contemplate the use of trailers or flatcar-trailers combinations owned or provided by shippers rather than the railroads:

> "[A]s TOFC service has grown there has arisen the practice of trip leasing trailers and flatcars by individual shippers wishing to take advantage of the available, minimal-service, ramp-to-ramp rail rates, and of the fact that their responsibility for the trailer ceases at the end of a one-way trip, thus eliminating the cost of dead-heading an empty vehicle back home." (322 I.C.C. 313)

the railroad can perform the highway portion of transportation within its terminal areas[7] and provide a door-to-door transportation service without the participation of a carrier by another mode. Under open-tariff plans III and IV, the railroads may provide the ramp-to-ramp rail movement of trailers delivered to them and received from them by the shipper and consignee. Also under open-tariff plans III and IV, a freight forwarder may act as both shipper and consignee as to the rail movement and hold out a door-to-door transportation service to private shippers. Thus, both the railroads and the freight forwarders, through the utilization of trailer-on-flatcar transportation, may provide a complete door-to-door transportation service in competition with the independent motor carriers.

Motor carriers may participate in trailer-on-flatcar service under the intermodal plans I and V only at the sufferance of the railroads since, under the Act, through routes between motor carriers and railroads are permissive rather than mandatory.[8] Under past Commission decisions, motor carriers may not utilize the open-tariff trailer-on-flatcar plans.

Thus, prior to this decision, the railroads possessed the power to control the participation by independent motor carriers in trailer-on-flatcar service. The railroads have made effective use of this power to limit motor-carrier participation in the service. A number of the nation's largest railroads do not hold out inter-

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[7] Under the provisions of section 202(c)(1) of the Interstate Commerce Act, 49 U.S.C. § 302(c)(1).

[8] Section 216(c) of the Interstate Commerce Act, 49 U.S.C. § 316(c).

modal plan I service to motor common carriers or, where they do, hold it out only on limited types of traffic,[9] or only to their own subsidiaries.[10] No plan I service is provided in large areas in the country.[11]

The growth of trailer-on-flatcar service has been sudden and rapid. The Commission's report characterizes this growth as "explosive" in the five years preceding its publication (322 I.C.C. 305) and notes that carriers and shippers alike agree that trailer-on-flatcar service "has already established itself as an extraordinarily significant and valuable innovation on the trans-

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[9] See Verified Statement of R. H. Holter, Baltimore & Ohio R. Co. (R. 231); Representations of Kansas City Southern Ry. Co. and Louisiana & Arkansas Ry. Co. (R. 74); Statement of Chicago, Milwaukee, St. Paul and Pacific R. Co. (R. 94); Verified Statement of Arthur E. Baylis, New York Central R. Co. (R. 198); Verified Statement of Joseph A. Kirkman, Southern Ry. System (R. 268); Verified Statement of William C. Schafer, Western Maryland Ry. Co. (R. 267); Representations of Atchison, T. & S. F. Ry. Co. (R. 122) (On automobiles only); Representations of Burlington Lines (R. 105) (On motor vehicles only); Representations of Union Pacific R. Co. (R. 99) (On motor vehicles only). See statement of Southern Pacific Co. (R. 79-80. Plan I would not be offered to motor carrier offering rates lower than all-rail rates.)

[10] Representations of Denver and Rio Grande Western R. Co. (R. 125); Representations of Burlington Lines (R. 105) (Other than on motor vehicles, its plan I service is limited to a subsidiary motor carrier); Representatives of St. Louis-San Francisco Ry. Co. (R. 65-66).

[11] There is "no Plan I service of any type available between midwest points east of the tier of states of Wyoming, Colorado, and New Mexico, on the one hand, and, on the other hand, points in the states west thereof. Transcontinental railroads operating between the latter points have elected not to offer any form of Plan I service to motor carriers between such points." Pacific Intermountain Express Co., Supplemental Statement of W. S. Pilling (R. 123).

portation scene and that it has an almost unlimited future ahead of it." (322 I.C.C. 321) Even the dissenting Commissioner referred to the "remarkable growth" of trailer-on-flatcar service and characterized the service as "the brightest star in the transportation firmament." (322 I.C.C. 386) While recognizing certain limitations on the statistical information available to it, the Commission cited the following figures as evidence of the development of trailer-on-flatcar service in the five years preceding its report:

> "In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963 there were 100 class I roads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings, for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 loaded TOFC cars, a weekly rate of approximately 12,700 loadings." (322 I.C.C. 309)

Because of the sudden explosive growth of trailer-on-flatcar service, the Commission recognized the obvious gaps in its knowledge about the scope and impact of this service and the regulatory lag in dealing with it. Most of the decisions dealing with trailer-on-flatcar service were rendered before it achieved any significance on the transportation scene. A number of the prior decisions re-evaluated here by the Commission relate to motor carrier use of open-tariff trailer-on-flatcar service, and for this reason, a basic question throughout the Commission proceeding involves the concept of equal trailer-on-flatcar charges for all, including carriers by other modes. (322 I.C.C. 319)

The railroads and the freight forwarders objected to the proposal that motor carriers and water carriers be given the opportunity to utilize trailer-on-flatcar service and put forth a number of legal arguments which were fully dealt with by the Commission in its report. (322 I.C.C. 329-36) In dealing with these arguments, the Commission called attention to their failure to recognize the inherent bimodality of this transportation service:

> "What they overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery." (322 I.C.C. 329; emphasis in original.)

As a result of this inherent bimodality, all three—rail carrier, motor carrier and freight forwarder—are in a position to provide complete door-to-door service which, in essential characteristics, is substantially similar. (322 I.C.C. 330)

As a result of its conclusions, the Commission issued two rules relating to the availability of open-tariff TOFC service to all on equal terms.[12] As the Court

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[12] Rule 2 (designated in the report as 500.2) provides:

> "TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like

below found, Rule 2 is in considerable part merely a paraphrase of section 2 of the Act, 49 U.S.C. § 2 (R. 25), while Rule 3(a) relates to the specific application of the concept underlying Rule 2 to motor carrier, water carrier, and freight forwarder use of trailer-on-flatcar service.

Appellee railroads and freight forwarders brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, to challenge these rules. The District Court concluded that Rules 2 and 3 exceeded the Commission's authority and set them aside. It rested its decision on a number of grounds: that under the Interstate Commerce Act railroads may exclude motor carriers and water carriers from the public they are required to serve; that motor carriers are not authorized to use trailer-on-flatcar service without the railroads' consent; that the rules conflict with part IV of the Act which forbids any person to act as a freight forwarder without a permit issued by the Commission; and that the promulgation of the rules conflicts with a long line of prior Commission decisions which have become a settled interpretation of the Act.

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kind of traffic under substantially similar circumstances and conditions."

The essential portion of Rule 3 (designated as 500.3 in the report) is subsection (a) which provides:

> "Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier." (322 I.C.C. 413)

SUMMARY OF ARGUMENT

Trailer-on-flatcar service combines the ability of motor carriers to perform a door-to-door transportation service in the same highway vehicle and the railroad's ability to transport large volumes of freight over long distances at high speeds. Railroads have been utilizing this bimodal service to capture traffic which had previously been moving by other modes of transportation; however, under prior Commission decisions, motor carriers are barred from participating in trailer-on-flatcar service except at railroad sufferance.

In publishing its open-tariff rules, the Commission was carrying out its obligation under the National Transportation Policy to recognize and preserve the inherent advantages of each mode of transportation in administering the Interstate Commerce Act. It correctly concluded that the Congressional purpose could best be carried out and the highest degree of coordination achieved by permitting motor carrier use of this bimodal service without the intervention of railroad control. Viewing the Interstate Commerce Act as a whole, the Commission's decision here implements the basic obligation of common carriers by insuring that this recent, significant transportation development will be available to all persons who desire to use it on equal terms and without discrimination. Nothing in the Act provides an exception to this duty based on the fact that the person tendering the loaded trailer under a rail open tariff is a carrier by another mode.

On the other hand, nothing in the Interstate Commerce Act precludes a motor carrier from utilizing service under an open rail trailer-on-flatcar tariff for a portion of its authorized service. The Act does not bar a motor carrier from participating in this bimodal

rail-motor service, provided the shipper is given the option, as the Commission's rules require, to choose an all-highway movement. The Commission's authority to require continuous and adequate service is sufficient to protect against the motor carrier abandoning its highway service completely. The provision by a motor carrier of TOFC service through the utilization of an open-rail tariff does not constitute a holding out of joint through service by a motor carrier and the railroad whose tariff is utilized. The motor carrier holds out a complete door-to-door service to the shipper and the railroad's holding out is limited under its open tariff to the motor carrier.

The Commission's rules do not conflict with the provisions of part IV of the Act governing freight forwarders. Motor carriers have historically provided a consolidation and distribution service on less-than-truckload freight. Congress recognized that there were operational similarities between the service performed by motor carriers, among others, and freight forwarders, and specifically provided that in performing such services, the motor carriers were not acting as freight forwarders. Since the Commission's open-tariff rules permit motor carriers to hold out and furnish trailer-on-flatcar service only as an incident to their authorized service, the motor carriers do not thereby become freight forwarders.

The long line of Commission decisions which the District Court concluded constitutes a "settled interpretation" of the Act do not provide an analysis of the Commission's reasons for stating that a person may not act as both a carrier and a shipper as to the same service. The Commission's analysis of those cases here properly led it to find that they do not

preclude a motor carrier from utilizing service under open rail trailer-on-flatcar tariffs in the performance of its authorized service. The District Court's contrary holding would unduly restrict the Interstate Commerce Commission in carrying out its functions under the Act and the National Transportation Policy to respond to new developments in transportation as the need arises.

ARGUMENT

INTRODUCTION

Although the idea of transporting freight-laden highway vehicles on railroad cars is not new, trailer-on-flatcar or piggyback transportation was of relatively minor significance until the latter half of the 1950's. Since that time its growth has been explosive. (322 I.C.C. 305) As a result, most of the Commission's decisions dealing with the subject were rendered "during the infancy of this transportation prodigy . . . before anyone could have realized the important place TOFC service was destined to attain. . . ." (322 I.C.C. 322) The Commission concluded, therefore, that there was a need to re-examine its past decisions in the light of modern developments, and a need to fill in the gaps in its available knowledge about trailer-on-flatcar operations. (322 I.C.C. 322-23) Coupled with these needs were certain immediate and pressing problems which had arisen shortly before this proceeding was instituted, and which required solutions. These various factors led the Commission to the institution of this rulemaking proceeding.

Trailer-on-flatcar transportation does not fit into the conventional modal pattern which divides surface transportation into rail, motor, and water carrier service. Trailer-on-flatcar service, as its name suggests,

combines the inherent advantages of both rail and motor transportation. (322 I.C.C. 329) As a result of this inherent bimodality of trailer-on-flatcar service, the various modes of surface transport, as well as freight forwarders, by its use, can all provide transportation services which in physical characteristics are essentially similar. By this method, if not prohibited, the carriers can voluntarily achieve the intermodal coordination of transportation which Congress has declared to be one of the significant objectives of transportation regulation.

The recent phenomenal growth of trailer-on-flatcar service has not come about through any sudden infusion of new traffic into the national transportation system; rather it has resulted from railroad capture, through the use of trailer-on-flatcar service, of "a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." (322 I.C.C. 307) While the railroads have been able to make use of this bimodal rail-motor transportation operation to divert traffic from their motor carrier competitors, the motor carriers have been able to participate in trailer-on-flatcar transportation only to the extent that the railroads have been willing to permit. Under Commission decisions rendered before anyone was aware of the revolutionary potential of this transportation innovation, motor carriers are barred from participating in trailer-on-flatcar transportation through the utilization of service held out to the public under open rail TOFC tariffs.

In publishing regulations requiring railroads in their open-tariff publications to make trailer-on-flatcar service available on equal terms to all users, including motor and water carriers, the Commission was restat-

ing the basic obligation of common carriers to transport for all on equal terms without discrimination, and applying that obligation to this recent transportation development. In other words, an "open tariff" should not be a contradiction in terms, but should be available to the traffic of all shippers whether originated by one carrier mode or by another. The Commission's rules are designed to lay down certain guidelines for the future growth and development of trailer-on-flatcar service "and as a means of insuring that this recent and valuable transportation service is made available to all persons who are able to make effective use of it." (322 I.C.C. 324)

In holding that the Commission's rules must be struck down, the Court below would countenance the continuation of a significant departure from the common carrier obligation of the railroads. It reached this conclusion from a part-by-part search of the statute for specific provisions forbidding railroads to discriminate against motor carriers and authorizing motor carriers to utilize trailer-on-flatcar service. Not unsurprisingly, the Court could find no specific provisions dealing with this bimodal transportation phenomenon, the significant development of which occurred many years after the statutory provisions became effective. This interpretation, involving as it does rigid compartmentalization of the statute, "regardless of altered circumstances in the transportation industry" (R. 24), fails to give effect to the Commission's power and duty to administer and enforce the Interstate Commerce Act in accordance with the specific considerations set out in the National Transportation Policy.

This Court has recognized that Congress did not, in specific provisions of the Act, spell out in detail all of the obligations of carriers. Dealing with a similar intermodal problem in *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945), it said:

> "There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in [February 4] 1887, 24 Stat. 379, c 104, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system." (Citations omitted)

I. The Commission's Order Allowing Motor and Water Carriers To Utilize Open-Tariff Trailer-on-Flatcar Service Effectuates the National Transportation Policy

Congress has declared it to be the national transportation policy to provide for the fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each mode. (49 U.S.C. preceding §§ 1, 301, 901, and 1001) This Court has recently concluded that factors spelled out in the declaration of that policy are more than merely hoped-for ends and are operative

factors which are bases for regulatory action on an adequate record. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 761-62 (1963).

Almost from its inception on an experimental basis, trailer-on-flatcar service was designed to attract to the railroads traffic which theretofore had been moving over the highways by truck. In the 1930's, trailer-on-flatcar service was developed and designed "to induce trucking companies to ship their vehicles by rail instead of operating them over the highways." (322 I.C.C. 306) The early open-tariff service was "intended to attract traffic from all highway carriers, including for-hire motor carriers as well as private shippers operating their own trucks, and from freight forwarders." (*Ibid.*) In order to accomplish this, the railroads had to devise a service with the basic inherent advantages of truck transportation. Describing the first such service offered, the Commission said: "[I]t would provide a door-to-door delivery of less-than-carload freight in trailer units requiring no transfer of lading en route from shipper to consignee." (322 I.C.C. 305)

Although the use of TOFC transportation remained rather sporadic until 1954, its growth from that time has been "explosive." However, that growth has been in substantial part at the expense of the for-hire motor carriers. The Commission found that piggybacking has been a decisive factor in shifting to the railroads a substantial volume of traffic that previously had been moving by other modes of transportation and that while the growth of intermodal plan I has meant a direct growth in railroad participation in motor common carrier highway traffic, the growth of open tariff plans

III and IV has resulted in diversion of highway traffic from both the for-hire and private motor carriers. (322 I.C.C. 307-08) At the time of its report, however, the Commission did not have available sufficiently refined or reliable data to determine the precise extent to which railroad successes with piggybacking have meant actual diversion of traffic from competing modes of transportation. (322 I.C.C. 308) But the evidence does indicate that the major growth has been in the all-rail, so-called open-tariff plans in which carriers by other modes do not participate. At the prehearing conference, the Commission distributed a general summary of completed piggyback questionnaires. (R. 135-41) That summary shows that virtually all of the selected reporting railroads participate in plans II and III, and about three-fourths participate in plan IV—the three all-rail or open-tariff plans. Only "somewhat more than half" of the reporting railroads participate in the intermodal plans I and V, and traffic in plan V "generally is extremely limited." (R. 135-36)

The general findings regarding the direction of growth of trailer-on-flatcar transportation are borne out by the specific statistics of individual railroads. The Pennsylvania Railroad Company, probably the major railroad participant in plan I, transported an estimated 80,000 trailers in intermodal plan I service in 1962; however, in the same year it handled an estimated 120,000 trailers in plans II and III, the all-rail plans. (322 I.C.C. 307) In 1962, the Louisville and Nashville Railroad Company handled 6,712 trailers in plan II service and 8,618 trailers in plan III, while it handled 1,771 trailers in plan I service in 1961. (322 I.C.C. 307)[13] A representative of that company in a

[13] The Commission report gives the 1961 figure for plan I and 1962 figures for plans II and III.

verified statement in this proceeding averred that plan III is the fastest growing form of TOFC service on the Louisville and Nashville, and now represents a very substantial part of that railroad's total TOFC traffic. He went on to state that the potential traffic available for plan III service has not even remotely been developed and to express his company's belief that plan III service "will, within the foreseeable future, become a very important component of our overall traffic." (R. 258)

Trailer-on-flatcar service is a bimodal service combining the essential inherent advantages of both motor and rail transportation, but the railroads have used it during the recent years of its phenomenal growth as a competitive weapon to divert traffic from the for-hire motor carriers. While the railroads are free, without the help of motor carriers, to effect a bimodal TOFC transportation service over their lines, the motor carriers, on the other hand, cannot do so without the cooperation of the railroads. This inequality has been brought about because the railroads have been in a position to control, in large measure, motor carrier participation in trailer-on-flatcar service. In a line of decisions beginning with *Substituted Freight Service,* 232 I.C.C. 683 (1939), the Commission held that a motor carrier could not act both as a carrier and as a shipper as to the same service and, consequently, could not participate in trailer-on-flatcar service by utilizing rail open-tariff service. Thus, the motor carriers were limited to participation in trailer-on-flatcar service under one of the intermodal plans (I or V) which, under section 216(c) of the Act, require that a voluntary through-route, joint-rate arrangement be established with the participating railroad. As noted, *supra,*

many of the nation's largest railroads do not hold out intermodal plan I service to motor carriers [14] or hold it out only on a limited, non-competitive basis,[15] and in a major area of the country no intermodal plan I service is held out by any railroad.[16]

One result of the Commission's re-evaluation in this proceeding of past decisions was the opportunity to gain a clearer understanding of the nature of trailer-on-flatcar service and of its place in the transportation system. In these prior decisions, admittedly rendered during the infancy of piggybacking, trailer-on-flatcar service was viewed either expressly or implicitly as transportation by railroad. See the review in *Movement of Highway Trailers By Rail,* 293 I.C.C. 93, 98, 101 (1954). This view was no doubt encouraged by the fact that the question first arose before motor carriers were brought under federal regulation. For example, the Commission was of the view, prior to 1935, that it was improper for a railroad to publish rates which included line-haul transportation by highway which was then not subject to its regulation, *Drayage and Unloading at Jefferson City, Mo.,* 206 I.C.C. 436 (1935), although it approved the publication of rates applicable to the transportation of freight in highway trailers on railroad flatcars, which was intended to be used in conjunction with motor vehicle transportation over the streets and highways. *Container Service,* 182 I.C.C. 653 (1932); *Vehicle Container Rates in Southwest,* 196 I.C.C. 127 (1933).

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[14] *Supra,* n. 9.

[15] *Supra,* n. 10.

[16] *Supra,* n. 11.

In these early reports, the Commission's view of trailer-on-flatcar service as transportation by railroad resulted from the consideration of only that portion of the service which was subject to its jurisdiction—transportation by railroad under what is now part I of the Act. However, this tendency to consider only the rail portion of a transportation operation designed to embrace elements of both rail and motor transportation carried over into the decisions rendered subsequent to 1935, when part II of the Act, regulating motor carriers, was enacted. In *Movement of Highway Trailers by Rail, supra,* 293 I.C.C. at 100-01, the Commission, in this connection, referred to "a freight-laden trailer secured to a flatcar, which in turn is coupled in a train being drawn by a locomotive over steel rails laid on the railroad's right-of-way. . . ."

Considering in the instant case the entire field of trailer-on-flatcar transportation for the first time on an adequate record, the Commission recognized that it does not begin and end at the railroad ramp; the freight-laden trailer must be moved over the streets and highways from the shipper and to the consignee. The highway trailer is no less essential to the success of trailer-on-flatcar service than is the flatcar. From its beginning, the purpose behind the development of TOFC service was to provide a door-to-door delivery of freight without transfer of lading en route and the only way this could be done was to utilize a highway trailer as the basic transportation unit.[17]

As the Commission recognized in its report, the railroad control over motor carrier participation in this

[17] Or "the container portion of any highway truck, trailer, or semi-trailer having a demountable chassis. . . ." Rule 500.1, *Definition of TOFC Service.* (322 I.C.C. 413)

bimodal transportation service contravenes the requirement of the national transportation policy for fair and impartial regulation of all modes of transportation subject to the Act. By freeing the motor carriers of railroad control over their participation in trailer-on-flatcar service, the Commission intended to give the freest play to the inherent advantages of each mode through the encouragement of the highest degree of coordination and specifically concluded that such coordination is in the public interest. (322 I.C.C. 330) Such coordination is one of the designated ends of the National Transportation Policy.

Motor carrier participation in trailer-on-flatcar service unrestricted by railroad veto also accords with the National Transportation Policy requirement for the promotion of economic and efficient service and the fostering of sound economic conditions in transportation and among the several modes. By limiting motor carrier participation to non-competitive situations and by refusing it in other circumstances, the railroads are in a position to preclude the economic use of this service. By denying motor carriers the opportunity to provide this bimodal TOFC service, the railroads not only may cripple their competitors, but also may prevent them from furnishing the public the economical and efficient coordinated transportation contemplated by the Congressional policy.

In striking down the Commission's open-tariff rules, the Court below did not specifically consider the requirements of the National Transportation Policy, but concerned itself primarily with a section-by-section analysis of the Interstate Commerce Act for specific authority for or prohibition against the Commission's action. In the next section of the argument, we will

discuss the District Court's analysis of the specific provisions of the Interstate Commerce Act, and in the final section, we will discuss the Court's conclusion that a line of prior Commission decisions establishes a settled interpretation of the Interstate Commerce Act which is no longer open to re-evaluation by the Commission.

II. The Commission's Order Allowing Motor and Water Carriers To Utilize Open-Tariff Trailer-on-Flatcar Service Is Authorized by the Interstate Commerce Act

The basic premise of federal transportation regulation is the common carrier obligation to provide service to all who desire to use it on equal terms and without discrimination. This common carrier obligation is so fundamental that it is not set out in any one provision of the Interstate Commerce Act, but permeates the legislation. Among other provisions based on this common carrier obligation are section 1(4), 49 U.S.C. § 1(4), which makes it the duty of every common carrier subject to part I "to provide and furnish transportation upon reasonable request therefor . . ."; section 2, 49 U.S.C. § 2, which prohibits unjust discrimination through special rates, rebates, or other devices; section 3(1), 49 U.S.C. § 3(1), which prohibits undue or unreasonable preferences or prejudices; section 4, 49 U.S.C. § 4, the "long and short haul" provision, which prohibits a special form of rate discrimination; and section 6, 49 U.S.C. § 6, which requires the publication of schedules of rates, fares, and charges, and subsection (7) thereof which prohibits carriers from engaging or participating in transportation except under and in conformity with those published tariffs. And, of course, these provisions applicable to railroad common carriers have their counterparts in other sections of the law applicable to motor and water carriers, *e.g.*,

49 U.S.C. §§ 316(b), 316(c), 317(b), 905(a), 905(c), 906(c).

The implementation of this common carrier obligation was the Commission's basic premise: "that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers." (322 I.C.C. 319) Rules 2 and 3, the open-tariff rules, are designed to achieve that implementation in the field of trailer-on-flatcar transportation.

A. The Commission Has Statutory Authority to Promulgate the Rules

In reviewing the Commission's authority to issue the open-tariff rules making trailer-on-flatcar service available to the motor carriers, the District Court first looked to the Act both for specific statutory support in the form of a provision forbidding railroad discrimination against motor carriers in the services afforded, and the absence of any limitation against motor carrier use of open-tariff trailer-on-flatcar service. (R. 24) This emphasis on the *service* aspects of the rules arises from the Court's conclusion that "the ostensible object and effect of those [open-tariff] Rules is not to eliminate discrimination in rates under Section 2, but rather to compel the railroads to afford TOFC service to motor carriers if it is provided for others." (R. 26) However, the open-tariff rules are directed against both service and rate discrimination. Rule 2 not only provides that TOFC service, if offered in an open tariff, shall be made available to any person, but that it shall be provided at equal charges for the same service. Rule 3 provides for the specific application of the principle of Rule 2 to motor and water carrier

use of trailer-on-flatcar service under open-tariff rates published by rail carriers.

The District Court specifically considered sections 2 and 3(1) of the Act, 49 U.S.C. §§ 2, 3(1), as possible authority for the open-tariff rules and concluded that neither section offers such support, even though it acknowledged that in considerable part, Rule 2 is merely a paraphrase of section 2. (R. 25) The Commission, however, did not rest its promulgation of the open-tariff rules on specific affirmative provisions of any one section of the Act.

The District Court noted that sections 2 and 3 of the Act are complementary and are to be read *in pari materia,* but it did not go further and conclude that they must also be read in the context of other provisions of the Act relating to the common carrier obligation, nor did it recognize that the Commission's open-tariff rules are not limited to service discrimination but relate to rate discrimination as well. This Court has recognized the close interrelation between the duty to carry and non-discrimination in charges. In *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U.S. 235, 252-53 (1911), it said:

> "The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of

> the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation."

Earlier, in *Wight* v. *United States,* 167 U.S. 512, 517 (1897), the Court described section 2 of the Act as "designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another." See *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U.S. 144, 166 (1897).

The common carrier duty to serve all without discrimination is so fundamental to the entire transportation regulatory scheme that the burden rests with the carrier claiming the right to discriminate in derogation of that duty, to point to the specific statutory exemption which justifies such discrimination. The only justification considered by the District Court is the proviso of section 3(1) that the paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier. This proviso, enacted in 1940, was based on a similar proviso in section 216(d) of the Act, 49 U.S.C. § 316(d), enacted in 1935. In discussing the purpose of the proviso language in the earlier legislation, Senator Wheeler said:

> "Paragraph (d) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The

Committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.

"In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.

"*This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage. This contention is not well founded* in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons. However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5656 (Emphasis supplied).

This Court has uniformly held that common carriers may not find exception to their common carrier obligation under the Act in the nature or identity of the shipper, *Kansas City S. Ry.* v. *United States,* 282 U.S. 760 (1931); *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740 (1931); *Interstate Commerce Commission* v. *Baltimore & O. R. Co.,* 225 U.S. 326, 342 (1912), or in his relationship to the shipment, *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U.S. 235 (1911).

Rate discrimination and service discrimination are but two aspects of the same evil. To a person barred from using a common carrier service available to others, it makes little difference whether his exclusion

results from the assessment of an exorbitant charge or from a flat refusal to serve. The result in either case is the same. The suggestion that a common carrier may not discriminate in charges between persons it does serve, but that it may refuse service to certain shippers completely negates the entire concept of the common carrier obligation. And to permit that service discrimination, as the District Court would do, on the basis of the identity or nature of the shipper, runs directly contrary to this Court's holdings in *Kansas City S. Ry., etc., supra.*

B. The Open-Tariff Rules Do Not Conflict With Specific Provisions of the Act

In considering the arguments of appellees that the Commission's open-tariff rules conflict with specific provisions of the Act, the District Court concluded that the formal separation of the legislation into four modal parts, as well as the "internal logic" of the legislation, necessitate an equally sharp separation of the operations by each mode. (R. 30-31) The historic accident whereby the different modes were brought under federal regulation at different times would, under the Court's reasoning, prove a continuing barrier to their coordination. The Court's view of the statutory compartmentalization of transportation does not give recognition to the Commission's primary conclusion that trailer-on-flatcar service is a bimodal service, incorporating the basic characteristics of both rail and motor service.

Trailer-on-flatcar service, being essentially bimodal, is neither an exclusively rail service nor an exclusively motor service, and it cannot be made to fit the rigid modal pattern that the District Court would require. If, as the District Court found, carriers in each mode

are limited to transportation within and by that mode, absent special exception (R. 31), there is simply no place in the regulatory scheme for trailer-on-flatcar transportation. The District Court concluded that under the open-tariff rules, a motor carrier would be violating its certificate which authorizes it to engage in for-hire transportation by motor vehicle, not by rail or other modes. (R. 31) But railroads are authorized to engage in for-hire transportation by "railroad" [18] not by motor vehicle or other modes. When a railroad engages in trailer-on-flatcar service, utilizing a highway trailer, which moves partly on a flatcar over steel rails and partly over the streets and highways, providing a door-to-door movement of goods without transfer of the lading, it is not confining itself to transportation by railroad.

The District Court's view of the inviolable separation between the modes of transportation appears to preclude any technological development such as trailer-on-flatcar transportaiton which cuts across modal lines. Such a view would deprive the Commission of the power to regulate any such new transportation development except under specific statutory authorization and it would deprive the public of such service. Such a view is directly contrary to the view of this Court in *United States* v. *Pennsylvania R. Co., supra,* at 323 U.S. 616, that Congress cast the transportation legislation in broad terms, leaving the details to be spelled out in particular cases by the Commission and the courts in the light of the Congressional purpose to foster an efficient and fair national transportation system.

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[18] 49 U.S.C. § 1(1)(a)

The District Court's position that transportation must under the statute be compartmentalized, "absent special exception" (R. 31), led it to consider the through-route provisions of section 216(c), 49 U.S.C. § 316(c), as the only relevant exception. (R. 31) Viewing trailer-on-flatcar service as essentially a rail service, the Court accepted the argument of appellees that "requiring railroads to offer open-tariff TOFC service to motor carriers would amount to establishing compulsory *de facto* through routes" (R. 32), contrary to section 216(c).

As the Commission stated in response to those same arguments when made before it, what is a through route is a matter of fact. (322 I.C.C. 334) A through route can only come about by an arrangement between connecting carriers to form a continuous line of carriage. *Through Routes and Through Rates*, 12 I.C.C. 163, 166 (1907). In *Thompson* v. *United States*, 343 U.S. 549, 557 (1952), this Court said: "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." When a motor carrier utilizes trailer-on-flatcar service under a rail open tariff, there is no holding out by connecting carriers of through service. The motor carrier is simply holding out a complete origin-to-destination transportation service to its shipper, and the railroad does not join in that holding out. The railroad's holding out is limited to the rail movement described in its open tariff and should be available to the motor carrier and to anyone else who desires to use it.

The differences between motor carrier use of open-tariff TOFC transportation and a rail-motor through route arrangement are numerous and sharp. Under its

open tariff, the railroad holds out service at rates which it sets and on terms and conditions it specifies; under a through-route arrangement, the railroad and motor carrier hold out a joint service at rates and subject to terms and conditions jointly established by the railroad and motor carrier. Under the open tariff, the railroad's bill of lading contract is with the motor carrier and covers only that portion of the movement embraced in the open tariff; under a through-route arrangement, the railroad and motor carrier jointly hold out a complete origin-to-destination transportation service to the shipper. Under the open tariff, the railroad is liable to the motor carrier only for the portion of the movement covered by the open tariff; under a through-route arrangement, the railroad is jointly liable with the motor carrier for the proper performance of the through service.

All that would be involved in motor carrier use of the open-tariff rules would be the unilateral substitution by the motor carrier of trailer-on-flatcar transportation for all or a portion of the highway movement. The absence of a joint holding out of service is made clear in paragraph (b) of Rule 3.[19] Although the shipper has the right under the rule to veto the use of trailer-on-flatcar service, he has no right to demand it as he would if there were a joint holding out of that service.

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[19] Rule 3(b) provides:

"Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized." (322 I.C.C. 413)

The District Court assumed the existence of a *de facto* through route and devoted its discussion to the question of "compulsion." (R. 32-33) However, there is no through route involved; therefore, as the Commission found, there is no question of compulsion under section 216(c). (322 I.C.C. 335) The only question involved is whether a common carrier may be compelled to provide service held out in its published tariffs to all of the public on equal terms or whether it may select only that segment of the public it chooses to serve. An open tariff is one in which service is held out to the public with no qualification except that the user must meet the lawful tariff requirements. And nothing in the law authorizes a common carrier to pick and choose the persons it will serve. By striking down the open-tariff rules, the District Court would permit that form of discrimination to continue.

The District Court also concluded that the Commission's open-tariff rules conflict with the provisions of part IV of the Act governing freight forwarders. (R. 35) This conclusion is based on the Court's assumption that, under the rules, the motor carrier would "be permitted to confine its own service to the assembly and consolidation of the shipment, leaving the actual transportation to the railroad. . . ." (R. 35) However, the Commission made clear in its report that in utilizing trailer-on-flatcar service under open tariffs, the motor carrier must be operating as a carrier and must give proper notice to the public through its tariffs. It specifically stated that if the motor carrier should hold out to perform what may amount to only an assembly and distribution service and utilize the substituted service between points it may not serve in a practicable manner, it would no doubt be held not to be operating as a carrier. (322 I.C.C. 335)

The Commission called attention in its report to its power under section 204(a)(1) of the Act, 49 U.S.C. § 304(a)(1), to establish reasonable requirements with respect to continuous and adequate service, a requirement which is specifically incorporated in every motor common carrier certificate issued. It concluded that it has the necessary power to protect the interests of those who may be affected by a particular motor carrier's "overenthusiastic embracing of TOFC service," and that no further specific rule was necessary. (322 I.C.C. 365)

Here, also, the Court's conclusion rests on its assumption that the various modes of carriage are rigidly separated, an assumption we have dealt with above. Not only is there nothing in part IV which carves out an exclusive manner of operation for freight forwarders, but the existence of such an operating monopoly is specifically rejected by section 402(a)(5), 49 U.S.C. § 1002(a)(5). It defines the term "freight forwarder" to mean a person which "*otherwise than as a carrier subject to part I, II, or III*" of the Act holds out transportation service to be provided in a certain manner. The exclusory language expressly recognizes that there may be operational similarity between what is done by rail, motor, and water carriers and what is done by freight forwarders, but that such operational similarity does not make the rail, motor, or water carrier a freight forwarder. Contrary to the District Court's conclusion, a motor carrier does not become a freight forwarder merely because it utilizes trailer-on-flatcar service under open rail tariffs.

III. Prior Commission and Court Decisions Do Not Preclude the Promulgation of the Commission's Open Tariff Rules

The District Court also concluded that the Commission's open-tariff rules must fall because a line of decisions by the Commission and the courts now stand as a "settled interpretation of the Act" and preclude such rules. (R. 37-40) It should be observed that in 1939, long before trailer-on-flatcar transportation reached any substantial significance, and in a case in which the instant question was not directly before it, the Commission stated that a person may not act as both a carrier and a shipper as to the same service, *Substituted Freight Service,* 232 I.C.C. 683, 688-90. The statement was made in that case "without explanation or supporting precedent" (322 I.C.C. 332), and it was subsequently repeated in a number of decisions without any specific analysis of its meaning. In view of the total lack of reasoning to support this catch-phrase, it is difficult to understand the District Court's conclusion that it represents a "settled interpretation of the Act." (R. 40)

The Commission, in its report here, analyzed the *Substituted Freight Service* decision and those which followed it. (322 I.C.C. 330-34) It noted that the first time this statement was made (232 I.C.C. at 688) it was made in answer to an argument of certain railroads which were substituting *contract* motor carriage for their common carrier rail service that "neither they nor such contract carriers are or should be required to act as common carriers by motor vehicle in their relation to the public." In context, in *Substituted Freight Service,* the statement about acting as a carrier and shipper as to the same service is followed immediately by the further statement that either the railroad or the

motor carrier performing substituted service for it must have the necessary motor common carrier operating rights to perform the service. In the situation where the motor carrier was substituting rail service, the Commission said that the conflict could be corrected by bringing the service into conformity with the tariff provisions of the Act. The Commission concluded here that the statement in the earlier case condemning a person acting as a carrier and a shipper as to the same service was directed at the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. (322 I.C.C. 333)

The Court below acknowledged that few of the "consistent and repeated decisions" it relied on can be regarded as directly holding that motor carriers cannot lawfully avail themselves of the railroads' open-tariff trailer-on-flatcar service without railroad concurrence. (R. 37) In view of this and the total lack of support for the statement that a person cannot act as a carrier and shipper as to the same service in any of the decisions which repeat it, the "long line of cases" clearly does not represent a "settled interpretation of the Act," barring the Commission from a re-evaluation of the basis for those past decisions.

The Court buttressed its "settled interpretation" argument by referring to a similar principle established in *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (D.C.N.Y. 1940), aff'd *per curiam* 309 U.S. 638; and *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N.D. Ill. 1941), aff'd 314 U.S. 580. However, these cases which arose under the "grandfather" provisions of the Motor Carrier Act, 1935 (49 U.S.C. §§ 306(a) and 309(a)), relate to the necessity of an applicant for "grandfather" motor carrier

authority to show bona fide operations on and after the "grandfather" date. They hold that a person who is not himself engaged in operations as a carrier by motor vehicle may not, under the "granfather" provision, receive operating authority based on evidence of the motor vehicle operations of another person. Clearly, these cases do not support the conclusion that a carrier, operating as a carrier, may never substitute the transportation service of another.

The effect of the holding of the Court below is to force an undue rigidity upon the administrative process. It would compel administrative agencies either to withhold action for fear that future developments would call for a modification of such action or to force them into initial decisions which cannot subsequently be altered despite the impact of those future developments. It is directly contrary to the Court's conclusion in *Virginian R. Co.* v. *United States,* 272 U.S. 658, 665-66 (1926), that the courts are not concerned with alleged inconsistencies in findings in agency proceedings. The justification for Congressional establishment of administrative agencies is to permit the application of the law to meet new circumstances. With respect to the Interstate Commerce Commission, this Court has recognized that Congress has cast the regulatory provisions in general terms and has left it to the agency and the courts to spell out the contents of those terms in accordance with the National Transportation Policy. *United States* v. *Pennsylvania R. Co., supra,* at 323 U.S. 615.

This proceeding represents the first full-scale investigation by the Commission of "what is probably the most significant recent development in transportation." (322 I.C.C. 303) In the course of its investigation, the Commission re-evaluated prior decisions rendered before anyone could have appreciated the potential im-

pact of trailer-on-flatcar transportation. The Commission's decision represents a commendable effort to carry out the Congressional mandate to administer and enforce the Interstate Commerce Act "to the end of developing, coordinating, and preserving a national transportation system. . . ." The particular and obvious end objective here is intermodal coordination. Unless the Commission is free to respond to new developments when the need for their regulation arises, it will necessarily fail to carry out the Congressional purpose and will frustrate its justification for being.

Trailer-on-flatcar service has produced a substantial upheaval in the national transportation system. It has obliterated the historic lines of physical demarcation between modes of transportation and has enabled railroads, motor carriers, and freight forwarders to provide what amounts to essentially similar transportation service—a coordinated service which combines the inherent advantages of both rail and motor service. When questions regarding the recent use of this new bimodal service came before the Commission in *Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954), without a record of past operations and without any reasonable basis for forecasting the future impact of this rail-motor service, the Commission approved the railroad use of it.[20] Through its exploitation,

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[20] In *Movement of Highway Trailers By Rail,* the motor carriers argued that the ability to provide a door-to-door transportation service in a single vehicle without rehandling of the cargo is the primary inherent advantage of motor carriers which Congress intended to preserve to them. They contended that trailer-on-flatcar service which embodies such a door-to-door movement in a highway trailer requires operating authority under the motor-carrier provisions of the Act. (293 I.C.C. at 97, 100) The Commission rejected this argument, as noted above, because it considered only the movement over the steel rails instead of the total door-to-door movement which TOFC service is designed to provide. (293 I.C.C. at 100-01)

the railroads have been able to divert a substantial quantity of traffic from competing modes of transportaiton including the for-hire motor carriers. (322 I.C.C. 307, 322). They have accomplished this by avoiding the limitations inherent in railroad operations, and are thus in a position to offer shippers a complete door-to-door movement of freight in the same highway vehicle without interchange of lading en route—the primary inherent advantage of motor carriers. Through the use of trailer-on-flatcar service, the railroads are no longer confined to service at points adjacent to the railroad tracks, but can extend their service over the streets and highways to the doors of shippers and consignees everywhere.

As a result of prior Commission decisions, railroads were not only able to utilize the inherent advantage of motor carriers to take traffic from them, but were also in a position to bar motor carrier use of this service except at rail sufferance, thereby depriving the public of an efficient and economical service. In the instant proceeding, the Commission, recognizing the bimodal nature of trailer-on-flatcar service, has moved in the direction of restoring the competitive balance by concluding that motor carriers may participate in trailer-on-flatcar service through the use of rail open-tariff rates. The decision assures that motor carrier use of this bimodal rail-motor service will not be subject to rail veto.

The decision of the Court below resulted from a rigid formalistic interpretation of the legislation which it felt constrained to follow "regardless of altered circumstances in the transportation industry." (R. 24) It failed to give weight to the Commission's power and duty to administer and enforce the provisions of the Interstate Commerce Act in the light of the specific

declaration of policy which precedes it. In its decision, the Commission acted in full accord with the mandate of that policy to provide for the fair and impartial regulation of all modes of transportation subject to the Act.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed and the Commission's Rules in issue sustained.

Respectfully submitted,

PETER T. BEARDSLEY
HARRY J. JORDAN
R. EDWIN BRADY
ALBERT B. ROSENBAUM
1616 P Street, N.W.
Washington, D. C. 20036

BRYCE REA, JR.
1329 E Street, N.W.
Washington, D. C. 20004

JAMES E. WILSON
1735 K Street, N.W.
Washington, D. C. 20005

GUY H. POSTELL
1375 Peachtree Street, N.E.
Atlanta 9, Georgia

FERDINAND BORN
708 Chamber of Commerce Building
Indianapolis, Indiana

GEORGE D. MICHALSON
P. O. Drawer 647
Kansas City 41, Missouri

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

Of Counsel:

RICE, CARPENTER AND CARRAWAY
1111 E Street, N.W.
Washington, D.C. 20004

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
4112 San Jacinto Street
Dallas, Texas

GEORGE S. DIXON
One Woodward Avenue
Suite 1700
Detroit, Michigan 48226

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN

RICHARD R. SIGMON
1111 E Street, N.W.
Washington, D. C. 20004

Attorneys for Appellants

APPENDIX

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SPECIAL RATES AND REBATES PROHIBITED

Sec. 2 [*As amended February 28, 1920, June 19, 1934, and August 9, 1935*]. [*49 U.S.C. § 2.*] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, col-

lects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

PREFERENCE; INTERCHANGE OF TRAFFIC; TERMINAL FACILITIES

Sec. 3. [*As amended February 28, 1920, March 4, 1927, August 9, 1935, August 12, 1935, September 18, 1940, August 2, 1949.*] [*49 U.S.C. § 3.*] (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

Sec. 216 [*August 9, 1935, as amended June 29, 1938, and September 18, 1940.*] [*49 U.S.C. § 316.*]

* * * *

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common

carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 60

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 17) is reported at 244 F. Supp. 955. The report of the Interstate Commerce Commission (R. 795) appears at 322 I.C.C. 301.[1]

JURISDICTION

This was a proceeding before a three-judge federal district court under 28 U.S.C. 1336, 2284, 2321–2325 to set aside orders of the Interstate Commerce Com-

[1] A copy of the report is bound into the record at R. 795.

mission promulgating certain rules. The final judgment of the district court (R. 44) was entered on August 20, 1965. On October 18, 1965, the United States and the Interstate Commerce Commission filed a joint notice of appeal (R. 50). This Court noted probable jurisdiction of the appeal on April 18, 1966 (R. 54, 384 U.S. 902). The jurisdiction of this Court to review the judgment below on direct appeal rests on 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within the lawful scope of its authority in ruling (1) that railroads which offer "piggyback" (trailer-on-flatcar) service to the shipping public must offer it on the same terms to motor carriers; and (2) that, subject to certain restrictions, motor carriers are entitled to utilize rail piggyback service in the performance of their authorized service.

STATUTE AND RULES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, 1001, 1231, and Sections 1(4), 2, 3(1), 12(1), 216(c) and 402(a)(5) of the Interstate Commerce Act, 49 U.S.C. 1(4), 2, 3(1), 12(1), 316(c), and 1002(a)(5); and Interstate Commerce Commission Rules 500.1–500.3; 49 C.F.R. 500.1–500.3 (Supp. 1966), are printed in the Appendix, *infra,* pp. 69–75.

STATEMENT

This case involves the legality of two of the basic rules that the Interstate Commerce Commission has prescribed to regulate the transportation of freight by "piggyback" (also known as trailer-on-flatcar, or TOFC, service). The essence of the service is the movement on railroad flatcars of laden truck trailers.

1. BACKGROUND AND GROWTH OF PIGGYBACK

Subject to qualification depending on the nature of the commodity and the origin and destination of the shipment, it is generally accepted that *large* quantities of freight can usually be moved most cheaply over *long* distances by rail. See, *e.g.*, S. Doc. No. 152, 73d Cong., 2d Sess., p. 17. However, rail transportation has obvious limitations. Many shippers and consignees are not located on railroad spur tracks, and—without piggyback—moving their freight by rail requires delivery to the railhead, transfer to railroad cars there, and, at destination, retransfer to trucks for delivery. Moreover, when less-than-carload shipments are involved, frequent delays are experienced while awaiting additional freight to fill up the railroad car. Because of these problems, motor carriers have been able to compete successfully for long-haul freight business. See *Coordination of Motor Transportation,* 182 I.C.C. 263, 336. The motor carrier is able to pick up freight at the shipper's establishment and carry it in a single movement direct to the con-

signee's door. Thus, depending on the size of the load, the distance traveled, and the existence of rail sidings at either or both ends of the haul, truck service is often as efficient, and frequently faster, than railroad freight service.[2]

The competitive balance between the railroad and the truck has been altered by the development and growing utilization of the piggyback technique (322 I.C.C. at 307–308, 322 (see n. 1, *supra*, p. 1)), which combines the

[2] The Commission has summarized the advantages of truck transportation as follows (*Coordination of Motor Transportation*, 182 I.C.C. 263, 301):

> The advantages of truck transportation from a service standpoint are to be found mainly in the speed, the completeness, and the flexibility of the service rendered. The area in which the truck has most effectively supplanted rail traffic is that which can be served one or more times during the day; the area within which overnight delivery can be made is a fertile field for the truck; to points more distant the service advantages of the truck are lessened until a zone of indifference or disadvantage is reached. Coupled with this phase of service is the ability or willingness of truck operators to take shipments at a later hour than the railroads ordinarily do and yet make earlier morning delivery.
>
> In the case of some shippers an even greater advantage of truck transportation is the completed service it renders. Only one transportation agency needs to be dealt with for given shipments and pick-up and delivery service is usually provided. There is also more flexibility about truck than rail service in moving emergency and irregular shipments. Special efforts are made to meet any unusual requirements of an industry or a shipper. Secondary factors favoring truck transportation are the more personal contacts between shipper and truck representatives than prevail between shipper and railroad, the less formal procedure, and, in some cases, the possibility of combining selling with transportation functions.

speed, flexibility and small-load advantages of door-to-door truck service with the line-haul efficiency of the railroad. Now, a trailer loaded by a shipper can be driven to the railroad yard, transferred directly to a flatcar for line-haul movement, and, at destination, driven off to the consignee (322 I.C.C. at 310–312). Delays from, and the high manpower cost of, transferring freight from trailer to boxcar and back to trailer again are eliminated. We do not suggest that piggyback is always a more efficient mode than all-truck or all-rail service. None, however, disputes that for many movements involving relatively long hauls this is so. As noted in a study of the Commission's Bureau of Economics:[3]

> The rapid growth of piggyback has been largely the result of its effectiveness in meeting the need for coordinating rail and motor services. Piggyback combines the advantages of movement by truck with the long-haul economies of rail or water transport, under conditions which hold total expense to a minimum. These factors have placed railroads and water carriers in a position to compete for traffic at locations not directly served by them and have made available to motor carriers the low-cost advantages of intermediate rail hauls or water movements over substantial distances, where agreements have been made with the rail or water carriers.
>
> Shippers have benefited from higher standards of service, reduction in the loss and

[3] *Piggyback Traffic Characteristics* (1966), pp. 16–17.

damage associated with successive handlings of freight, and often reduced rates. Manufacturing has experienced since World War II expansion in highly processed products, which in turn have generated a growing demand for specific types of transportation services. Products of high value per unit of weight, subject to frequent changes in design, and requiring minimum inventory levels generate a demand for premium-quality transportation. Piggyback becomes increasingly important as a growing segment of industry becomes more concerned with availability of premium-quality transport service, rather than with minimum cost. TOFC service can "free" industry from commitments to particular locations formerly necessary to obtain the benefits of low cost transport from one mode, e.g., an industry need not locate on a rail siding to make use of rail transportation of merchandise traffic.

In recent years piggyback service has expanded rapidly, and it is now a major factor in the transportation industry.[4] Its annual growth rate in the last decade has been approximately 15 percent, and no leveling off is yet in prospect (*Railway Age,* Aug. 1,

[4] In 1957, some 57 Class I railroads published piggyback tariffs; in mid-1963, 100 railroads did so (322 I.C.C. at 309). Annual railroad piggyback revenues now exceed $300 million (I.C.C. Bur. of Econ., *Transport Economics*, Nov. 1965, p. 1), and even greater expansion is indicated. In 1955 the 32 railroads that reported offering piggyback had 168,150 piggyback carloadings (322 I.C.C. at 309); in 1965, the 63 reporting railroads had 1,031,000 carloadings (Assn. of American Railroads, Car Service Div., Cir., CS–54A, January 1, 1966). Since a car is usually loaded with two trailers, this means that almost two million trailers moved by piggyback in 1965.

1966, p. 33). This dynamic growth has, however, created formidable regulatory problems. Central among them is the question of the right of motor carriers to participate fully in this new service.

2. MOTOR-CARRIER PARTICIPATION IN PIGGYBACK

In 1926, in response to motor-carrier competition, the Chicago North Shore & Milwaukee Railroad inaugurated door-to-door railroad piggyback service between Chicago and Milwaukee. In the 1930's, other railroads offered piggyback service on an experimental basis to motor carriers as well as to shippers. The experience of most railroads in piggyback was very limited, however, until 1954, when the Commission gave approval to a number of slowly developing practices. See *Movement of Highway Trailers by Rail,* 293 I.C.C. 93. Thereafter, piggyback began its intensive growth and development, but along separate paths for motor carriers and conventional shippers. (322 I.C.C. at 305–308.)

Some motor carriers entered into classic joint through route arrangements with various railroads. More frequently, however, they employed the railroad as an intermediate or "bridge" carrier for traffic originated and delivered by them under their own tariffs and bills of lading. In both cases, the railroads received as compensation an agreed-upon division of the revenue (*id.* at 306).

In addition to these joint intermodal arrangements, the railroads began to offer open-tariff service, but only to conventional shippers and freight forwarders

(*id.* at 306). Initially, door-to-door service, using railroad trucks for pickup and delivery, was stressed (*id.* at 311). More recently, emphasis has been given to ramp-to-ramp service. The shippers here must provide their own trailers, but in practice they often lease them from the railroad. Frequently the leases are for the loaded outbound portion of the trip only or the railroads lease back the trailer for the usually empty return trip (*id.* at 312–316). Railroads have also begun offering shippers various accessorial services—some not covered by tariffs—such as free or low-cost trailer loading and pickup and delivery (*id.* at 317). In these ways, the railroads independently offer shippers various door-to-door piggyback services.

In all, five basic piggyback arrangements have evolved (*id.* at 309–312):

Plan I: The shipper's property is transported by trailer, at the motor carrier tariff rate and on the motor carrier's bill of lading; but, by agreement with the railroad, the motor carrier substitutes piggyback rail movement for the line haul.

Plan II: Under its tariffs, the railroad offers its own trailers or containers to shippers for door-to-door service, using piggyback for the line haul.

Plan III: Under its tariffs, the railroad offers to haul trailers owned by others from railhead to railhead at a flat charge, without pickup or delivery.

Plan IV: Under its tariffs, the railroad hauls a trailer or container-loaded flatcar, furnishing only power and rails.

Plan V: The shipper's property is transported door-to-door by trailer under a joint rail-motor rate negotiated by the rail and motor carrier. The property moves on a rail or motor bill of lading, depending upon which carrier originates the shipment.

Plans I and V are joint intermodal plans. The former covers substituted service in which the railroad acts as a bridge carrier; the latter, the classic joint through route arrangement. Plans II, III and IV are open-tariff plans. Under Plan II the railroads offer a door-to-door service, frequently using their own trucks and trailers.[5] Under Plans III and IV they offer ramp-to-ramp service only, but in practice they often provide, through trailer leasing and the provision of local pickup and delivery, an all-rail door-to-door service. Freight forwarders, using these open-tariff plans, offer similar door-to-door piggyback service.

Thus, while motor carriers are traditionally the mode of transportation providing door-to-door service by highway trailer, "all three—rail carrier, motor carrier, and freight forwarder—* * * today provid[e], through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail" (322 I.C.C. at 330).

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[5] Railroads may provide their own incidental truck service within "terminal areas." 49 U.S.C. 302(c)(1).

There is one significant difference, however. While railroads are themselves able to provide shippers, without the assistance of the motor carriers, a complete piggyback service, motor carriers desiring to provide such service must utilize the facilities of a railroad in every instance (*id.* at 327).

While the piggyback plans developed in the 1930's were designed by the railroads "to induce trucking companies to ship their vehicles by rail instead of operating them over the highways" (*id.* at 306), piggyback service did not follow in the 1950's the course of mutually beneficial rail-motor cooperation that these beginnings presaged (*id.* at 308–309, 323).

The root of the problem was the suggestion by the Commission in 1939 in *Substituted Freight Service,* 232 I.C.C. 683, that a motor carrier could not act as both a common carrier by motor vehicle and as a shipper by rail. This suggestion was taken by many as prohibiting motor carriers from using rail open-tariffs. Motor-carrier use of such tariffs continued to a limited extent (see, *e.g., Gordon's Transports, Inc.* v. *Strickland Transp. Co.,* 318 I.C.C. 395, 396–397, sustained *sub nom. Strickland Transportation Co.* v. *United States,* 219 F. Supp. 618, 620 (N.D. Tex.)), but for the most part rail-motor coordinated service shifted to voluntary Plan I and Plan V arrangements, which the railroads could, of course, refuse to enter into.

Furthermore, the railroads discovered in the late 1950's and early 1960's that all-rail piggyback service could capture from the motor carriers, if they were denied equivalent piggyback service, large volumes of traffic that long had moved over the highways (322

I.C.C. at 307–308). As a result, although the nation's largest and most strategically situated rail carriers increasingly offered open-tariff piggyback plans, many declined to offer any Plan I substituted service, under which most motor carrier piggyback traffic moves. Among these roads were the Atchison, Topeka & Santa Fe (with an exception for auto haulers) (R. 122); the Baltimore & Ohio (R. 231); the Chicago, Milwaukee, St. Paul & Pacific (R. 94); the Kansas City Southern (R. 74); the New York Central (R. 198); and the Southern Railway system (R. 61). Other railroads offered Plan I service only to their own subsidiary motor carriers (R. 65, 88, 105, 125). In some regions of the country, no service was made available by any of the railroads. Various motor carriers complained to the Commission that there was no transcontinental piggyback service (R. 63, 123),[6] and "no Plan I service of any type available between Midwest points east of the tier of states of Wyoming, Colorado, and New Mexico, on the one hand, and, on the other hand, points in the states west thereof. Transcontinental railroads operating between the latter points have elected not to offer any form of Plan I service to motor carriers between such points" (R. 123).[7]

Those railroads that did offer Plan I service generally asserted the right to pick and choose among

[6] Union Pacific now furnishes Plan I transcontinental piggyback service.

[7] Railroad reluctance to enter into cooperative arrangements with motor carriers is evidently a long-standing problem in the transportation industry. See Locklin, *Economics of Transportation* (6th ed.), p. 868.

the motor carriers. The factors considered included the interest in preventing motor-carrier piggyback rate competition with the railroads' own Plan II door-to-door service (R. 79–80).

Studies revealed that among Class I railroads, "plan II was being provided by the greatest number of railroads, followed closely by plan III. Plans I and IV ranked third or fourth, depending upon the survey used." Of 59 railroads asked to rank their plans as to fastest growth, "[p]lan III was placed in that category by 27 roads, plan II by 25 roads, plan I by 6 roads, plan V by 1 road, and plan IV by no roads."[8] I.C.C. 76th Ann Rep. (1962), pp. 87–88. Thus piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads.[9]

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[8] For example, the Pennsylvania Railroad, one of the largest Plan I carriers, instituted Plan II service in 1954 and Plan III in 1959. By 1962, although the Pennsylvania carried 80,000 motor carrier trailers in Plan I service, its burgeoning Plan II and Plan III service had far surpassed that figure with a total of 120,000 trailers (R. 222). Similarily, the Louisville and Nashville Railroad inaugurated Plan II in 1955 and Plans I and III in 1960. Its comparative results for January through August of 1962 were 1,590 trailers of motor carriers in Plan I service and a total of 15,330 shipper trailers in Plans II and III (R. 614).

[9] By 1965, a minimum of 42 percent of all piggyback shipments were found to be moving under plans in which the railroads directly or indirectly performed or provided the *entire* movement; motor carriers participated in only 28 percent. I.C.C. Bur. of Econ., *Transport Economics*, November 1965, p. 1. By contrast, in 1960 motor carriers had participated in 31.7 percent of piggyback movements, *Railway Age*, November 28, 1960, p. 25. Figures for 1965 further show that 934,590 highway trailers were transported wholly by railroads in that year; motor-carriers participated in the movement of only 199,174.

In February 1962, the American Trucking Associations, during oral argument to the Commission in the *Gordon's Transports* case (*supra*, p. 10), made a strong plea that motor carriers be allowed to utilize piggyback open-tariffs (Plans III and IV). The Associations contended that the railroads had demonstrated their intention not to enter into joint intermodal piggyback service with the motor carriers and had thereby "foreclosed" them from such service. *Transport Topics*, February 12, 1962, pp. 1, 13. The Associations pointed out (*ibid.*):

> The motor carriers frequently find themselves in the paradoxical position of being the only persons or carriers who or which are barred from using piggyback service. * * * This ironic turn of events does not conform to the purposes of the National Transportation Policy.

On April 5, 1962, President Kennedy sent a transportation message to Congress calling for legislative action to "assure all carriers the right to ship * * * on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers." H. Doc. No. 384, 87th Cong., 2d Sess., p. 5. Secretary of Commerce Hodges transmitted to Congress proposed legislation to implement the President's message. Hearings before the Senate Committee on Commerce, 87th Cong., 2d Sess., pt. 1, p. 13; see, also, Hearings before Surface Transp. Subcomm. of the Senate Committee on Commerce, 88th Cong., 1st Sess., pt. 1, p. 3.

The rail figure represents an increase of 16 percent over the previous year, while the motor carriers' total increased only 5 percent. I.C.C. Bur. of Econ., *Transport Economics*, March 1966, p. 3.

3. THE COMMISSION PROCEEDING

It was at this juncture that the Commission, on June 29, 1962, instituted, on its own motion, its "first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service." Ex Parte No. 230, *Substitute Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 303. It advised Congress of its action and of its intention to "resolve" the matter, or if it could not, to recommend appropriate legislation. Hearings before Surface Transp. Subcomm. of the Senate Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., § 43, pt. 2, p. 801; Hearings on H.R. 4700 and H.R. 4701 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., pt. 1, p. 32. The Commission's statement was followed by requests from the industry that Congress withhold legislative action pending the Commission's decision in this proceeding. See, *e.g.*, Hearings on H.R. 4701, *supra*, pt. 1, p. 231, pt. 2, p. 991. No further action on the Administration's proposal was taken by Congress.

The Commission's notice of proposed rule-making announced that the proceeding would embrace every aspect of piggyback operations, including "[t]he extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] rail rates and service in their operations" (R. 56). Representatives of every interested group, including

freight forwarders, railroads, motor carriers, water carriers, shipper interests, and various government agencies, participated in the proceedings. Two hearing examiners jointly prepared a recommended report and an order containing recommended rules (R. 607, 751). Their recommendations did not, however, require railroads to enter into joint-intermodal arrangements or to make open-tariff service available to other modes.

Exceptions to the examiner's recommendations were filed, and the Commission requested the parties to discuss (among other things) "[w]hether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight forwarders, express companies, and common and contract motor and water carriers, exempt or regulated)" (R. 792). All agreed that voluntary coordination of intermodal service should be encouraged. The freight forwarders, however, argued that voluntary substituted rail service between points a motor carrier is certificated to serve, typical of Plan I, was not legal (R. 625). And both the railroads and the freight forwarders opposed any use by motor carriers of rail piggyback open-tariffs (322 I.C.C. at 329).

In its final report, the Commission observed that "*all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation" (*ibid.*, emphasis in original), and stated that it is "obvious to us that the inherent advantages of each mode of transportation can be given freest play through the

highest degree of coordination, and that encouragement of such coordination is in the public interest" (*id.* at 330). Coordinated service would confer benefits on both the rail and motor carriers and, "most important," on the "shippers and the general public which ultimately reap the benefits of the increased efficiency and economy" of such service (*id.* at 322). For these reasons the Commission concluded that motor carriers should be and legally were permitted to utilize piggyback open-tariffs "in lieu of their all-highway operations in the performance of authorized transportation between authorized service points" (*id.* at 336).

On the basis of these findings, the Commission promulgated two rules, numbered 2 and 3 (App., *infra*, pp. 74–75). Rule 2 (49 C.F.R. 500.2; 322 I.C.C. at 336) provides that "TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The core of Rule 3 (49 C.F.R. 500.3; 322 I.C.C. at 337) is a provision that motor carriers "may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier."[10]

[10] The Commission promulgated other rules, relating to incidental aspects of piggyback service, which were also challenged below. The district court sustained them and they are not in issue in this appeal, although the rules governing equipment leasing have been challenged in *New York Central R. Co.* v. *United States*, No. 58, this Term, appeal pending.

In adopting these rules, the Commission emphasized that piggyback is still developing and that "whatever we do here will not be the final and definitive word on all the ramifications of piggyback service" (322 I.C.C. at 325). It called upon carriers and shippers to request remedial action if any rules should "prove in practice to have the unwanted effect of in any way hampering the flexible development and free use of TOFC service" (*ibid.*).

4. THE DECISION OF THE DISTRICT COURT

The railroads and freight forwarders that had participated in the proceedings before the Commission brought an action to set aside the Commission's rules. The three-judge court concluded that Rules 2 and 3 exceeded the Commission's authority and set them aside (R. 41), thereby upholding the absolute right of a rail carrier to refuse to carry, under its publicly available open tariffs, any trailers tendered to it by a motor carrier. The court held, first, that Sections 2 and 3(1) of the Interstate Commerce Act did not forbid a railroad thus to refuse to deal with motor carriers (R. 30). Further, it held that in any event a motor carrier's use of rail open tariffs would contravene both the express provisions of the Act and its entire "internal structure" and "legislative plan" (R. 30–31). The court relied specifically on Section 216(c) of the Act, 49 U.S.C. 316(c), which authorizes (but grants the Commission no power to compel) joint rates and through routes between motor carriers and rail carriers (R. 32), and certain provisions

of part IV of the Act regulating the business of freight forwarders (R. 35).

ARGUMENT

INTRODUCTION AND SUMMARY

It is generally (albeit not invariably) cheaper, faster and more efficient to move large quantities of freight long distances by rail than by truck; and yet a substantial amount of freight is, of course, transported by long-haul motor carriers. A truck can pick up the goods directly at the shipper's establishment and carry them in a single movement direct to the consignee. A railroad car cannot, unless both shipper and consignee have rail sidings. In the absence of such facilities rail transportation entails costly rehandling operations which tend to offset the railroads' long-haul advantages and enable the motor carriers to compete for this traffic. This has been changed, however, by the development and growing utilization of the piggyback technique, whereby the truck's trailer is moved—intact—onto a railroad flatcar at the originating railhead, and moved off again at the destination railhead to be hauled by truck to the consignee. The costly process of unloading the van at the originating railhead and there reloading its contents into a freight car—a process that must be repeated in reverse at the destination rail terminus—is eliminated. The result is a transportation method frequently cheaper and faster than either conventional rail transportation or long-haul truck transportation.

Although the essence of the advance which piggyback represents over previous techniques is that it fuses the inherent advantages of the rail and truck modes—the superior efficiency of the train in the long haul with the truck's ability to pick up and deliver at points not located on a railroad track—there are signs that the railroads seek to dominate the entire piggyback service, its motor as well as its rail portions. They will doubtless succeed in this aim unless prevented by law. They are not dependent upon motor carriers to perform the trucking services which piggyback entails. If the shipper has no truck, the railroad can lease one to him; if the shipper and consignee are proximate to the railheads, the railroad can pick up and deliver the goods using its own trucks; if the shipper or consignee is not located in the terminal area, the railroad can perform the necessary trucking services through a trucking subsidiary or a contract trucker. Moreover, the railroad has only to refuse to furnish flatcar transportation for trailers tendered by independent motor carriers to assure itself freedom from effective competition in providing piggyback services. It can exploit its dominant position in a slightly different fashion by permitting one or a favored few motor carriers to utilize its flatcars on terms dictated by it.

The prospect of railroad domination of all phases of piggyback service is not a theoretical one. Railroads have in fact widely, and increasingly, exploited the advantages of their position by the techniques outlined above (see Statement, *supra*, pp. 10–12). This

development (along with reports of illegal rebating and other forms of discrimination among shippers utilizing piggyback service) led the Interstate Commerce Commission to conduct the comprehensive inquiry that led to the promulgation of rules requiring the railroads to offer piggyback service to motor carriers upon the same terms as they offer it to conventional shippers and permitting motor carriers to utilize the service upon this basis. The legality of these rules is the issue here; two distinct though related questions are involved.

I

The first is whether the Commission correctly concluded that the Interstate Commerce Act forbids the railroads to discriminate with respect to the availability or terms of piggyback service upon the basis of the sender's identity, and so charge a higher rate, or flatly refuse service, to a motor carrier tendering its vans for shipment. We conclude that such discrimination is forbidden. As we show, the Act broadly forbids discrimination. The prohibition has long been interpreted as permitting a railroad to predicate a refusal to serve or a higher rate only upon the physical characteristics of the shipment—its distance and route and the nature of the commodity—and never upon the identity of the sender. Thus, rebates to favored shippers, discrimination against passengers on racial grounds, and, most pointedly, discrimination against other common carriers are forbidden.

There is no basis for carving an exception for a refusal to grant equal treatment to motor carriers desiring to utilize piggyback service for a portion of their movement. Piggyback, to be sure, is a relatively recent phenomenon; but Congress, in creating a permanent commission to enforce the broadly worded provisions of the Interstate Commerce Act, and in endowing that commission with broad enforcement powers, surely did not intend to restrict its reach to those forms of discrimination that existed in 1887. The Act has never been given such niggardly application. The proper inquiry, we believe, is whether discrimination in providing piggyback service to motor carriers produces the kind of evils at which the Act's antidiscrimination provisions are directed.

The law's special concern with discrimination by common carriers is rooted in the fact that often one or a few such carriers—whether for economic reasons or because they have received exclusive franchises from the government—enjoy a decisive competitive advantage (sometimes a monopoly) in transporting particular commodities or in servicing particular localities. The existence of such power makes its abuse a far graver matter than discrimination by an ordinary businessman. If the one railroad in town refuses to carry the freight of a particular shipper, he may be forced to choose a less efficient mode of transportation and may even be ruined. If the railroad picks and chooses among shippers, charging higher rates to some, granting inferior service to others, the competi-

tive balance among the shippers will be affected and the less efficient may prosper.

Because piggyback has given the railroads a significant competitive advantage in the door-to-door transportation over long distances of many commodities, discrimination by the railroads among motor carriers and between them and conventional shippers in furnishing piggyback service has consequences not unlike those of discrimination among ordinary shippers. The motor carrier denied access to the railroad flatcar on reasonable terms must perform the long-haul segment of the trip himself, even though this may be a rather inefficient alternative, or lose his customer. By refusing to deal with the regulated motor carriers, moreover, the railroads are in a position to dominate the motor as well as the rail segments of piggyback service, or to favor some motor carriers at the expense of others and thereby create unfairness and, perhaps, debilitate competition generally between the railroad and motor-carrier industries.

If any doubt remains that consequences of this nature bring the challenged discrimination within the antidiscrimination provisions of the Act, it is dispelled by the National Transportation Policy declared by Congress in 1940 as a guide to the Commission in interpreting and applying the Act. The concern of the Policy is with the relationship of the various modes of transportation regulated under the Act to each other—railroads, barges, trucks, freight forwarders. Its mandate—to achieve equity and coordination among the modes—cannot be fulfilled if the railroads are free to discriminate against motor com-

mon carriers who desire to participate in the benefits of a technique, like piggyback, which combines the intrinsic advantages of rail and truck carriage.

II

Nothing in the structure of the Interstate Commerce Act precludes a motor carrier from utilizing the shipper's tariff for a portion of the motor carrier's authorized service, as the Commission's rules in issue here permit. While a motor carrier is defined in the motor-carrier part of the Act as one who holds himself out as offering transportation by motor vehicle, he is nowhere forbidden to offer rail service in substitution for a portion of his authorized service, so long as he gives the shipper the option of all-truck movement—and this the Commission's rules require. The Commission has ample authority—and demonstrated willingness—to prevent motor carriers from abusing their rights of access to rail piggyback.

It is true that the Commission has no power under the Act to compel a railroad to enter into a through route with a motor carrier. However, in requiring the railroad merely to offer its open tariff piggyback service to motor carriers as well as ordinary shippers, the Commission's rules do not, as the court below thought, compel the formation of through routes. There is no compulsion to provide a through service. A railroad may, if its wishes, forego piggyback open tariffs altogether—in which event it will not be in violation of the Commission's rules. Moreover, the concept of a through route is a technical one. A holding out of a through service is required. There is

no holding out when the railroad merely publishes an open tariff and a motor carrier ships under it. Finally, the through-route provision evinces no purpose to withhold from the Commission the power to require the type of coordination involved here.

The Commission's rules do not, as contended by the freight forwarders, permit motor carriers to act as freight forwarders in violation of part IV of the Act. They do permit motor carriers to perform many of the same functions, but that has always been true and never before questioned. Since the rules permit motor carriers to perform such functions only as an incident to the performance of their authorized service, there is no invasion of the freight forwarders' domain. On the contrary, the rules restore a proper competitive balance between the two modes.

I

A RAILROAD'S REFUSAL TO PROVIDE A MOTOR COMMON CARRIER WITH FLATCAR SERVICE UPON THE SAME TERMS OFFERED ORDINARY SHIPPERS IS A DISCRIMINATION PROSCRIBED BY THE INTERSTATE COMMERCE ACT

A. UNDER SETTLED PRINCIPLES, A RAILROAD MAY LAWFULLY PREDICATE A REFUSAL TO ACCORD EQUAL TREATMENT ONLY UPON A RELEVANT DIFFERENCE IN THE PHYSICAL CHARACTERISTICS OF THE SHIPMENT—AND NOT UPON THE FACT THAT THE SENDER IS A COMPETING CARRIER

1. *Background*

At common law, it was early established that a common carrier was under a strict duty to carry all goods offered for transportation.[11] This duty was thought

[11] *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 382–383; *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.*, 128 F. Supp. 475, 490–493 (D. Ore.); Michie, *Carriers*, § 1601, p. 1175; Story, *Bailments* (8th ed.), § 508, p. 462; Angell, *Carriers* (5th ed.), p. 115; 2 Kent, *Commentaries* (14th ed.), § 590.

to be inherent in the nature of its undertaking and was absolute. An act of God or of the public enemy that made the rendering of service physically impossible was the only defense. *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.*, 128 F. Supp. 475, 521–522 (D. Ore.). A flat refusal to carry the goods of some shippers was thus unlawful, but other forms of discrimination—*e.g.*, in rates—were left untouched. While rates charged by common carriers were required at common law to be reasonable, no rule forbade the imposition of unequal, but not necessarily unreasonable, rates. See *Interstate Commerce Commission* v. *Baltimore & O. R.R.*, 145 U.S. 263, 275.

In England, Parliament legislated equality of rates in the "Equality Clause" of The Railways Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 20, and proscribed all other undue preferences or prejudices between persons or localities in legislation enacted in 1854 and 1873. But in this country during the same period—when the railroads had a virtual monopoly of freight transportation and the only constraints upon discrimination were the inadequate strictures of the common law—secret rebates to favored shippers, negotiation of special rates with large shippers, and preferences and discriminations of all kinds flourished notoriously (see, *e.g.*, 1 Sharfman, *The Interstate Commerce Commission*, pp. 17–18)—indeed, played a major role in the growth of the great trusts (see, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 42). "[I]nequality of treatment as between persons, places, and commodities" by 1887 "constituted the outstanding evil of the railroad situation" (1 Sharfman,

supra, p. 17, n. 13), and was the principal spur to the passage of the Interstate Commerce Act in that year (*id.*, p. 18).[12] Not surprisingly, the "principal evil" at which the Act was aimed, as this Court has observed, was "discrimination in its various manifestations." *New York* v. *United States*, 331 U.S. 284, 296.

2. *The development of the rule of equality under the Interstate Commerce Act*

The Act mounted a comprehensive attack upon the problem of discrimination. Section 1(4) (49 U.S.C. 1(4)), which codified the basic common-law duty to serve (pp. 24–25, *supra*),[13] provides that every common carrier must "provide and furnish transportation upon reasonable request therefor." Section 2 (49 U.S.C. 2; App., *infra*, p. 70), modeled upon the Equality Clause of the English Railway Clauses Consolidation Act,[14] forbids "unjust discrimination," by prohibiting a rail carrier from demanding a greater compensation from one person for transportation than it demands from any other person for performing a similar service in similar circumstances. Section 3 (49 U.S.C. 3; App., *infra*, p. 71), modeled on the English acts of 1854 and 1873 (*Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197, 222),

[12] See, also, S. Rep. No. 46, 49th Cong., 1st Sess., p. 215, quoted in 1 Sharfman, *supra*, p. 18, n. 14.

[13] *Lucking* v. *Detroit & Cleveland Nav. Co.*, 273 Fed. 577, affirmed, 284 Fed. 497, affirmed, 265 U.S. 346; 1 Sharfman, *The Interstate Commerce Commission*, p. 96, n. 32.

[14] *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197, 222; *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 254.

forbids undue preferences or prejudices between persons or localities.[15]

With respect to discriminations based either upon the person of the sender or his interest in the goods being shipped ("personal" discrimination), these sections jointly create what the leading authority on the Interstate Commerce Act has termed the "rule of equality" (3 Sharfman, *supra,* pp. 359–413). That principle is the foundation of the Commission's rules challenged here. Section 2, which the Commission expressly cited in promulgating the rules (and of which, indeed, Rule 2 is a paraphrase), has been at the center of the development of the rule of equality.

The prohibition of discrimination in that section is absolute whenever a "like and contemporaneous service," a "like kind of traffic," and "substantially similar circumstances and conditions" are involved. Controversy, therefore, has focused on the quoted words. The carriers early advocated a reading of those terms that would justify different treatment based upon the type of shipper involved. But the same language in the English Equality Clause had been interpreted as referring solely to the physical characteristics of the service the railroad was asked to perform, not to circumstances arising before the service began or after it was terminated, such as the purposes of the sender or his in-

[15] Other sections, not directly relevant here, are also concerned with discrimination. Central among these is Section 6(7), which requires railroads to publish tariffs and adhere to them. See, also, Section 4(1), which forbids charging greater compensation for the same kind of traffic for a shorter than for a longer distance over the same line or route in the same direction.

terest in the goods,[16] and this interpretation was from the outset adopted by the Interstate Commerce Commission in construing Section 2. Attempts by railroads to accord special treatment to certain classes of traffic, not because the service rendered by the railroad was any different, but because discriminatory treatment would enhance the railroads' revenue or prevent loss of a customer to a competing carrier, were, therefore, uniformly condemned.[17]

The Commission's view was sustained by this Court. In *Wight* v. *United States*, 167 U.S. 512, 518, the Court held that the statutory phrase "under substantially similar circumstances and conditions" "refers to the matter of carriage, and does not include

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[16] *Great Western R. Co.* v. *Sutton*, L.R. 4 H.L. 226; *Denaby Main Colliery Co.* v. *Manchester Sheffield & Lincolnshire Ry. Co.*, 11 App. Cas. 97; *London & N.W. Ry. Co.* v. *Evershed*, 3 App. Cas. 1029.

[17] *Larrison* v. *Chicago & Grand Trunk R. Co.*, 1 I.C.C. 147 (mileage tickets offered only to commercial travelers); *Smith* v. *Northern Pac. R. Co.*, 1 I.C.C. 208 (lower fares for land explorers and settlers); *Cary* v. *Eureka Springs R. Co.*, 7 I.C.C. 286, 311 (special rate for shipment that was to proceed further by wagon); *In the Matter of Party Rate Tickets*, 12 I.C.C. 95 (party-rate tickets offered only to amusement companies and similar organizations); *Stowe-Fuller Co.* v. *Pennsylvania Co.*, 12 I.C.C. 215 (rate differences predicated on intended use of freight); *California Commercial Assn.* v. *Wells, Fargo & Co.*, 14 I.C.C. 422 (refusal to offer bulk-shipment rate for packages made up and tendered by freight agent); *Boise Commercial Club* v. *Adams Express Co.*, 17 I.C.C. 115, 121 (lower rates for prepaid shipments); cf. *Shoemaker* v. *C. & P. Telephone Co.*, 20 I.C.C. 614 (lower rates for old subscribers). See, also, *Crescent Coal & Mining Co.* v. *B. & O. R.R.*, 23 I.C.C. 81, 83; *In re Restricted Rates*, 20 I.C.C. 426; *In the Matter of Transportation of Company Material*, 22 I.C.C. 439; *Hitchman Coal & Coke Co.* v. *B. & O. R.R. Co.*, 16 I.C.C. 512, 517.

competition." If the service was the same, one sender could not be offered a lower rate to meet a competing carrier's rate.[18] Nor was it material that the sender was another carrier. In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 225 U.S. 326, railroads offered special rates applicable to any coal shipped by another railroad for its own fuel use. These rates were lower than the rates published for carriage of coal for all other uses. This Court held the differential unlawful, ruling that a carrier who tenders freight for shipment may not be treated any differently from ordinary shippers, and that a railroad's duty of equality of charges extends to all patrons without distinction.[19]

The case most nearly in point here is *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, where this Court held unlawful the practice of some railroads of charging less-than-carload rates for carrying carload shipments tendered to them by freight forwarders (see pp. 63–67, *infra*)—these rates being higher than the carload rates charged other shippers for identical shipments.[20] The Court made clear that this discrimination was improper even though the freight forwarders were competitors of

[18] Accord: *Seaboard Airline Ry.* v. *United States*, 254 U.S. 57; *Interstate Commerce Commission* v. *Alabama Midland Ry.* 168 U.S. 144, 166; but cf. *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197.

[19] 225 U.S. at 342; *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740; *Kansas City S. Ry.* v. *United States*, 282 U.S. 760.

[20] See, also, *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Chicago Etc. R. Co.* v. *Acme Freight*, 336 U.S. 465.

the railroads who, if permitted to utilize carload rates, might siphon off a portion of the railroads' revenues from less-than-carload traffic. In the Court's view, the railroads were not entitled to inquire into the purposes or interest of the sender and upon finding he was a carrier rather than the owner decline to accord him the same treatment as ordinary shippers. "The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement." 220 U.S. at 252.

3. *Application of the rule of equality to discriminatory refusals to provide service*

The principle of equal treatment enunciated in rate-discrimination cases like *Interstate Commerce Commission* v. *Delaware, L. & W. R.R., supra,* applies with undiminished force to the greater discrimination involved in a flat refusal to provide service to a particular sender on grounds unrelated to the nature of the service desired. Although Section 2 in terms applies only to differences in the charge exacted for a service, the practical economic effects of a refusal to serve and of a discriminatorily high rate are often the

same and this Court equated the two forms of discrimination in the passage quoted above from the *Delaware, L. & W. R.R.* case. But we need not stop there. Section 1(4) of the Act, as noted above, incorporates the common law rule that a carrier is bound to receive and carry all goods offered for transportation, without exception, unless physically incapable of doing so.[21] It is an *a fortiori* violation of this section to deny one class of shippers the same service being rendered another class. In addition, the principle that a carrier may discriminate only upon the basis of the physical circumstances of the carriage—the nature of the commodity, the distance, etc.—rather than the person of the shipper or his interest in the goods has been applied to cases arising under Section 3(1). *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740; *Kansas City S. Ry.* v. *United States,* 282 U.S. 760. These cases make clear that when a carrier tenders goods as a shipper, it is entitled to the same treatment as any other shipper.

[21] See *Minneapolis & St. Louis Ry. Co.* v. *Pacific Gamble Robinson Co.*, 215 F. 2d 126, 133, 135 (C.A. 8); *New York Central R.R. Co.* v. *Interstate Commerce Commission*, 201 F. Supp. 958 (S.D.N.Y.), vacated as moot, 371 U.S. 805; *Galveston Truck Line Corp.* v. *Ada Motor Lines*, 73 M.C.C. 617. In *New York Central*, the railroad had adopted an embargo upon certain less-than-carload shipments, claiming that such traffic was unprofitable. The court held that Section 1(4) prohibited the railroad from refusing to deal for economic reasons, and pointed out that in almost all cases in which the laying of an embargo had been approved (*e.g.*, *Holt Motor Co.* v. *Nicholson Universal S.S. Co.*, 56 F. Supp. 585 (D. Minn.)), weather conditions, traffic congestion, or other physical or operational conditions had made it impossible for the carrier to provide transportation.

In short, Sections 1(4), 2 and 3(1) have been read *in pari materia* as creating a rule of equality under which all personal discriminations against shippers and passengers using the same transportation service are prohibited. It is irrelevant in such cases that the discrimination is required to meet competition (*Wight* v. *United States,* 167 U.S. 512, 518) or to prevent losses (*New York Central R.R. Co.* v. *Interstate Commerce Commission, supra* n. 21), or that it has no competitive effect (*National Spring & Wire Co.* v. *Director General,* 60 I.C.C. 564, 566), or would attract new business (*Smith* v. *Northern Pacific R. Co.,* 1 I.C.C. 208).

B. THE RAILROADS' REFUSAL TO PROVIDE FLATCAR SERVICE FOR TRAILERS TENDERED BY MOTOR CARRIERS ON THE SAME TERMS AS THEY PROVIDE SUCH SERVICE TO CONVENTIONAL SHIPPERS VIOLATES THE RULE OF EQUALITY. THE RAILROADS' DUTY IN THIS REGARD IS NOT, AS THE COURT BELOW THOUGHT, QUALIFIED BY THE PROVISO TO SECTION 3(1)

The Commission's open-tariff piggyback rules are virtually a restatement of the rule of equality. They require railroads offering open-tariff piggyback service to accept for shipment all trailers tendered by motor carriers, and forbid them to charge discriminatory rates for such shipments. This is merely a command to the railroads to serve all shippers without discrimination—the fundamental duty of the common carrier. Upon what possible basis can the railroads justify discrimination against the motor carriers? There is certainly no physical difference in the circumstances involved or the service to be performed, and the fact that the motor carriers do not

own the freight and are competitors in transportation is irrelevant.[22] *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235. Yet, the railroads have asserted only these unacceptable grounds.

The present case is indeed no different in essentials from *Delaware, L. & W. R.R.* If a railroad must treat a freight forwarder tendering goods for shipment no differently from an ordinary shipper—the teaching of that case—so must it offer a motor carrier the same trailer-on-flatcar service it offers conventional shippers (including freight forwarders). To be sure, the antidiscrimination provisions of the Act are intended to protect shippers, not competing carriers as such (*e.g.*, *Atlantic Coast Line R. Co.* v. *Southern Ry. Co.*, 302 I.C.C. 711, 716), but the decisions of this Court make clear that this precept is inapplicable where the competing carrier is tendering goods for shipment and the relationship between the railroad and that carrier is consequently one of carrier and patron.

We have thus far been speaking generally of the rule of equality. And ordinarily it is unnecessary to decide which of the antidiscrimination sections of the Act forbids a specific form of discrimination, since these sections together preclude all such discriminations.[23] The court below, however, reasoned that a

[22] Also pertinent here is the rule that a railroad must transport goods in the cars of another railroad without compelling a breaking of bulk and the transfer of the goods to its own cars. Elliott, *Railroads* (2d ed.), § 1395. See, also, 49 U.S.C. 7.

[23] Cf. *Pennsylvania R.R.* v. *Puritan Coal Co.*, 237 U.S. 121, 132:

> It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated

flat refusal to provide service is cognizable only under Section 3(1) of the Act, and that, since Section 3(1) is limited by a proviso that it "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description," the railroads cannot be prevented from discriminating against trailers tendered by motor carriers. This reasoning bespeaks a failure to recognize that Section 3(1) has more than a single function in the scheme of the Act—and that its proviso is wholly inapplicable in the present context.

With respect to "personal" discrimination—refusal to accord equal service because of the identity or interest of the sender—and specifically with respect to discrimination based solely on the goods' having been tendered by a carrier, this Court has reached the same result—that it is wholly unjustifiable—whether Section 2 or Section 3 was invoked. A refusal to perform the same service for a carrier *qua* shipper as for other shippers is both unjust discrimination and unreasonable prejudice. *Interstate Commerce Commission* v. *Baltimore & Ohio R.R.*, 225 U.S. 326; see

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as a suit for a breach of the carrier's common law duty to furnish cars, or an action for damages for the carrier's unjust discrimination in allotting cars to the [one company] * * * while at the same time refusing to follow its own rule and furnish them to the [other company] * * * on the basis of mine capacity. In either case the liability is the same. For where the carrier performs its duty to A and at the same time fails to perform its duty to B, there has been, in a sense, a discrimination against B. In those instances neither the cause of action, nor the jurisdiction of the court, is defeated because the breach of duty is also called an unjust discrimination,

Interstate Commerce Commission v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 252 (pp. 29, 30, *supra*); *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740; *Kansas City S. Ry.* v. *United States*, 282 U.S. 760. Thus, where two senders (one a conventional shipper, the other a motor carrier) tender the same cargo (a truck trailer) for the same flatcar service over the same route for the same distance, the rule of equality requires the railroad to treat both patrons the same. In this respect, Section 3(1) and Sections 2 and 1(4) overlap.

Section 3(1), however, reaches many forms of discrimination not covered by the rule of equality or cognizable under Sections 1(4) or 2. Principally, these are situations in which the alleged service discrimination involves neither a flat refusal to serve nor different treatment of shipments physically the same. Thus, when two shippers send freight to different points on the same or different lines of the same railroad, or are located at different points on the same or different lines of the railroad, a difference in rate or service (not involving a refusal to carry) may ordinarily be attacked only under Section 3(1), as an undue or unreasonable preference or prejudice to a person, company, locality, or region. In such a case the prohibition of Section 3(1) is not absolute, as it would be in any case involving personal discrimination. The inquiry is broader. The two shippers must be in competition with each other (*United States* v. *Great Northern Ry.*, 301 I.C.C. 21, 26–27)—a requirement not present in personal discrimination cases (*National Spring & Wire Co.* v. *Director General*, 60 I.C.C. 564,

566)—and the court may consider competitive necessity as a justification for a rate preference (*Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627; compare *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U.S. 144)—a factor that also would not be relevant in a simple personal discrimination case (*Wight* v. *United States,* 167 U.S. 512, 518).

Such considerations have never been deemed relevant in a case of personal discrimination challenged under Section 3(1). For example, this Court expressly ruled out competition as an admissible factor in its *Baltimore & Ohio R.R.* decision (p. 29, *supra*), which involved that section. 225 U.S. at 343. Personal discriminations are flatly prohibited by the rule of equality whether Sections 1(4), 2 or 3(1) are invoked. The proviso in Section 3(1) was never intended to excuse such discriminations. Its only application is with respect to the broader function of the section in regulating a range of different discriminatory practices which normally cannot be challenged under the other provisions of the Act.

Specifically, while Sections 2 and 1(4) confer rights against discrimination only on the patrons of a railroad, Section 3(1) also confers such rights upon individuals, corporations or localities, not patrons, that may be injured by the discriminatory practice of a railroad (*Barringer & Co.* v. *United States,* 319 U.S. 1, 13); and so elastic is Section 3(1) that a carrier which suffered a diversion of traffic to a competing carrier by reason of the latter's lower rates or superior service could conceivably invoke Section 3(1). The proviso to the section was intended to close that avenue of attack. It was not intended to go further

and permit a railroad to discriminate as between shippers because one shipper was also a carrier. This is apparent from the language of the proviso itself. It exempts only discrimination against the "traffic" of another carrier. This term signifies the custom of the carrier—the business it enjoys when a shipper entrusts his goods to it for transportation, not a carrier's tender of trailers—its own or others', laden or empty—for rail transportation like a conventional shipper. See *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.* and *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, discussed p. 29, *supra*. The legislative history strongly supports this construction.

Added to the Act by the Transportation Act of 1940, the proviso was taken verbatim and without any discussion from Section 216(d) of the Motor Carriers Act of 1935 (now 49 U.S.C. 316(d)). Section 216(d) is a provision, modeled on Sections 2 and 3(1) of the Interstate Commerce Act, which forbids unjust discriminations and undue preferences and prejudices by motor carriers. See H. Rep. No. 2016 (Conference Report), 76th Cong., 3d Sess., p. 62. The sole purpose of the proviso, as it appeared originally in the Motor Carriers Act (an Act passed against a background of intense motor-rail competition), was to make clear that a railroad had no standing to complain that it was unreasonably prejudiced or disadvantaged because a competing motor carrier was charging a lower rate. 79 Cong. Rec. 5656 (remarks of Senator Wheeler, the bill's sponsor). The very broad language of Section 216(d) (as of Section

3(1)) might, as mentioned, have supported such a claim (see Hearings before Subcomm. of H. Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess., p. 64)—the concept of undue preference or prejudice being broad enough to permit a person not a patron to complain about a carrier's conduct. To dispel any doubt Congress decided to provide explicitly that the fact that a motor carrier's rate was lower than a railroad's was not a basis for proceeding under Section 216(d).

The incorporation of the proviso in Section 3(1) a few years later was doubtless intended to deal with the converse situation of a railroad's rate which undercuts a motor carrier's rate. There is no indication it was meant to permit a railroad to discriminate against a patron because he happened to be, not the owner of the goods tendered for shipment, but a carrier of them. That would have amounted to overruling this Court's well settled rulings in personal-discrimination cases under Section 3(1), and there is not the slightest evidence that Congress had any such purpose. Had Congress so purposed, moreover, it would certainly have amended Sections 1(4) and 2 as well as Section 3(1), to avoid the anomaly of permitting a carrier to discriminate in service against another carrier while prohibiting him from discriminating in rates. Experience shows that service discriminations are frequently but evasions of the statutory proscription of rate inequality. See *Barringer & Co.* v. *United States,* 319 U.S. 1; *United States* v. *Baltimore & O. R.R.,* 333 U.S. 169.

C. APPLICATION OF THE RULE OF EQUALITY HERE IS REQUIRED BY THE POLICIES WHICH UNDERLIE THE ACT'S PROHIBITION OF DISCRIMINATION

We have shown that the precedents in this Court establishing the rule of equality are fully applicable to the present case. But we do not rest there. The novelty and importance of the question invite fresh examination. We shall argue here that the basic policies which underlie Section 2 of the Interstate Commerce Act—and related provisions like 1(4) and 3(1)—compel, as an original matter, the conclusion that discrimination against motor carriers in the provision of flatcar service is unlawful.

We preface our discussion of policy with the observation—really a truism—that Congress, in legislating a comprehensive prohibition of discrimination, was not concerned merely to forbid the particular forms of discrimination extant in 1887. Had that been the legislative purpose, Congress would not have established an elaborate scheme of administrative regulation and enforcement. It did so, as this Court has remarked, so that particular "conditions which may directly frustrate the success of the regulation undertaken by Congress" could be remedied without additional legislation even though they might not have been anticipated by the original draftsmen. *American Trucking Assns.* v. *United States,* 344 U.S. 298, 311; *id.* at 311–313; *United States* v. *Pennsylvania R. Co.,* 323 U.S. 612, 616 (pp. 47–48, *infra*). See, also, *Assigned Car Cases,* 274 U.S. 564. The cited cases hold that the Commission is not confined to the precise statutory language—that it may—and must—

interpret the Interstate Commerce Act flexibly, in accordance with its overriding purpose to eliminate all types of harmful discrimination.[24] We are justified in invoking that principle here because the discrimination that the Commission questioned in this case has many of the same injurious consequences as the traditional forms encompassed by the prohibitions of the Act.

An example will illustrate. Suppose that in a certain town there are two bakers, *A* and *B*, and one railroad. Both bakers, of course, need sugar for their business. The nearest commercial source of sugar, however, is several hundred miles away. *A* and *B* use the railroad to ship in the sugar they need, because that is the cheapest and most efficient mode of transportation available. If *A* persuades the railroad to refuse to carry sugar for *B*, or to charge *B* a much higher rate for the service, *B* may be ruined—leaving *A* with a monopoly of the town's baking industry—or (what is essentially the same) so disadvantaged as to be incapable of offering *A* effective competition. At the least, *B* will be compelled to utilize what is by hypothesis a less efficient and more expensive method of transporting sugar in the circumstances. By so doing, he may be able to remain a viable competitor; but the public interest in sound allocation of the nation's economic resources is im-

[24] *New York* v. *United States*, 331 U.S. 284, 296 (p. 26, *supra*); *Boynton* v. *Virginia*, 364 U.S. 454; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *United States* v. *Baltimore & O. R.R.*, 333 U.S. 169; *Chesapeake & O. Ry. Co.* v. *United States*, 11 F. Supp. 588 (S.D. W. Va), affirmed, 296 US. 187.

paired whenever goods that can more efficiently be transported by rail are diverted to other modes. These are the traditional evils fostered by discrimination on the part of carriers having a decisive advantage, in terms of competition and efficiency, with respect to a particular kind of traffic. The illegality of such discrimination is beyond dispute. Yet, the discriminatory practices employed by the railroads with respect to piggyback service lead to the same kind of harmful result.

Imagine a town with two motor common carriers, *X* and *Y*, and, again, one railroad. The town has a number of manufacturers who market their products in distant localities, but who are too small to have their own railroad sidings or fleets of trucks and therefore depend upon *X* and *Y* to pick up the goods at their factories and deliver them to the railroad's terminal. For such shippers, piggyback may well be—and let us assume that in the circumstances it is—the cheapest and most efficient method of shipment. But suppose the railroad, having purchased a fleet of trucks to perform the pickup service formerly rendered by the motor carriers, refuses to accept for transportation on its flatcars trailers tendered by *X* or *Y*. Those shippers who prefer piggyback will give their patronage exclusively to the railroad. Other shippers may remain loyal to the motor carriers, but, to the extent that they do, economic waste will result. For the motor carriers must now perform the long-haul segment of every movement themselves; consequently, a shipment that, in the interest of the maximum efficient utilization of the nation's

transportation resources, should move by rail will, instead, crowd the highways.

These illustrations are perhaps sufficient to demonstrate that the consequences of railroad discrimination in the terms or availability of piggyback service are essentially like the classic injurious consequences of railroad discrimination among shippers. But the serious implications of the present railroad control of piggyback will bear further elaboration.

We start with a premise that none disputes: piggyback is often a more economical method of transporting commodities for long distances than either all-truck carriage or conventional rail-plus-truck carriage (where the shipment must twice undergo costly rehandling operations before it reaches its ultimate destination). Were it otherwise, how to explain the phenomenal growth of piggyback? It is because of this superior efficiency that the railroads' present policy of either refusing motor carriers any access to piggyback or making it selectively available to them on terms dictated by the railroad constitutes so insidious a form of discrimination.

To the extent that motor carriers are prevented from utilizing flatcar service in their long-haul movements, a misallocation of national transportation resources will in many instances result. A long-haul motor carrier excluded from participation in piggyback must choose between abandoning long-haul shipping altogether on routes where piggyback service is offered or using his trucks for the line-haul as well as

terminal portions of such shipments. In some cases the first choice will be compelled; the motor carrier will simply find that he is unable to compete with the railroad. Sometimes, however, either by paring his profits to the bone or by virtue of a special relationship with the shipper, the motor carrier will be able to retain the traffic. In those instances trucks will be used to move shipments over distances for which railroad piggyback service may be more economical and efficient, and the highways and the trucking industry burdened with traffic which, under a rational allocation of transportation resources, belongs on the rails.

Railroad domination of piggyback may also foster monopoly conditions in the vital truck segment of piggyback service. The railroads may now refuse, at their option, to offer any piggyback service to motor carriers.[25] They are also free to charge them rates that exceed open tariffs. The railroads have frequently exercised these options, and candidly admit that a consideration in doing so is the desire to elimi-

[25] In addition, a suit attacking the validity of Plan I service, which accounts for 70 percent of motor-carrier participation in piggyback (I.C.C. Bur. of Econ., *Piggyback Traffic Characteristics* (1966), p. 58), is now pending. *Lone Star Packing Car Company* v. *United States*, Civ. No. 4-355 (N.D. Tex.). If successful, it would almost totally exclude motor carriers from piggyback. There has also been serious doubt as to whether contract carriers, which account for approximately 9 percent of motor-carrier business, could use Plans I or V. See 322 I.C.C. at 350. The open-tariff rules eliminate this doubt also since they make piggyback service freely available to those carriers.

nate motor-carrier rate competition (Statement, *supra*, pp. 10–11).

There is surely no reason for thinking the railroads are any better equipped to provide truck service than certificated motor carriers—whose business, after all, is providing transportation by truck. Consequently, the elimination of motor-carrier competition from the truck segment of piggyback would appear to reflect, not efficiency, but only the railroads' economic power. This is a classic instance of unfair competition. As in tying arrangements traditionally condemned under the antitrust laws,[26] the leverage flowing from the railroad's complete control of the essential rail segment of piggyback service could enable it to transfer its monopoly power to the truck segment and thereby perhaps eliminate competition in the latter service from the independent motor carriers.[27] That is at odds with the well settled rule that a company lawfully possessing monopoly power in one market may not, by refusals to deal, seek domination of another market. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359; *United States* v. *Klearflax Linen Looms*, 63 F. Supp. 32 (D. Minn.).[28]

[26] See *e.g.*, *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1; *International Salt Co.* v. *United States*, 332 U.S. 392.

[27] The danger that the railroads will monopolize the truck segment of piggyback service is not a theoretical one. A minimum of 42 percent of all piggyback shipments now move under plans in which the railroads perform (or provide indirectly) the *entire* service; independent motor carriers participate in only about 28 percent of the shipments and then only on the railroads' terms (see Statement, *supra*, p. 12, n. 9).

[28] The consequences are not markedly less injurious where the railroad permits motor-carrier participation in piggyback

In addition, the absence of any legal restraints upon the railroads' dealings with motor carriers desiring to use piggyback invites harmful discrimination *among* motor carriers. Those motor carriers whom the railroads favor by permitting them access to piggyback service or by granting them more favorable terms than other motor carriers receive a substantial competitive advantage over the others—an advantage unrelated to superior efficiency. Such preferences are bound to debilitate competition in the motor carrier industry. They are the very evils at which the anti-discrimination provisions of the Act were aimed. And the promotion of alliances between railroads and a few favored carriers would be bound in the long run to weaken competition between railroads and motor carriers generally.

The short of it is that while piggyback is a novel method of transporting freight, the consequences of permitting the railroads to discriminate against motor carriers in the provision of this service are the same as those produced by the familiar forms of discrimination outlawed by the Interstate Commerce Act. Accordingly, the application of the rule of equality in the piggyback context accords with the historic purposes of the Act—foremost among which was a determination to prevent the railroads from abusing the great power that they frequently enjoy with respect to particular kinds of transportation service.

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service but at rates so much higher than those charged ordinary shippers as to assure that the competition of the motor carriers will be marginal and that the railroads will skim off the bulk of the profits to be made in the truck segment of the service.

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As next we show, any doubt there may once have been on this score was laid to rest by Congress' declaration of a "National Transportation Policy" to guide the Commission in interpreting the Act.

D. THE NATIONAL TRANSPORTATION POLICY DIRECTS THE COMMISSION TO INTERPRET AND APPLY THE INTERSTATE COMMERCE ACT SO AS TO PROMOTE EQUITY AND COORDINATION AMONG THE MODES OF TRANSPORTATION SUBJECT TO ITS REGULATORY JURISDICTION; THIS MANDATE REQUIRED THE COMMISSION'S CONSTRUCTION OF THE DISCRIMINATION PROVISIONS OF THE ACT.

In 1940, Congress enacted as a preamble to each of the four parts of the Interstate Commerce Act what it declared to be "the national transportation policy." The basic tenets of the policy are (49 U.S.C. preceding § 1):

> * * * to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, * * * so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. * * *

The Commission is enjoined that "[a]ll of the provisions of * * * [the Interstate Commerce Act] shall be administered and enforced with a view to carrying out" the declared policy. This Court has made clear that the National Transportation Policy is "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 88; see, *e.g.*, *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82–83.

The importance of the Policy as a guide to, and basis of, decision is illustrated by *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612—a case similar in significant respects to the present one. The issue was whether the Commission could, in the absence of specific statutory authority, require railroads to interchange their cars with water carriers.[29] Seatrain Lines had constructed ships specially equipped to carry entire railroad cars, thus enabling an integrated rail-water service—analogous to piggyback—that would not require the goods to be unloaded from the railroad car and then reloaded onto the ship. Utilization of this economical method was frustrated by the railroads' refusal to deliver cars to Seatrain's ships. This Court sustained the Commission's assertion of authority to compel interchange. Holding that "the absence of specific language" was not determinative and that "[t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms" and leave "the contents of these terms

[29] It did have express authority to compel rail and water carriers to form joint through routes with one another. 49 U.S.C. 1(4), 905.

to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose [which the Court found expressed in the National Transportation Policy] to foster an efficient and fair national transportation system," it emphasized that to permit the railroads to pick and choose among water carriers and thereby weaken competition among them would be inconsistent with the Policy's dictate of "fair and impartial regulation of all modes of transportation subject to" the Interstate Commerce Act. 323 U.S. at 616–617; see, also, *id.* at 619.

The present is an *a fortiori* case for upholding the Commission. Here, the affirmative statutory basis of the Commission's rules is, as we have seen, far clearer; as we shall presently urge, the objectives of the National Transportation Policy even more urgently require the accommodation made. We point out, too, that the bearing of the Policy was a principal issue in the Commission proceeding, and that the Commission's conclusion—that "the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination and that such coordination is in the public interest" (322 I.C.C. at 330)—is entitled to great weight in view of the Commission's experience and knowledge in transportation matters (*e.g.*, *Barringer & Co.* v. *United States*, 319 U.S. 1; *New York, New Haven & Hartford R.R. Co.* v. *Interstate Commerce Commission*, 200 U.S. 361).

1. The initial directive of the Policy is that the Commission is to provide "fair and impartial regulation of all modes of transportation" subject to its jurisdiction. This Court in *United States* v. *Pennsylvania R. Co., supra,* declared that the Commission would breach this duty if it permitted railroads to discriminate among carriers of a different mode with respect to participation in an advantageous joint service. As noted earlier, such discrimination is practiced by the railroads in making piggyback service available to some motor carriers but not to others.

2. The Commission is directed "to recognize * * * the inherent advantages of each" mode of transportation. This implies both that traffic should not be diverted arbitrarily from the mode most capable of handling it efficiently and that each mode should have a fair opportunity to compete for the traffic that it can best handle. If the Commission countenanced railroad domination of the motor as well as the rail phases of piggyback, both precepts would be seriously impaired.

Piggyback is a bimodal service—not a pure rail service. Its superior efficiency lies in the fact that it combines the inherent advantages of rail and truck service; its performance requires trucks as well as trains. Uniting the inherent advantages of both modes, it should be available to either. If railroads may offer a

complete door-to-door piggyback service, using trucks, motor carriers ought to be free to offer the same service using the rails. Thus, the Commission properly rejected the railroads' argument that the open-tariff rules permit the motor carriers to exploit the railroads' long-haul efficiency instead of preserving the inherent advantages of the rail mode (322 I.C.C. at 329, 330). The Commission's rules only permit the motor carriers to compete with railroad and shipper trucks in the truck segment of piggyback. There is no inroad upon the railroads' right to charge fully compensatory rates for carrying truck trailers on their flatcars regardless of whose trucks haul the trailers to and from the railhead.

3. Unrestricted railroad domination of piggyback is manifestly incompatible with the "adequate, economical, and efficient service" that is one of the desiderata declared in the National Transportation Policy. It is frequently inefficient to force long-haul traffic to move by truck—a likely consequence, as we have seen, of the railroads' present policies. So, also, "sound economic conditions in transportation and among the several carriers" are not fostered if the railroads are permitted to discriminate among motor carriers in making piggyback service available.

4. The railroads' exclusionary policies with respect to piggyback service are also incompatible with "encourag[ing] the establishment and maintenance of reasonable charges for transportation services"—their

tendency being, rather, to promote monopoly conditions that may lead to increased rates. Cf. *Georgia* v. *Pennsylvania R. Co,* 324 U.S. 439. For the reasons explored in the preceding subpart, it is likewise clear that the railroads' policies promote "unjust discriminations," "unjust preferences or advantages" and "unfair or destructive competitive practices" and conflict with the ultimate desideratum declared in the Policy—"developing, coordinating, and preserving a national transportation system by * * * highway * * * and rail, * * * adequate to meet the needs of the commerce of the United States * * *."[30]

[30] *United States* v. *Rock Island Co.*, 340 U.S. 419, where this Court upheld, under the motor-carrier provisions of the Act the practice of the Commission in limiting railroads' motor-carrier affiliates to operations auxiliary and supplemental to rail service, is relevant here. The Court reasoned (340 U.S. at 432–433):

> * * * Such limitation was in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation. Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation.

See, also, *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60; *Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37.

The burden of our argument thus far has been to show that the Commission was correct in finding that the railroads are forbidden under the Interstate Commerce Act to refuse motor common carriers the same piggyback service, and upon the same terms, that they offer it to ordinary shippers. We believe that this conclusion is compelled by the Act's prohibition of discrimination, as construed by this Court, notably in *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235. Further, the Commission has broad authority to proscribe practices conducive to the evils at which the Act is directed, even if those practices are not specifically forbidden. And, finally, the Commission's construction is strongly supported by the principal interpretive aid available—the National Transportation Policy, enacted expressly to guide the Commission in administering the Act.

Such is our affirmative argument. It remains to discuss appellees' contention that application of the discrimination provisions of the Act in the manner we urge is inconsistent with the statutory limitations upon the services that motor carriers may perform.

II

THE INTERSTATE COMMERCE ACT DOES NOT MANIFEST ANY PURPOSE TO PRECLUDE A MOTOR CARRIER FROM USING PIGGYBACK CARRIAGE AS A SUBSTITUTE FOR OVER-THE-HIGHWAY TRANSPORTATION FOR A PORTION OF ITS AUTHORIZED SERVICE UPON THE SAME TERMS AS AN ORDINARY SHIPPER

We consider under this heading three points: whether it is "repugnant" to the general scheme of the

Act for a motor carrier to act as a shipper with respect to a portion of his authorized service, as permitted by the Commission's rules; whether those rules compel the establishment of joint motor-rail through routes in violation of the Act; and whether the rules, contrary to the Act, permit motor carriers to act as freight forwarders.

A. A MOTOR CARRIER DOES NOT VIOLATE ITS CERTIFICATE MERELY BECAUSE IT UTILIZES RAIL SERVICE UNDER OPEN TARIFFS FOR PORTIONS OF SOME SHIPMENTS; THE COMMISSION WAS ENTITLED TO REJECT ITS EARLIER DICTUM TO THE CONTRARY

1. The Interstate Commerce Act defines a "common carrier by motor vehicle" regulated under the Act as "any person which holds itself out to the general public to engage * * * in transportation by motor vehicle" (49 U.S.C. 303(a)(14)). The Act nowhere states, however, that a motor carrier who also offers to perform (unless otherwise directed by the shipper) a portion of his authorized service by rail piggyback rather than over the highway exceeds his authority. Nor does the legislative background support such an inference.

Prior to the enactment of the Motor Carriers Act of 1935, which first subjected motor carriers to federal regulation, it was settled that a competing unregulated mode of transportation was eligible to utilize a railroad open tariff on the same terms as any other shipper. In *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 335, this Court held that a freight forwarder was entitled to railroad service on this basis, and in 1936 the Commission, approving tariffs filed prior to the Motor Car-

riers Act, held that motor carriers could utilize open piggyback tariffs. "We have here a published tariff, and a motor carrier would have the same right to make shipments thereunder as any other member of the body politic." *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435, 444.

The Commission made clear that it would have reached the same result had the tariffs been filed after the effective date of the Act. This ruling, contemporaneous with the Act, was fully consistent with the legislative history and scheme. Congress' primary concern was to bring order into the chaotic competitive situation of the motor carrier industry of that time,[31] and particularly to raise motor carrier rates from the uneconomic levels to which they had fallen [32]—not to exclude motor carriers from beneficial participation in bimodal transportation methods like piggyback. In fact, in the first section of the Act Congress declared its policy to be to "improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers" (49 Stat. 543). The subsequently enacted National Transportation Policy repeats and amplifies the congressional goal of coordination of the different transport modes (see pp. 46–51, *supra*)—a goal that requires,

[31] *American Trucking Assns.* v. *United States,* 344 U.S. 298; S. Rep. No. 482, 74th Cong., 1st Sess.; *Report of the Federal Coordinator of Transportation,* S. Doc. No. 152, 73d Cong., 2d Sess.

[32] Hearings to Amend Interstate Commerce Act Before S. Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pt. I, p. 64 (testimony of Federal Transportation Coordinator Eastman).

as we have seen, that motor carriers enjoy access to rail piggyback service on the same terms as other shippers.

2. It is true that in 1939 the Commission in dictum deemed it "repugnant to the act" for a motor carrier "to act as a common carrier by motor vehicle and as a shipper by rail as to the same service" (*Substituted Freight Service,* 232 I.C.C. 683, 690).[33] It is likewise true that—although no statutory basis for the dictum was suggested, no legislative history cited, no reasons of policy advanced, and no reference made to the Commission's contrary holding in *Trucks on Flat Cars Between Chicago and Twin Cities, supra*—this dictum was later interpreted, without any additional consideration, to preclude motor carrier usage of railroad piggyback open tariffs. *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 104. In the present proceeding the Commission carefully considered the dictum of *Substitute Freight Service,* noted that it had been uttered "without explanation or supporting precedent" (322 I.C.C. at 332), and concluded that it was "incorrect in the light of this record and current conditions." 322 I.C.C. at 334. The Commission has, of course, an ongoing responsibility to reexamine its precedents in the light of changed conditions in the transportation industry. Here, it quite properly conducted such a reexamination in a com-

[33] The Commission's holding was merely that the motor carrier's tariffs were legally insufficient in failing to notify the shipper that substituted service was contemplated and to give him an option to insist on all-motor transportation. The Commission's rules here in issue are consistent with this holding since they require that such an option be given. See p. 16, *supra.*

prehensive rulemaking proceeding in which it was able, for the first time, to view the entire piggyback problem upon a complete record. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202. We can think of no problem more timely for fresh consideration than piggyback.

Nevertheless, the court below concluded that the dictum was beyond the power of the Commission to disturb. It emphasized that the rule had endured for 25 years. However, it is clear that when cogent reasons and the public interest compel, even a consistent and generally unchallenged administrative practice may, after careful consideration, be overturned. Compare *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315. The court below cited *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D. N.Y.), affirmed, 309 U.S. 638, for the proposition that the *Substituted Freight Service* dictum had received a judicial imprimatur. But that decision held only that a motor common carrier could not establish *joint rates* with a freight forwarding company, since Section 216(c) of the Act, 49 U.S.C. 316(c), requires that both parties be regulated common carriers, and forwarders were, at the time, unregulated. The opinion recognizes that forwarders could and did avail themselves of *open tariffs*, and does not intimate that a regulated motor carrier could not.

Finally, the district court gave great weight to the failure of Congress to act upon proposals for express legislation in this area. However, the legislation proposed by the Commission (*e.g.*, S. 3510 and H.R. 1225,

87th Cong., 2d Sess.; S. 676 and H.R. 2088, 88th Cong., 1st Sess.) would have amended Section 216(c) of the Act to give the Commission authority to compel the establishment of motor-rail through routes—a quite different proposition, as we explain below (pp. 59–62), from entitling motor carriers to use the railroads' open tariffs. To be sure, additional legislation, proposed by President Kennedy (see H. Doc. No. 384, 87th Cong., 2d Sess.; S. 3242 and H.R. 11584, 87th Cong., 2d Sess.; S. 1062 and H.R. 4701, 88th Cong., 1st Sess.), would have authorized motor carriers to utilize open tariffs. But the Commission itself indicated that additional legislation might not be necessary to achieve the ends for which it was proposed, and the industry then requested Congress to stay its hand pending completion of the Commission proceeding from which the rules here in issue emerged.[34] See Statement, *supra*, p. 14. In these circumstances, congressional inaction can hardly be construed as indicating doubt of the Commission's authority to promulgate these rules. Furthermore, government agencies must be free to request legislation clarifying or confirming their authority without fear that their request will be treated as a concession that they lack the authority under existing law. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *United States* v. *duPont & Co.*, 353 U.S. 586, 590; *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 610.

[34] These requests evidently pertained to the legislation the Commission had proposed as well as that proposed by the President.

3. The court below was also concerned lest the Commission's rules allow a motor carrier to cease providing truck service altogether, by always using railroad trucks for local pickup and delivery (R. 28). There is no such danger. In the first place, a motor carrier that abandoned the highways would violate its duty under Section 204(a)(1) of the Act (49 U.S.C. 304(a)(1)) to provide "continuous and adequate service" and its certificate could be revoked for dormancy (49 U.S.C. 312(a)). The Commission has made it perfectly clear that it is prepared to invoke its powers under these sections to prevent "over-enthusiastic embracing of TOFC service" (322 I.C.C. at 365). Secondly, a motor carrier will normally find it more advantageous to use its own trucks, since the out-of-pocket cost of moving freight with its own equipment is likely to be less than the cost of employing another carrier to do so at rates that reflect both the total costs of, and a profit for, the second carrier. Finally, under the Commission's rules, the motor carrier must preserve the shipper's option of requiring all-truck movement (Rules 3(c), 4(b); 322 I.C.C. at 337, 351), and must provide "safe and adequate service, equipment, and facilities" for this purpose (49 U.S.C. 316(b)).[35]

[35] Also unfounded is the court's concern that the logic of the Commission's rules would "permit a carrier which had received freight from another to exercise the same right by tendering the same freight immediately back to the original carrier" (R. 28), thereby creating an impasse. Since rail rates are ordinarily lower than motor rates for the same line haul, it would not be in the railroad's economic interest to do this except as a device to prevent truckers from using piggyback. Such conduct, deliberately aimed at avoiding a duty of carriage, would violate Section 1(4) of the Act. See p. 28, *supra*.

B. PARTICIPATION BY MOTOR CARRIERS IN RAIL PIGGYBACK SERVICE ON THE SAME TERMS AS ORDINARY SHIPPERS IS WHOLLY UNLIKE THE COMPELLED ESTABLISHMENT OF JOINT THROUGH ROUTES

Section 216(c) of the Interstate Commerce Act (49 U.S.C. 316(c)) permits, but does not compel, motor and rail carriers to establish joint through routes and rates. The court below reasoned (R. 33) that the Commission's rules, in permitting motor carriers to demand piggyback service upon the same terms as ordinary shippers, compel the establishment of joint through routes and hence violate the voluntary feature of Section 216(c). We disagree. These rules do not compel the railroads to offer piggyback service; they in no sense require the establishment of joint through routes—a technical concept under the Act; and Section 216(c) discloses no purpose to prevent the Commission from requiring the railroads to grant equal access to carriers who desire to ship a portion of their freight by rail.

1. The Commission has express power under the Act to compel the establishment of joint through routes and rates between rail carriers [36] and between rail and water carriers.[37] It claims no such power under Section 216(c) with respect to rail and motor carriers. Thus it may not compel a railroad to join with a motor carrier in establishing a joint through route involving piggyback service, or prescribe the rates, terms and conditions of the tariff, or require

[36] 49 U.S.C. 15(4); *Denver & R.G.W.R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321; *Thompson* v. *United States*, 343 U.S. 549; *United States* v. *Great Northern R. Co.*, 343 U.S. 562.

[37] 49 U.S.C. 1(4); *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612.

both the railroad and the motor carrier to provide service on the prescribed route. Nor has it done so in the rules in issue here. They do not require the railroads to offer any open-tariff piggyback service; they do not require motor carriers to use such service if offered; they establish no rates, terms or conditions. They require only that piggyback service, if offered, be made available to all on nondiscriminatory terms. The only compulsion is to abate the discrimination, and this command springs from the antidiscrimination provisions of the Act rather than from any power the Commission claims under Section 216(c) and can be fully complied with by discontinuing open-tariff piggyback services—in which event there could be no contention that the Commission had compelled the establishment of a joint service. It is no answer that the railroads are not likely to find abandonment of open-tariff service an attractive method of compliance. Certainly, the Commission may proscribe discrimination in circumstances where, as a practical matter, the railroad may feel compelled to abate the discrimination rather than discontinue the service. *Larrison* v. *Chicago & Grand Trunk R. Co.*, 1 I.C.C. 147; *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235.

2. Beyond that, a motor carrier's use of an open rail tariff does not constitute the establishment of a through route—voluntary or compulsory. "[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." *Thompson* v. *United States*, 343 U.S. 549, 557. See, also, *Denver*

& R.G.W.R. Co. v. *Union Pacific R. Co.*, 351 U.S. 321, 327. Under such an arrangement the rail carrier and the motor carrier jointly publish a tariff whose rates, terms and conditions they have jointly established, and they share in an agreed-upon division of the revenues. The bill of lading may be issued by either carrier, depending upon which originates the shipment. The shipper may hold either carrier liable for overcharges or for loss or damage to the shipment under Section 20(11) of the Act (49 U.S.C. 20(11)). And either carrier may claim over against the other as a connecting carrier under Section 20(12) (49 U.S.C. 20(12)).

The contrast with open-tariff service is marked. In open-tariff service, the shipper contracts only with the motor carrier, ships on its bill of lading and pays only motor carrier tariff rates. There is no holding out by the railroad of service;[38] the shipper can make no claim against the railroad for overcharges or for loss or damage to the shipment; and the railroad has no say whatsoever in the rates, terms or conditions of the motor carrier's tariff or bill of lading and does not share in the trucker's revenues.

When the motor carrier elects to employ open-tariff piggyback service, it is treated by the railroad like any other shipper. The railroad issues a bill of lading to the motor carrier as consignor. The motor carrier pays the same rate and is subject to the same terms and conditions, unilaterally established by the

[38] The shipper is merely advised that, unless he stipulates to the contrary, the motor carrier may, at its option, substitute open-tariff rail piggyback service for a portion of the freight movement.

railroad in its tariff, as any other shipper. It cannot deviate from them, seek special conditions of service, or negotiate a more favorable rate. It cannot claim over against the railroad as a connecting carrier under Section 20(12) for loss or damage to the freight, but must file a shipper's claim under Section 20(11). The owner of the goods is not a party to the railroad's bill of lading and can make no claim against the railroad.

3. Finally, nothing in the history or purpose of Section 216(c) suggests that Congress withheld from the Commission power to compel railroads and motor carriers to establish through routes because it believed that railroads should be permitted to discriminate in the manner that the present rules forbid. The power was withheld solely for a reason peculiar to through routes and inapplicable to piggyback—the fear expressed by some motor carriers that they would be weakened if forced into such arrangements with powerful railroads. 79 Cong. Rec. 5655 (remarks of Senator Wheeler). The Commission's rules do not affect that concern. They do not compel any motor carrier to join in an offer of service with a railroad, or *vice versa*. They neither regulate the terms upon which the motor carrier may ship on the railroad's flatcars nor prescribe divisions of revenue from a piggyback movement in which both a rail and a motor carrier participate. They merely permit the motor carrier, at its option, to ship under certain tariffs.[39]

[39] The court below expressed concern that offering a motor carrier a choice between plan III (open tariff) and plan I (through route and joint rate with the railroad) would create

C. THE COMMISSION'S RULES DO NOT PERMIT MOTOR CARRIERS TO ACT AS FREIGHT FORWARDERS IN VIOLATION OF PART IV OF THE INTERSTATE COMMERCE ACT

The freight-forwarder appellees contend that when a motor carrier utilizes rail piggyback service for the line haul, performing only the pickup and delivery itself, it is acting as a freight forwarder in violation of Section 410(c) of the Interstate Commerce Act, 49 U.S.C. 1010(c), which forbids the Commission to grant a freight-forwarding permit to any carrier subject to the other parts of the Act.[40]

Freight forwarders collect small shipments, consolidate them into truckload or carload lots for movement by a motor or rail carrier at bulk rates, break bulk at a central delivery point, and distribute the component shipments to the consignees. The forwarder charges the shipper the less-than-truckload or less-than-carload rate, but is charged the lower truckload or carload rate by the motor or rail carrier; his profit is the difference. See *Interstate Commerce*

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an unjust discrimination in violation of Section 2, assuming the applicability of that section (R. 28–29). However, divisions obtained by a carrier under a joint rate stand on a different footing from rates charged the shipping public. Under a joint rate, the motor carrier is not purchasing carriage from the railroad but joining in partnership with the railroad to sell shippers a through service. Their division of the income of the partnership is ordinarily of no concern to the shipper, who in any event pays the rate specified in the tariff. See *Louisville & N.R. R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234; compare 49 U.S.C. 1009.

[40] The railroad appellees do not join in this argument since, if accepted, it would preclude the railroads from providing piggyback service to motor carriers even on terms dictated by the railroads.

Commission v. *Delaware, L. & W. R.R.*, 220 U.S. 235; 49 U.S.C. 1002(a)(5). There is inevitably a good deal of overlap between the functions of motor carriers and railroads, on the one hand, and freight forwarders on the other. Since a substantial number of motor carrier shipments are less than truckload, consolidation of small shipments is a very important aspect of a motor carrier's service. Railroads also offer less-than-carload services—and did so long before freight forwarding was a recognized service.

In bringing freight forwarders under the regulatory aegis of the Commission in part IV of the Act, Congress did not intend to preclude motor carriers from performing their traditional pickup and delivery function, albeit it is physically similar to the service performed by freight forwarders. In fact, it expressly exempted any person who performs consolidation, break-bulk, and other services physically similar to a freight forwarder's as a carrier subject to one of the other parts of the Act. 49 U.S.C. 1002(a)(5). Part IV thus does not "apply with respect to transportation performed by * * * motor * * * carriers in accordance with the applicable provisions of the Interstate Commerce Act." H. Rep. No. 1172, 77th Cong., 1st Sess., p. 6.

The background of Part IV is instructive. In 1940, it was held that forwarders, as unregulated carriers, could no longer enter into joint rate arrangements with regulated motor carriers. *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D. N.Y.), affirmed, 309 U.S. 638. The forwarders persuaded Congress that unless these arrangements were

legalized they would be forced to discontinue their service to many small communities and shippers—a service constituting almost half their business. See *e.g.*, Hearings on H.R. 3684 before H. Comm. on Interstate and Foreign Commerce, 77th Cong., 1st Sess., p. 29. The forwarders never represented to Congress that they required insulation from the competition of motor-carrier less-than-truckload service, whose physical similarity to and overlap with forwarder service was well known to Congress. Hearings, *supra*, p. 196. And Congress accordingly did not consider or enact any limitations upon motor-carrier competition in this area. If such an intention had emerged in the lengthy hearings on this legislation, it would surely have evoked an objection from the motor carriers,[41] who were then already using substituted piggyback service. *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435; *Substituted Freight Service*, 232 I.C.C. 683.

Far from invading a preserve of the freight forwarders, the Commission's rules restore a competitive balance between them and the motor carriers that had been disturbed by the preclusion of motor carriers from free access to piggyback service. Forwarders are permitted to utilize railroad piggyback open tariffs. *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 111. They are also permitted to quote trailer-load rates, and compete for such business with the motor carriers, although their traditional functions of assembly, consolidation, break-bulk

[41] The motor carriers supported the legislation. Hearings, *supra*, pp. 197–198.

and distribution are not performed in such shipments and their traditional small customers are not involved. *Eastern Express, Inc.* v. *United States,* 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37. Before the intensive development of piggyback in the 1950's, the forwarders' business apparently flourished despite competition from motor-carrier less-than-truckload service. The extension of the same piggyback service now enjoyed by the forwarders to the motor carriers thus should not in any way affect the competitive balance between these transport modes with respect to the traditional business of the forwarders. It merely restores motor carriers to a position of competitive equality with respect to *their* traditional business.

Nor is there any danger that the rules enable the motor carriers to become freight forwarders in disguise. A motor carrier may offer substituted rail service only as an incident to its authorized service and only with respect to routes covered by its certificate. These routes are ordinarily much more limited than those of freight forwarders, who generally enjoy broad regional or national authority. In addition, the motor carrier must hold out to the shipper the option of complete over-the-highway service and be prepared to furnish it. Finally, any abandonment of the highways or excessive embracing of piggyback service by a motor carrier would, as we have seen (*supra,* p. 58), expose it to severe sanctions that the Commission is fully prepared to apply.

CONCLUSION

The judgment below should be reversed and the Commission's rules in issue sustained.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
RICHARD A. POSNER,
Assistant to the Solicitor General.
HOWARD E. SHAPIRO,
MARTIN B. LOUIS,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Associate General Counsel,
Interstate Commerce Commission.

MARCH 1967.

APPENDIX

APPENDIX

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Section 1, provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense. All of the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(4) of the Interstate Commerce Commission Act, 49 U.S.C. 1(4), provides:

> (4) *Duty to furnish transportation and establish through routes; division of joint rates.*
>
> It shall be the duty of every common carrier subject to this chapter to provide and furnish

transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 2 of the Interstate Commerce Commission Act, 49 U.S.C. 2, provides:

§ 2. *Special rates and rebates prohibited.*

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3(1) of the Interstate Commerce Commission Act, 49 U.S.C. 3(1), provides:

> § 3. *Preferences; interchange of traffic; terminal facilities.*
>
> (1) *Undue preferences or prejudices prohibited.*
>
> It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 12(1) of the Interstate Commerce Commission Act, 49 U.S.C. 12(1), provides:

> § 12. *Authority and duties of Commission; witnesses; depositions.*
>
> (1) *Authority, duties, and proceedings of Commission, witnesses.*
>
> The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a

common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Section 216(c) of the Interstate Commerce Commission Act, 49 U.S.C. 316(c), provides:

(c) *Through routes and joint rates; "common carriers by water".*

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by

railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this chapter.

Section 402(a)(5) of the Interstate Commerce Commission Act, 49 U.S.C. 1000(2)(a)(5), provides:

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of

break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title.

Interstate Commerce Commission Rules 500.1–500.3 (Supp. 1966) provide:

49 CFR 500. *Practices of for-hire carriers participating in trailer-on-flatcar service*

500.1 *Definition of TOFC service.*—Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the [redacted] of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 57

American Trucking Association, Inc., et al.,
Appellants,

v.

The Atchison, Topeka and Santa Fe
Railway Company, et al.;

No. 59

National Automobile Transporters Association
of Detroit, Michigan,
Appellant,

v.

The Atchison, Topeka and Santa Fe
Railway Company, et al.; and

No. 60

United States, et al.,
Appellants,

v.

The Atchison, Topeka and Santa Fe
Railway Company, et al.

Appeals from the United States District Court for the Northern District of Illinois

BRIEF FOR EASTERN RAILROAD APPELLEES.

INTRODUCTORY PARAGRAPH

These appellees do not disagree with Appellants'[1] briefs with respect to Opinions Below and Jurisdiction. However, there is an additional question presented by these appeals, and certain additional statutory provisions must be brought to the attention of the Court. Moreover, the statements contained in the two briefs present a somewhat distorted picture of the origins, growth, development and impact of trailer-on-flat-car service on the transportation scene.

QUESTIONS PRESENTED

In addition to the questions set forth by Appellants, these appeals raise this further question, whether the action of the Interstate Commerce Commission should be sustained on the basis of findings of fact and conclusions of law not relied on in the Commission's opinion.

STATUTES INVOLVED

In addition to the statutes specified at pages 2-3 of the Government's brief and page 2 of the motor carriers' brief, this case also involves Section 202(c), § 203(a)(10), § 203(a)(12), (13), (14), § 206(a)(1) and § 217(a) of the Interstate Commerce Act, 49 U.S.C. 302(c), 303(a)(10), 303(a)(12), (13), (14), 306(a)(1) and 317(a), which are printed in the Appendix, *infra*, pp. 46-50.

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[1] Joint briefs have been filed by the United States of America and the Interstate Commerce Commission, which document shall be referred to herein as "the Government" brief, and by the American Trucking Association, Inc., et al. and National Automobile Transporters Association, referred to herein as the "motor carriers'" brief. Where reference is made to the "Commission" it will be to the action of the Commission in this proceeding, rather than to its contentions jointly advanced on brief with the United States. The names of these appellees are listed in the appendix, *infra* p. 50.

STATEMENT

This case arises out of a general investigation by the Interstate Commerce Commission of what has come to be known variously as trailer-on-flat-car, TOFC or piggyback service.[2] While its recent development and expansion has been impressive, its origins occurred almost 125 years ago.

1. Background, Origin and Development of Early Piggyback Service.

In the 1840's a railroad began the practice of moving loaded canal boats on flat cars between certain points in Pennsylvania as a part of a Philadelphia-Pittsburgh rail water route. This operation lasted until the late 1850's but must be considered the seed of what has come to be regarded as the most significant recent development in transportation. Toward the end of the 19th century, another railroad operated so-called farmers' trains carrying four loaded produce wagons per freight car with the teams riding on the same train in box cars built expressly for that purpose.

The movement of actual highway trailers-on-flat-cars began over forty years ago, when, in 1926, a railroad published rates for the movement of 16 foot highway trailers between Chicago and Milwaukee. The first operation was an all-rail service in that it contemplated the transportation by railroad of freight tendered to it at railroad rates on railroad bills of lading in trailers provided by the railroad. (*Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 94-95).

In 1936, by tariffs filed prior to the date on which the provisions of the Motor Carrier Act became effective, a railroad published a flat charge per loaded trailer, with related charges for the movement of empty trailers, for transportation of such trailers on flat cars between Chicago and St. Paul. While the primary purpose was to

[2] These terms are used interchangeably throughout.

induce use of the service by motor common carriers, it was contemplated that private shippers and freight forwarders (*Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435, 436-37) would also ship under the tariff. Almost immediately thereafter, there were published joint motor-rail-motor rates covering the same service which were subsequently approved by the Commission. (*Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245). In its decisions, the Commission noted the facts that the tariffs open to motor carriers were published prior to the effectiveness of the Motor Carrier Act, and that upon approval of the joint motor-rail-motor rates the open tariffs were to be withdrawn.[3]

In 1939 the Commission instituted a comprehensive investigation of the use by one mode of transportation of the facilities and services of another mode of transportation and laid down certain principles governing these operations. (*Substituted Freight Service,* 232 I.C.C. 683.) Subsequent decisions through the 1940's reaffirmed these basic principles.[4] Rail carriers continued to handle the trailers of private shippers under open tariffs and those of motor common carriers under voluntary through route arrangements entered into and published in accordance with the Commission's tariff rules and regulations (*Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 96).

In late 1953, the Commission took note of a resurgence of interest in the movement of trailers-on-flat-cars and made interpretations of the Interstate Commerce Act concerning the relations, limitations and obligations incident to the transportation of highway trailers on railroad flat cars. (*Movement of Highway Trailers by Rail,* 293, I.C.C. 93).

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[3] See 216 I.C.C. 435, 437; 219 I.C.C. 245, 247-48.

[4] See *Greer Broker Application,* 23 M.C.C. 417 (1940); *Stone's Express, Inc. Common Carrier Application,* 32 M.C.C. 525 (1942); *Ringsby Truck Lines, Inc. v. Atchison, T. & S.F. Ry. Co.,* 263 I.C.C. 139 (1945); *Savage Application,* 265 I.C.C. 157 (1947); *Peninsula Truck Lines, Inc. v. Puget Sound Nav. Co.,* 292 I.C.C. 157 (1954).

In accordance with these and other decisions, the pattern of trailer-on-flat-car operations has evolved which permits only shippers to utilize tariffs, but not make through route arrangements, and allows connecting motor carriers to enter into through route arrangements, but not use tariffs.

Much has been said concerning the so-called five "plans" of piggyback. It should be noted immediately that these plan numbers in and of themselves have no legal significance, but are, in fact, simple shorthand terms for convenient conversation within the transportation industry. As far as can be known, the plan numbers do not appear in any tariff, divisional arrangement, or any other paper which sets forth the operative terms and conditions for any type of trailer-on-flat-car service. An understanding of the actual services and rates involved is essential to appreciate the nature, scope, and impact on the transportation scene of the various trailer-on-flat-car services now being provided. It is for this reason that it is especially dangerous and misleading to draw factual conclusions from extra record sources which have not been subjected to the test of a formalized proceeding whether through the traditional method of examination and cross examination or through the use of statements and reply statements.[5]

2. Background, Development and Growth of Modern Piggyback Service.

A. *Background.*

Shortly after the conclusion of World War II, the railroad industry began to experience a serious decline

[5] In this connection throughout the following description of the growth and development of modern piggyback, reference will be made to certain citations to material not contained in this record, not relied on by the Commission and indeed not even in existence at the time of the Commission proceeding, which materials are contained in the Government's brief. The inadequacy of such sources for the purpose for which used will be demonstrated. To do so, however, it will sometimes be necessary for these Appellees to use the same extra record materials. It is for this reason that they are contained herein.

in its participation in the intercity carriage of freight. By 1961, their participation had declined by over one hundred million ton miles and their percentage of the total intercity movement of freight had dropped from sixty-five percent to slightly under forty-three percent (R. 201). Numberless attempts by the railroads to improve their competitive position through the medium of rate adjustments and improvement in conventional box car service were largely unavailing (R. 217). Aggravating these conditions was the fact that much of the railroads' decline was caused by private and unregulated competitors which were actually threatening the continued existence of the common carrier transportation system in the United States. The Commission made note of the serious implication of this threat to all for-hire carriers in its annual reports (R. 195). Against this background of the sheer need to do something to survive, and the declaration by the Commission of governing principles concerning trailer-on-flat-car service in its 1954 decision, the railroads embarked on a tremendous expansion and development of piggyback service (322 I.C.C. 307).

B. *Development of the Present Plans of Service.*

Almost immediately after the Commission's decision in *Movement of Highway Trailers by Rail,* a number of the railroads began, or expanded what have come to be known as, Plan I and Plan II TOFC operations. The Pennsylvania Railroad, for example, started Plan II service in 1954 and handled approximately 15 thousand trailers the remainder of that year. By 1962, this total had grown to 55 thousand trailers. This plan generally contemplates a door-to-door service from and to shippers' plants within a railroad terminal area. A railroad publishes a tariff whereby it undertakes for a fixed rate to provide such complete service. A modification of Plan II has arisen which has come to be known as Plan II½, whereby the railroad provides all of the components of the service

except the pickup and/or delivery of the trailer to or from the shippers' premises. It is important to understand that while the railroads' rates for Plan II service contemplate the rendition of the complete service under the provisions of the railroad tariff, this does not mean that motor carriers do not "participate" in such service. The record clearly indicates that, even as to Plan II service, motor carriers do participate in such service under agreements with the railroad (R. 786-787).[6]

Since Plan II½ is the number which is used to describe tariff arrangements which do not include drayage to and from the shippers' premises, the motor carriers are free to compete for the motor carrier portion of the service, as is the railroad. Or the shipper may provide it himself. Under such an arrangement, the railroad does not and cannot control which company performs such drayage.

At almost the same time, a number of railroads began to enter into voluntary through route arrangements with motor carriers, substituting rail service for a portion of the motor carriers' line-haul service. This has come to be known as Plan I. It, too, has had a dramatic expansion, although it has always been characterized by peaks and valleys, since the motor carrier has the option as to whether it will interchange trailers under Plan I with its rail carrier partner, (R. 224); *Eastern Central Motor*

[6] In this connection, the alleged facts recited in note 9 on page 12 of the Government's brief are completely misleading, if not incorrect. First of all, the figures shown are not for the year 1965, but for the year 1964. The forty-two percent figure, shown on the first line of the footnote, is simply an addition of the totals for Plan II and Plan II½. It purports to be a figure representing the percentage of shipments in which the railroad performs the entire movement. Of course, as to Plan II½, the railroad does not perform the entire movement. The twenty-eight percent figure, which is allegedly the total of motor carrier participation in piggyback, is simply a total of the movements in Plan I and Plan V service. These, however, do not represent the only movements in which motor carriers participate. The record is clear that motor carriers also participate in the handling of trailers in connection with Plans II, III and IV (R. 338, 264, 387, 412-13, 466-67, 480-81, 503, 505, 515, 588, 589, 590, 786-87).

Carriers Association v. *B. & O.*, 314 I.C.C. 5, 19-20 (1961).[7]

Neither of these trailer-on-flat-car plans, however, was fully effective in stemming the tide of diversion of traffic away from the railroads. This was because neither of these efforts made any substantial dent in the constantly expanding field of private carriage. (R. 382, *Eastern Central Motor Carriers Association* v. *B. & O.*, 314 I.C.C. 5, 19-20). In order to recapture this highly desirable traffic being lost to private carriage, the railroads published rates for the ramp-to-ramp movement of trailers owned or leased by the shipper containing a certain mixture of freight-all-kinds. The publication met with immediate and vociferous opposition from virtually the entire motor carrier industry. The rates published in late 1958 were not finally removed from the cloud of litigation until late 1964.[8] The rates have been successful in

[7] In this connection, Government's attempt in footnote 8 on page 12, to show that Plan I is relatively less important to the Pennsylvania Railroad than are Plans II and III is also misleading. In the year covered, the Pennsylvania moved more trailers in Plan I than in any other single service. Comparing it with Plan III, held out to shippers, and which involves similar physical service, the Plan I arrangements exceeded Plan III by 15 thousand trailers annually and Plan II by 25 thousand trailers (R. 222). The Government's comparison is misleading because it combines the totals for two different rail services with the number of Plan I trailers which the motor carriers chose to interchange with the railroad. A proper comparison to illustrate the potential of Plan I would have to include the number of trailers which motor carriers might have interchanged with the Pennsylvania, but chose for some reason not to. That there are such reasons not caused by either the railroads' willingness to accept trailers or the total availability of traffic, is demonstrated by this record. (R. 358-59, 531; See 322 I.C.C. 381-83). That motor carriers enjoyed more business in 1965 cannot be denied. "The operations of motor carriers of property continued to expand in 1965. Operating revenues reached a new peak at $10.1 billion, an increase of 10.2 percent over the preceding year." I.C.C. 80th Ann. Rep. (1966) p. 58. In 1965 the total net income of Class I intercity motor carriers and Class I local motor carriers reached $226,038,668., an increase of $56,472,672., or 33⅓% over the year 1964. *Ibid.*, pp. 170-172.

[8] *Eastern Central Motor Carriers Association* v. *B. & O.*, 314 I.C.C. 5 *aff'd sub nom. Cooper-Jarrett Inc.* v. *United States.* 226 F. Supp. 318 (W.D. Mo. 1964), *aff'd* 379 U.S. 6 (1964). Indeed, the attack on the lawfulness of Plans III and IV continued in this proceeding where the motor carriers continued to urge that they were unlawful tariff publications. See 322 I.C.C. 370.

attracting large portions of traffic back to the rail carriers, much of it from unregulated private carriage (322 I.C.C. 307-08).

At the same time the so-called Plan III rates were published, additional rates for a service quite similar to Plan III were published, whereunder the shipper must also supply the flat car. These have come to be known as Plan IV rates.

Throughout this entire period, railroads and motor carriers have voluntarily entered into end-to-end and other through route arrangements by a joint rate applying only over that route. A number of railroads which have chosen not to enter into Plan I, have effectuated motor-rail coordination by this means (e.g., R. 773, 775, 776), which has come to be known as Plan V.

These developments in modern piggyback demonstrate that far from attempting to control the motor carrier portion of trailer-on-flat-car service, the railroads have established arrangements wherein a motor carrier is either an essential partner or is permitted to compete for the motor carrier portion of a less than complete service. The statement to the contrary on page 12 of the Government's brief, that piggyback was becoming predominantly a railroad service arises from a misapprehension of the facts. It also fails to recognize that the Commission has long held that trailer-on-flat-car service, even when performed door-to-door by a railroad, is railroad service subject to part I of the Act. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 101. This conclusion was reaffirmed in this very case.[9] The statements of the Government on pages 10 to 12 of its brief to show the pattern of railroad dominance of the motor carrier portion of piggyback are misleading to say the least. For example,

[9] See 322 I.C.C. at 343, where the Commission said: "In the *New Haven Case, supra*, it was found, properly, we think, that 'trailer-on-flat-car transportation' is in fact transportation by railroad', and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers' "

railroads are only able to provide shippers with a complete service without the assistance of motor carriers within terminal areas. They may do so because of a specific statutory exemption granted by Section 202(c) of the Interstate Commerce Act.[10] When a railroad wishes to publish rates for service to points outside a terminal area, it does so at the sufferance of a motor carrier willing to join the railroad in a through route arrangement. Similarly, the statement on page 12 of the Government's brief that railroads which offer Plan I wish to pick and choose, and that "the factors considered included the interest in preventing motor carrier piggyback rate competition with the railroads' own Plan II door-to-door service" gives somewhat less than a complete picture of the record herein. One railroad indicated this. The great number of the other railroads, which are participating in Plan I arrangements, do not list this as a factor, but indicate that their only considerations in the decision to join with a motor carrier in a TOFC arrangement, concern whether or not the motor carrier is authorized to perform the service, is financially stable or does not demand preferential treatment vis-a-vis other motor carriers. (R. 75, 91, 215, 225, 235, 240-41, 243, 257-58, 264, 577, 778, 780, 781, 782).

Thus, far from attempting to dominate trailer-on-flat-car service, the railroads have published arrangements which clearly expand the possibilities of motor carrier participation therein, even though what is involved is admittedly a railroad service.

3. The Commission and Lower Court Proceedings.

On June 29, 1962, the Commission, on its own motion, instituted a rule making proceeding encompassing every aspect of TOFC operations. The case was begun with a broad general statement that the authority for the proceeding consisted of the first four parts of the Interstate

[10] 49 U.S.C. 302(c).

Commerce Act and Section 4 of the Administrative Procedure Act. A prehearing conference was held on October 9, 1962, at which certain proposed rules were distributed, which rules are attached to the Commission's report in this proceeding as Appendix II (322 I.C.C. at 406, *et seq.*) No oral hearings were held but various written documents were filed by numerous parties. The two Examiners assigned to this proceeding served their report and order on August 23d, 1963, in which were contained the rules they recommended (R. 605-791). Exceptions and Replies thereto were filed by several parties and oral argument was held December 10 and 11, 1963. In its report dated March 16, 1964, the Commission, with Commissioners Hutchinson and Webb dissenting, adopted its own set of rules, which are attached to the Commission's report as Appendix IV (322 I.C.C. at 413, *et seq.*). In a brief formal order dated July 22, 1964, the Commission denied all petitions for reconsideration, including one filed by these appellees.

Included among the rules which the Commission adopted are rules designated 500.2 and 500.3 (322 I.C.C. 413), which for convenience herein are referred to as Rules 2 and 3. These rules represent a radical departure from the Commission's previous longstanding consistent interpretation of the Act. The Commission reinterpreted certain of its previous decisions and overruled a number of others in order to adopt Rules 2 and 3.

Shortly before the institution of the Commission proceeding, the Administration had sought legislation which would have specifically amended Section 2 of the Act to permit carriers to tender loaded or empty vessels or shipping containers to rail carriers.[11] The hearings, however, produced little or no support for the proposal, and it died in Committee. In stating that it did not have sufficient information on which to take an informed position on this

[11] See H. Doc. No. 384, 87th Cong., 2nd Sess. See also S. 3242, H.R. 11584, 87th Cong., 2nd Sess.; H.R. 4701, 88th Cong., 1st Sess.

legislation, the Commission recognized that its ramifications were far-reaching and could drastically affect basic and long-established relationships between carriers. Hearings on H.R. 4700 and H.R. 4701 before the House Committee on Interstate and Foreign Commerce, 88th Cong. 1st Sess. Pt. 1, p. 32. The motor carriers in the same hearings objected to this legislation because they stated it would dilute the position of motor carriers by forcing them into a behavior pattern which was basically shipper oriented, and that the proper solution should be one that would treat carriers as carriers. *Ibid.*, p. 212. Nevertheless, in this proceeding the Commission adopted rules which, in effect, treat carriers as shippers and do disturb basic long-established relationships between carriers.

After the denial of the petitions for reconsideration, appellee railroads and freight forwarders brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, to set aside Rules 2 and 3. The District Court concluded that Rules 2 and 3 did exceed the Commission's authority and set them aside. On several related, but independent, grounds, the Court concluded that the rules were not authorized by any section of the Interstate Commerce Act, that they created conflicts with other sections of the Act, and that change in the Commission's prior longstanding and consistent interpretation of the Act to preclude carriers from acting as shippers was now solely within the province of the Congress (R. 41).

ARGUMENT

Introduction and Summary

At the outset, two significant concepts must be kept in mind in considering the issues involved in this proceeding. The first is that trailer-on-flat-car transportation is railroad service. The Commission so held in this pro-

ceeding. (322 I.C.C. at 343). The second is that what is being discussed in this case is not the transportation of a motor carrier's own property such as a trailerload of its own office furniture or supplies, but the tender by a motor carrier to a railroad of a trailer loaded with "traffic",[12] which has been tendered to the motor carrier by a shipper for movement under the motor-carrier's tariffs in its capacity as a federally franchised regulated carrier.

Both Appellants contend that in judging the railroads' duty to serve motor carriers only the physical operations can be considered. However, if this be the case, it must be recognized that the physical operations involved in the tender by a motor carrier in Plan III pursuant to Rules 2 and 3 and the physical operations involved under Plan I are identical. Yet, the Commission has held in this case that the latter operations result in a through motor-rail route under Section 216(c) of the Act. (322 I.C.C. at 342-43). The only difference between this and a tender by a motor carrier under an open tariff is that in Plan I the railroad and the motor carrier have voluntarily agreed to assume the status of connecting carriers. Under the open-tariff rules the railroad transportation is supplied not pursuant to a voluntary concurrence or agreement, but is compelled by the rules. Hence it must be concluded that Rules 2 and 3 result in compulsory through motor-rail routes. The Commission lacks statutory authority to compel such transportation.

The resolution of the issues in this case is not aided by statements to the effect that there is no specific statutory prohibition in so many words against a motor carrier becoming a shipper. The fact is that Section 216(e) pro-

[12] The Government recognizes the distinction between traffic and property on p. 37 of its brief. They fail to recognize the significance of the distinction, however, when they do not see that a trailer loaded with shipments tendered to it for transportation is not property of a motor carrier shipper, but the facility of a carrier handling its traffic in revenue service. *Cf. Louisville & N. R. Co. v. U. S.*, 282 U.S. 740, 754-55 (1931).

vides the exclusive method of coordinating rail and motor services. No one in the proceeding contends that the Commission has power under the Act to order motor-rail coordination either directly or indirectly. Hence, unless the arrangement can be said to be voluntary, it is not an arrangement in accord with the Commission's authority under Section 216(c).

On the other hand, if the relationship resulting from transportation compelled by Rules 2 and 3 is not one of carrier-carrier, but a shipper-carrier relationship, then the Rules have permitted transportation in violation of the forwarder permit section of the Act.[13] In short, the Commission's attempt to change the status of the motor carrier participant in transportation under these Rules from carrier to shipper and back to carrier again is not availing to avoid conflict with the Interstate Commerce Act.

Even if the other sections of the Act did not prevent a motor carrier from tendering its traffic to a railroad as a shipper, the exclusions from the prohibitions against discriminatory treatment contained in the Act, prevent those sections of the Act from becoming a statutory source of authority for the rules.

Nor does the National Transportation Policy compel any different result. The fact is that the Commission did not find that the National Transportation Policy justified Rules 2 and 3. It simply held that it did not prohibit them. The reason the Commission made no such findings is clear. There was no evidence to support them. The broad policy arguments newly advanced in Appellants' briefs are inadequate to support the Commission's adoption of Rules 2 and 3. Moreover, they are based on a lack of understanding of the facts or misapprehension of the law. In fact, if Section 2 of the Act is relied on as the source of authority for the rules, voluntary coordination in piggyback service may well be seriously retarded.

[13] Section 410(a); 49 U.S.C. 1010(a).

These considerations would compel affirmance of the district court's judgment setting aside Rules 2 and 3, if this were the first time this issue were raised. However, this is not the case. The Commission's longstanding consistent interpretation in several different cases, that the Act forbids a motor carrier from assuming the dual status of carrier and shipper, has reached the point where a change in that interpretation may come only after successful request to Congress to make it.

I

RULES 2 AND 3 RESULT IN THE ESTABLISHMENT OF COMPULSORY THROUGH MOTOR-RAIL ROUTES AND THE COMMISSION HAS NO AUTHORITY TO COMPEL SUCH ROUTES.

The Commission has consistently held that it has no authority to compel coordinated service between rail and motor carriers. In 1938, shortly after the passage of the Motor Carrier Act, the Commission indicated that it had no such power. It stated that such coordination could only be accomplished through the medium of through routes and joint rates and it had no power to require their establishment.[14] This Court has also taken this view of the Commission's power.[15] Thus, if what the Commission has accomplished by Rules 2 and 3 are compulsory motor-rail routes, the Rules are clearly beyond the Commission's power, and hence, must be set aside.

A comparison of the physical operations,[16] the tariff provisions and the Commission's own rules governing the transportation under Rules 2 and 3 with these same features of a Plan I movement, which the Commission holds

[14] *Kansas City S. Transport Co., Inc. Common Carrier Application*, 10 M.C.C. 221, 235-36 (1938).

[15] *I.C.C.* v. *Parker*, 326 U.S. 60, 72 (1945).

[16] This discussion assumes for ease of comparison a motor carrier's use of a so-called Plan III rate published by a railroad.

is a motor-rail through route (322 I.C.C. at 342-43), discloses not only a similarity but a virtual substantial identity.

The physical operation as to any particular trailer would be identical. The motor carrier would provide the trailer. It does in Plan I. The motor carrier would provide or arrange for the provision of the origin and destination drayage. Again this is the same in the Plan I through route arrangement.[17] The rail carrier would in both instances place the trailer on the car, provide the line-haul transportation and remove the trailer from the car.[18]

The tariff provisions by which the motor carriers would use rail open tariffs would also be virtually identical with those under which they join a railroad in a Plan I through route arrangement. In one case, the motor carrier would advise that rail service would be "utilized" and in the other that it would be "provided".[19] The tariffs would provide that the shipper pay a single rate for a movement that was partly by motor, partly by railroad and partly by motor again. The traffic would move over such a route. This is the classic example of a motor-rail-motor movement. (See 322 I.C.C. at 349-50).

Similarly, the rules which the Commission has adopted to govern open tariff transportation and through

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[17] See e.g., R. 786-87.

[18] This is not to say that there would be the same operational efficiency for the railroad in both instances. Because Plan I presupposes the advance agreement by the railroad, and concurrence in the interchange at specific named points, it is possible for the railroad to make advance plans to have sufficient terminal facilities and equipment to accommodate the movement smoothly. On the other hand, if a motor carrier may use open tariffs, it can "tender" its traffic without these advance arrangements at any of its authorized points, perhaps in large volumes with little or no notice. For example, a motor carrier which has never used a railroad might because of a snowstorm show up at a rail terminal with a hundred trailers to be moved. The resulting confusion and strain on facilities would work to the detriment of the railroad's regular customers and voluntary motor carrier partners.

[19] Cf. Rule 3(b) with Rule 4(b).

route service are virtually identical. The only difference is the omission of contract carriers from the through route rules. But this is because contract carriers may not enter into through route arrangements with common carriers. 322 I.C.C. at 350. Indeed the concern about contract carriers evidenced in this proceeding is somewhat mystifying, since in the landmark case of *Movement of Highway Trailers by Rail, supra* the Commission had permitted such carriers to tender traffic to railroads as agents for their shippers, to the extent that their contracts and status permitted such tender. 293 I.C.C. 93, 103-04, 108-09. In such case, of course, the rail carriers' responsibility would be directly to the shipper.

With respect to common carriers, the operative rules governing open-tariff and through-route transportation are virtually carbon copies one of the other. The tariff notice requirements are the same.[20] The rules governing tariff designation of interchange points, connecting carriers, and routes are all the same.[21] The rules impose the same limitation on where traffic may be interchanged.[22] The rule of thumb limitations with respect to how much circuity may be eliminated by use of an open tariff or under a rail-motor through route are contained in the same rule.[23]

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[20] Rules 3(b) and 4(b).

[21] Rules 3(d) and 4(c).

[22] Rules 3(e) and 4(d). In this connection, the limitation on a motor carrier's right to tender traffic to a railroad as a shipper is particularly interesting. The Commission cites no specific authority to impose such a limitation. If Section 2 of the Act (49 U.S.C. 2) requires a motor carrier to be treated the same as any other shipper, it would follow that a motor carrier has the right to tender traffic any place a railroad holds itself out to receive it. Indeed, the very imposition of these limitations indicates that the Commission must believe that, contrary to the assertions contained in the Government (p. 24, *et seq.*) and Motor Carrier (p. 28-29) briefs, something more than the physical character of the shipment must be viewed, in determining a motor carrier's right to be a "shipper". These limitations are based on the fact that a motor carrier has a different status than any other shipper.

[23] Rule 5(a).

It is clear that a motor carrier's use of a rail open-tariff to move its traffic produces transportation that has every characteristic of a through motor-rail route, except the railroad's voluntary concurrence.[24] But this is a fatal defect for it is only the voluntary through motor-rail route which Section 216(c) comprehends.

To overcome the obvious lack of authority it possessed to compel through motor-rail routes, the Government and the Motor Carriers both rely on the contention that transportation under Rules 2 and 3 cannot be a through route because the railroad does not voluntarily join in holding out a through service. (Govt. Brief 60-61; Motor Carrier Brief 31-33). The best answer to this argument can be found in the opinion of the District Court where it pointed out the logical fallacy in the argument when it said:

> "By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route." (R. 33)

It should be noted that this was not the basis for the Commission's decision. It quite frankly admitted that there would arise a *de facto* through route, but found that there would be no compulsion on either the motor carrier to use open tariffs or the railroads to publish any TOFC tariffs.

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[24] The Government (p. 62) and Motor Carrier (p. 32) assertions concerning differences in liability of the rail carrier are without significance. Even if the motor carrier could not claim against the railroad under Section 20(12) of the Act, it can claim under Section 20(11). Even the ultimate shipper whose traffic the motor carrier is hauling might claim against the railroad on the theory that it is the undisclosed principal on whose behalf its agent, the motor carrier tendered it to the railroad. See *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Acme Fast Freight*, 336 U.S. 465, 488 n. 27 (1949). See also *Thompson* v. *American Abrasive Metals Co.*, 253 S.W. 2d. 83 (Tex. Civ. App. 1952), *cert. den.* 346 U.S. 816 (1953). Similarly the motor carrier claim (p. 32) that there is a difference because the shipper can only veto the use of TOFC, but not demand it, is incorrect. In a Plan I through route the shipper's only right is to veto the service. Again Rules 2 and 3 and Plan I conditions are identical.

(322 I.C.C. at 334-35). The District Court characterized this finding as being "at odds with reality" (R. 33).

Indeed this is probably the most fanciful finding in the entire report. With respect to the motor carrier, it is true that it still does have a choice to use or not use the TOFC service. But, as a practical matter, the railroad's choice has been taken away. The rail carriers have been told that they either open their tariffs to, and thereby establish through routes with, motor carriers, or get out of the business entirely.

The finding that there is "no compulsion whatever . . . on rail carriers to hold out a TOFC service. . . ." also overlooks important provisions of the Interstate Commerce Act. This discussion would indicate that the rail carriers have complete freedom to decide whether or not they will ever hold out a trailer-on-flat-car service. Of course, this conclusion completely ignores Section 1(4) of the Act[25] which places an absolute duty on rail carriers to "furnish transportation upon reasonable request therefor . . ." and Section 6(1) which requires railroads to print, publish and file tariffs showing the rates and charges for such transportation. It is inconceivable at this stage of transportation history that, with equipment and facilities already in existence, no shipper at any location could make a "reasonable request" for trailer-on-flat-car service. But in order for the railroads to be free not to hold out such a service, this would have to be the existing factual situation. In short, the Commission's finding does place a compulsion on the rail carriers, which can be immediately seen if one is aware of the terms of the Act. The finding does result in compulsory through motor-rail routes.

From a common sense standpoint, the finding that Rules 2 and 3 involve no compulsion must rank among its most unrealistic in the Commission's 80 year history. Several analogies immediately spring to mind. On the same

[25] 49 U.S.C. § 1(4).

basis, one might conclude that the victim of a robbery who has turned over his purse to a brigand upon the threat, "your money or your life," has "voluntarily" surrendered his valuables. By the majority's logic, such act would have been voluntary, for the victim had a choice; he could have given up his life. Similarly, the majority would find no compulsion on either side in a situation in which a lawyer held a gun to a judge's head and told him to decide all the lawyer's cases in his favor. There would be no compulsion on the lawyer to submit any cases to that judge; the judge's decisions would be "voluntary" because he could always resign from the bench (or presumably kill himself), rather than submit to the lawyer's demands. The illogical nature of this conclusion would be extremely humorous, were the basic philosophy which underlies it not so frightening.

The fact is that Rules 2 and 3 do compel the railroads to enter into through routes with motor carriers, a result which the Commission presently has no power to effectuate. On this ground alone, the judgment of the District Court must be affirmed.

Moreover, Section 216(c) of the Act does not provide simply one method of coordinating motor rail service. It provides *the* way. A simple reading of this Section as well as Section 217(a)[26] shows two things with striking clarity. A motor carrier is authorized to file tariffs providing service between points on its own route and points on a route including a common carrier by railroad only when a through route has been established. As has been demonstrated, such a through route may only be established by the voluntary agreement of the parties thereto.

The exclusivity of Section 216(c) has already been tested in a case in which the forwarders, who could ship by tariff, contended for their right to enter into joint rates with carriers. They argued that there was nothing in the Act to prevent them from doing so. A District Court, in a

[26] 49 U.S.C. 317 (a).

learned opinion by Circuit Judge Augustus Hand, rejected the contention, stating the section set forth the circumstances under which joint rates could exist and its provisions were exclusive.[27]

II

THE COMMISSION'S RULES PERMIT MOTOR CARRIERS TO ACT AS FORWARDERS IN VIOLATION OF PART IV OF THE INTERSTATE COMMERCE ACT.

As already indicated, these Appellees submit that the Commission's rules create compulsory and therefore unauthorized through motor-rail routes. This is because the rules require railroads to enter into connecting carrier relationships with motor carriers acting in the guise of shippers. If, however, it be argued that the motor carrier is not a connecting carrier in an arrangement compelled by these rules, then it is a shipper. If this be the case, the Rules are unlawful because in violation of Part IV of the Act.

Section 410(a) of the Act[28] prohibits anyone from engaging in service subject to Part IV of the Act without a forwarder permit. Section 402(a)(7)[29] defines service subject to Part IV as service provided by a freight forwarder. Section 402(a)(5)[30] defines a forwarder as one who holds himself out to assemble and consolidate property, and break bulk and distribute it at destination, assume responsibility for such property from point of receipt to point of destination, and utilize for part of the transportation, the services, *inter alia,* of a Part I carrier

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[27] *Acme Fast Freight Inc.* v. *United States* 30 F. Supp 968, 973 (S. Dist. N.Y. 1940) *aff'd.* 309 U.S. 638 (1940).

[28] 49 U.S.C. 1010(a).

[29] 49 U.S.C. 1002(a)(7).

[30] 49 U.S.C. 1002(a)(5).

(a railroad). The section excludes from this definition one who performs these activities, as a carrier subject to part I, II or III of the Act. If, however, the motor carrier, tendering traffic to a railroad is acting, not as a carrier, but as a shipper, as authorized by Rules 2 and 3, then the Rules violate Part IV of the Act.

It should be noted that the exclusion from the definition relates not to the general status of the person, but his activity with respect to the particular transportation under review. It does not simply exclude Part I, II or III carriers. It excludes only those who are performing or holding out to perform the specified activities as carriers.

The legislative history of the section confirms that the clear language of the Section was so intended. In explanation of the exclusion the House Committee said:

> "The definition, it will be noted, does not include a person by reason of a holding out to transport or provide transportation 'as a carrier subject to part I, II, or III' of the Interstate Commerce Act. The purpose of this provision is primarily to avoid regulation, under Part IV, of the operations of express companies, which might otherwise have been considered to be included within the definition. It was deemed desirable to refer to the other carriers in order to clearly carry out the policy of not having part IV apply with respect to transportation performed by railroads, motor and water carriers in accordance with the applicable provisions of the Interstate Commerce Act." H. Rep. No. 1172, 77th Cong., 1st Sess., p. 6.

Of course, there are only two ways in which a motor carrier may perform, or hold out to provide, transportation in accordance with the provisions of the Act. One is to engage in operations on a public highway by motor vehicle,[31] and this does not include moving such a vehicle

[31] Section 206(a)(1) of the Act; 49 U.S.C. 306(a)(1).

over a railroad.[32] The only other method contemplated by Part II of the Act is for a motor carrier to join voluntarily with a willing rail, water, or express company partner in a through service over an intermodal route.[33] Indeed the definition of the "interstate commerce" to which Part II of the Act applies includes only these possibilities.[34]

In this connection it is extremely important to appreciate the difference between a lawful voluntary through motor-rail route under Part II and an unlawful compelled through route. It is the failure to comprehend this distinction which undoubtedly accounts for the Government's statement that the railroads do not join in the argument that the rules violate Part IV of the Act.[35] These railroad appellees have from the beginning of this case, and indeed from the first time the Commission suggested the possibility of open-tariff use in its notice of oral argument, pointed out the extremely important difference between the two situations. The difference is that Plan I is a lawful through route joint-rate arrangement because the railroad has voluntarily agreed to the arrangement. The open-tariff arrangement is not lawful because the Commission is attempting to substitute the compulsion of the Rules for the voluntary concurrence of the railroad.

When the railroad has given such concurrence, a motor carrier interchanges a trailer with a railroad as a "connecting carrier", and thus the argument has no merit

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[32] Section 203(a)(12), (13), (14) of the Act; 49 U.S.C. 303(a)(12), (13), (14).

[33] Section 216(c) of the Act; 49 U.S.C. 316(c).

[34] Section 203(a)(10); 49 U.S.C. 303(a)(10).

[35] Government Brief, p. 63, n. 40. Admittedly, these appellees submit that the Court need not reach the question if it concludes that the Rules result in compulsory and hence, unlawful through routes. The argument must be advanced, however, because both the Commission and the Government, at various stages of this proceeding, have, in answering the arguments of the parties, changed the motor carrier's identity, like Achelous, from carrier to shipper to carrier, depending on which conflict with the Act they were attempting to evade.

because of the specific exclusion in the definition of a freight forwarder in Section 402(a)(5) of one which performs its activities as a carrier. But if the railroad has not given such a concurrence, and the motor carrier tenders a trailer "as a shipper" and not a "connecting carrier", the exclusion does not apply. Then the argument that the motor carrier would be unlawfully operating as a forwarder without a permit is not only meritorious but alternatively conclusive.

The significant item that the Commission overlooked in its Report[36] and the Government continues to ignore in its Brief, is that, with the voluntary concurrence of the railroad, a substituted service arrangement is perfectly lawful, permitted by Congress and contemplated under Section 216(c) of the Act. Without that concurrence the arrangement is unlawful, either in violation of Section 216(c) or Section 410(a).

III

NEITHER SECTION 2 OF THE ACT, THE NATIONAL TRANSPORTATION POLICY NOR OTHER POLICY REASONS AUTHORIZE THE IMPOSITION OF RULES 2 AND 3.

1. *Section 2 Of The Act Does Not Authorize Rules 2 and 3 and Is Immaterial Since A Motor Carrier Cannot Become a Shipper of Its Traffic Entitled to the Protection of Section 2.*

The only section of the Interstate Commerce Act mentioned by the Commission in support of its adoption of Rules 2 and 3 is Section 2. Accordingly, other sections of the Act now advanced by counsel seeking to defend the

[36] The Commission only discussed this argument in connection with the contention that the Plan I through route arrangement was unlawful. Of course, having concluded that under such an arrangement, the parties were acting as connecting carrier partners to a through route, the exclusion from the definition became operative and overcame the argument. See 322 I.C.C. at 347.

Commission's order are unavailing, since the action of an administrative agency must be measured against the grounds invoked by the agency.[37]

However, Section 2 provides no authority for the Rules. None of the cases cited by Appellants contradicts this conclusion. None of those cases deals with a situation where a federally regulated carrier is attempting to ship via another mode in order to carry out its undertaking as a carrier. For example, *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740 (1931), cited by both the Government and the Motor Carriers was one of the few cases cited by the Commission in this portion of its report in support of the Rules. But far from supporting Appellants, the case contains a recognition of the distinction to be made between a carrier tendering its own property for shipment, and a carrier handling another's equipment for revenue purposes in a connecting line movement. See 282 U.S. 740, 754-55.

The only case cited by Appellants which is even remotely similar to the issues here involved is *I.C.C.* v. *Delaware L. & W. RR.,* 220 U.S. 235 (1911). That case involved attempted discrimination in rates against the forwarders. The Court ultimately forbade discrimination in charges "upon the mere circumstance that the shipper is or is not the real owner of the goods." 220 U.S. at 252. However, certain things must be noted about this case. First of all it was decided prior to the enactment of Part IV of the Act. At that time a forwarder had no federally regulated status as a "carrier" and, of course, could be a

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[37] *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-69 (1962); *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 94 (1943). In this regard the parties' resort to Section 1(4) is particularly interesting. It is this section which imposes the duty on a railroad to enter into through routes with other railroads and water carriers subject to Part III. Motor carriers are not mentioned. If this section be given the meaning hinted at by Appellants here, the first duty imposed by the section would make the remainder surplusage. It would also make Section 3(4) of the Act needless verbiage.

shipper.[38] There could be no inconsistency or repugnancy in a forwarder having this dual status. Moreover, forwarders have traditionally occupied this dual position, and Congress in enacting Part IV of the Act recognized their "unique" position in this regard, as indicated by the legislative history.[39] By the same token, in refusing to permit regulated carriers to engage directly in forwarder operations, it is clear that Congress did not intend to permit other carriers to carry on this dual role of carrier and shipper.[40]

Section 2 must be read *in pari materia* with Section 3(1) of the Act. The latter actually governs discrimination in service as contrasted with Section 2 which covers only discrimination in charges. However, Section 3(1) does not apply to the "traffic"[41] of other carriers and hence motor carriers are not entitled to the protection of these sections when attempting to tender freight which they have received for transportation in their capacity as carriers.

Other appellees will deal with this issue in some detail so there is no need to burden the Court with lengthy repetition. Sufficeth it to say that to the extent a motor carrier can lawfully become a shipper of its property, it would

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[38] As could a motor carrier. In this very decision the Commission recognized the import of this factor when it said (322 I.C.C. at 338): "Prior to August 1935, when part II of the Interstate Commerce Act became law, the motor carrier industry was not subject to Federal regulation and such carriers, *therefore*, could utilize the services of railroads as could any shipper. *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435." (Emphasis Supplied). That this is the significance of the cited case can be seen from the emphasized word.

[39] See H. Rep. No. 1172, 77th Cong., 1st Sess., p. 1.

[40] *Ibid.*, p. 15. "The provisions of this subsection [Section 411(c)], as well as those of section 410(c), are intended to carry out the policy of permitting . . . [Part I, II or III] carriers to engage in freight forwarding indirectly, through control of subsidiary corporations, but of not permitting them to engage directly in the freight-forwarding business."

[41] As distinguished from their own property; the Government brief acknowledges the difference at p. 37.

be entitled to the protection of Section 2. As to its "traffic", however, it is not entitled to this protection.

This interpretation of Section 2 avoids conflict with other sections of the Act. See pp. 15-24, *supra*.

The cases cited by the Government compel no different result. Those cases simply hold that a rail carrier may not discriminate against one shipper and in favor of another because there is competition for the latter shipper's business and not for the former's business. This has nothing to do with whether or not a carrier can discriminate against a competitor. If Section 2 covered this matter, there would have been no reason for the enactment, for example, of Section 3(4) of the Act.[42]

The fact is, of course, that the question is not whether a railroad can discriminate against a competitor, but whether or not that competitor can lawfully be a shipper entitled to the protection of Section 2. To the extent that his federally franchised, regulated status as a carrier prevents him from lawfully becoming a shipper, the provisions of Section 2 become irrelevant.

2. *Neither The National Transportation Policy Nor Other Newly Advanced Policy Reasons Support The Adoption of Rules 2 and 3.*

In adopting Rules 2 and 3, the Commission did not rely on the mandate of the National Transportation Policy. In fact, the only thing the Commission held with respect to the Policy was that it did not of itself bar the Rules (322 I.C.C. at 329-30).

Of course, the Policy alone could not provide support for the rules since it is merely an interpretive aid, and does not give the Commission a roving mandate to prescribe what it thinks is good for the carriers. The Commission has in the past recognized this. In a case posing somewhat similar questions as the instant one, *Strickroot*

[42] 49 U.S.C. § 3(4).

v. *Detroit & Cleveland Navigation Co.*, 253 I.C.C. 535 (1942), the Commission denied the request of a motor carrier that a water carrier be required to join with it in the establishment of through routes by saying at 537-38:

> "We are without authority under either part II or part III of the act to require defendant to join with complainant in the establishment of through routes and joint rates on this traffic. The provisions of section 216(c) of part II and of section 305(b) of part III of the act in respect of the establishment of through routes and joint rates between common carriers of property by motor vehicle and common carriers of property by water are permissive, not mandatory. . . . In his exceptions, complainant by inference contends that we have such authority under the declaration of national transportation policy in the act, as amended, to the effect that there shall be fair and impartial regulation of all modes of transportation which will preserve the inherent advantages of each without unfair or destructive competitive practices. We do not agree that the declaration of policy indicates that the provisions of sections 216(c) and 305(b) have any different meaning or purpose than that here given them. We are not clothed with substantive power other than that given by the substantive provisions of the act."

United States v. *Pennsylvania R. Co.*, 323 U.S. 612 (1945) does not indicate that the policy or some vague rule of equality will substitute for statutory authority for Commission action. While there need not be specific *language* there must be some section or sections of the Act which provide the authority. In the last cited case, the Court was able to ascertain such authority pointing to specific sections which provided it. See 323 U.S. 612, 619.

The other policy arguments advanced by both the Government and the Motor Carriers seem to be nothing more than the cry that the scheme of the Interstate Commerce Act itself is anti-competitive. Of course, such complaints should more appropriately be directed to Congress, rather than to this Court.[43]

Appellants' basic complaint is that railroads can provide door-to-door piggyback and motor carriers cannot. Since piggyback is transportation by railroad,[44] this should not be surprising. The ability to provide the over-the-street movement in conjunction with the rail transportation results from a specific authorization in the Act, viz., Section 202(c) thereof. Moreover, it must be remembered that this ability of a railroad is limited to shipments originating *and* destined within the railroad's terminal area. Beyond these limits, the railroad must find a motor carrier willing to join it in a through route arrangement, or it cannot provide door-to-door transportation.

The complaint that a railroad may join some motor carriers in through routes and not others is another quarrel with the provisions of the statute. It is simply a statement of dissatisfaction with Section 216(c) of the Act which permits through motor-rail routes but does not give the Commission the power to compel them.

The attempt to show that this "anti-competitive scheme" is harming the motor carriers founders on the

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[43] See *American Trucking Associations* v. *United States*, 364 U.S. 1, 15 (1960):

> "Appellees say that these safeguards are no longer needed, because independent trucking is no longer an 'infant industry'. This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say the transportation legislation does, and that the pardoning power in this case belongs to Congress."

The cited case involved an attempt by railroads to justify a broader incursion into the motor carrier field with the argument that changed conditions warranted lesser restrictions on rail affiliated motor carriers.

[44] 322 I.C.C. at 343; *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 101 (1954).

facts. It is based on the mistaken understanding of statistics relating to movements under certain Plans of TOFC, and the consequent invalid conclusion that these figures measure the extent of motor carrier participation in piggyback.[45] As indicated above, the figures do not measure that participation (See Statement, *supra*, pp. 6-10), and even if they did, the relevant forum in which to advance these persuasions would be the Congress.

Even the hypothetical speculations[46] concerning the great harm which may result without Rules 2 and 3 are unavailing. They simply mean that a railroad may be able, with efficient, economical service, at a price which must be just, reasonable, non-prejudicial and not competitively destructive, to attract some traffic to its lines.

Actually, if one wishes to hypothesize, greater harm to the future of TOFC can be envisioned if Rules 2 and 3 are imposed under the authority of Section 2 of the Act. These Appellees are the most substantial participants in voluntary through motor-rail routes with innumerable motor carrier partners. For many of them, this type of arrangement provides as large or larger volume than any of their other TOFC services.[47] The divisions which these rail carriers receive are lower than the published Plan III rates available to shippers for the same quantum of service.[48] If Section 2 means that only the physical operations must be considered in determining whether or not a railroad is discriminating between shippers and motor carriers, then these railroads would be compelled to fix the same level of charges for both. Since it is unlikely that rail carriers would wish to concede that the past

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[45] E.g., Government Brief, p. 44.

[46] Government Brief, p. 40-41.

[47] R. 221, 222, 577.

[48] R. 382, 584, 593. The New Haven, for example, receives systemwide an average of $48.12 per trailer in Plan I divisions; its Plan III traffic on the same basis averages $70.77 per trailer. R. 220-21.

Plan III rate level was too high, they would undoubtedly raise the Plan I divisions. This would almost certainly retard the future development of this form of coordination, if, indeed, it did not reduce the present level of cooperation.

In attempting to overcome this impact of the application of Section 2 to authorize Rules 2 and 3, the Government (Brief, pp. 62-63, n. 39) simply retreats from its previously asserted position that only the physical characteristics of the shipment may be examined in determining whether a difference in treatment is warranted (Brief, pp. 24, *et seq.*). Having contended that the motor carrier's status as a carrier makes no difference in connection with the anti-discrimination provisions of the statute, the Government relies on that status to avoid the deleterious results which will flow from the use of Section 2 as a source of authority for Rules 2 and 3.

Finally, it must be recognized that the so-called policy reasons for adopting the rules represent the speculations of appellate counsel. They are not based on any findings by the Commission, nor did the Commission state them as the grounds on which it acted. Hence, even if accurate, they would not support judicial approval of Rules 2 and 3. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962).

IV

THE COMMISSION'S LONGSTANDING CONSISTENT INTERPRETATION OF THE ACT TO THE EFFECT THAT MOTOR CARRIERS MAY NOT ACT AS SHIPPERS CAN NOW ONLY BE CHANGED BY CONGRESS AND THUS RULES 2 AND 3 EXCEED THE COMMISSION'S POWER.

Assertions concerning the effect of administrative interpretations of a statute and later legislative action or inaction have been stated, restated, applied and misapplied

for at least the last sixty years. The doctrine is sometimes set forth in an unqualified fashion, but on other occasions is stated with limitations.[49] In the instant proceeding, however, by any measure or standard, it is clear that the Commission erred in attempting to reverse its longstanding and consistent interpretation of the Interstate Commerce Act to prevent motor carriers from acting as shippers by rail.

In *New Haven RR. Co.* v. *Interstate Commerce Commission,* 200 U.S. 361 (1906), perhaps the earliest, and certainly one of the leading cases in the area, this Court said, at 401-02:

> ". . . a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

It will be immediately noted that an obvious qualification to the doctrine is that the original interpretation not be plainly erroneous. In the instant case even the Commission, in refusing to follow its previous longstanding interpretation of the Act, conceded that that original interpretation was not plainly erroneous. In discussing and later rejecting the interpretation, the majority said:

> "We are now of the opinion, however, that these decisions, [holding that a motor carrier could not act as a shipper] *although we do not doubt that when made they represented sound conclusions,* are incorrect in the light of this record and current conditions." (322 I.C.C. at 334) (Emphasis supplied)

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[49] See generally Davis, *Administrative Law Treatise,* §§ 5.06, 5.07 (West Pub. Co., 1958).

Another element of the doctrine is that the interpretation has been impliedly sanctioned by the reenactment of the statute without alteration. Such sanction has been found at times by mere silence on the part of Congress, but the doctrine has especial force where specific bills to overcome the interpretation have been introduced, but not enacted. It is said that great weight must be given the contemporaneous construction of an act of Congress by an agency charged with its supervision, which interpretation has been followed by agencies of government, and has been acquiesced in by congressional failure to pass bills introduced to repeal the administrative interpretation. *U. S.* v. *Bergh,* 352 U.S. 40 (1956). A more recent administrative interpretation of a statute cannot prevail against a prior longstanding, consistent interpretation, particularly where Congress has not only impliedly through silence but expressly through refusal to enact laws changing the original interpretation acquiesced in that original interpretation. *U.S.* v. *Leslie Salt Company,* 350 U.S. 383, 396-97 (1956).[50]

With respect to the interpretation of the Act to the effect that a motor carrier may not assume the dual role of shipper and carrier, it can be seen that it meets every qualification of the doctrine that requires such interpretation to be read into the statute. As indicated above, it was not plainly erroneous when made. Secondly, it was made shortly after the passage of the Motor Carrier Act, which for the first time gave for-hire motor carriers the status of federally regulated carriers. The members of the Com-

[50] A clear and succinct statement of this doctrine can be found in *Atchison, Topeka and Santa Fe Railway Company v. U. S.,* 209 F. Supp. 35 (N.D. Ill., 1962) where the Court said, at 41-42:

"Finally, the Commission here for the first time has adopted a view that is antagonistic to the construction which it had followed for the previous seventy years of its lifetime. In such a case the new interpretation is entitled to no weight as an administrative determination." (Citing *U. S. v. Leslie Salt*)

mission who participated in the decision in *Substituted Freight Service,* 232 I.C.C. 683 (1939), which contained the interpretation, were largely those who had participated in the Congressional procedures leading up to the enactment of the Motor Carrier Act.[51]

Because both the Commission's report and the Appellants' briefs state the history and holding of that decision in a somewhat unclear fashion, it may be well to review the proceeding in detail, comparing it with the Commission's attempt in the present case to restate that previous interpretation. This decision was rendered shortly after the passage of the Motor Carrier Act and was by its very terms a general investigation into the use of substituted motor for rail, or rail for motor service. This case clearly held that one could not act as a motor common carrier and a shipper by rail as to the same shipment. Such a situation was said to be "repugnant to the Act." Here, the Commission attempted to distinguish that decision. It stated that the clear holding in that proceeding must be considered in view of the ultimate nature of the findings therein, and indicated that the holding that a motor carrier could not perform a coordinated service through the use of a railroad open tariff was probably not "necessary to the determination of the case." (322 I.C.C. at 332)[52] The majority stated that the ultimate findings of the Commission in *Substituted Freight Service* were of a limited nature, viz., that "service substituted for common carriage must itself be common carriage and that the tariff publications

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[51] See Hearings Before the Committee on Interstate Commerce, U.S. Senate 74th Cong., 1st Sess., on S. 1629, p. 115:

"THE CHAIRMAN. Yes; and I might say that I claim no pride of authorship of these bills. These are bills suggested by the Commission and by the Coordinator, and I introduced them as chairman of this committee."

Commissioner Eastman who was the "Coordinator" was a member of the majority in *Substituted Freight Service.*

[52] Similarly the Appellants in their briefs constantly refer to this statement of principle as a dictum.

allowed under the special permissions were legally insufficient ... ." The majority continued that the prohibition against a motor carrier acting as a shipper was solely because the motor carrier was not giving proper notice in its tariffs that it might substitute rail service. This is absolutely and completely wrong.

One of the ultimate conclusions in the *Substituted Freight Service* was as follows:

> "3. The furnishing of the so-called substituted service without setting forth the service, the routes over which it is performed, and the parties performing same in *lawfully filed tariffs* is in contravention of sections 216-217 and our regulations thereunder, including rule 31 and section 2 of Tariff Circular 20." (Emphasis supplied).[53]

Two things must be noted about this ultimate conclusion. The first is the reference to Rule 31 of Tariff Circular 20 which at that time provided in part as follows:

> "Where it is desired to establish arrangements for through transportation with motor carriers, joint rates in accordance with the provisions of section 216(c) of Part II of the Interstate Commerce Act and of the regulations applicable to joint rail-motor rates as provided in section 2 of this Circular as amended, should be established."[54]

In short, it may be noted that the Commission in *Substituted Freight Service* did not say that a motor carrier could act as a shipper provided it gave notice in its tariffs. It said that, if a motor carrier and railroad wished to make through arrangements for joint motor-rail service, they had to follow the provisions of section 216(c) of the Act. Hence, the finding that a motor carrier could

[53] 232 I.C.C. at 691.

[54] See 232 I.C.C. 685.

not act as a shipper, and use an open-rail tariff to construct a joint motor-rail service *was* necessary to the ultimate determination in the proceeding.

Secondly, it should be noted that the Commission did not simply say in *Substituted Freight Service* that notice of a possible substitution of service in some kind of tariff was all that was necessary to effectuate a joint motor-rail service. The Commission said that such information had to be given in "lawfully filed tariffs." Earlier in the *Substituted Freight Service* decision the Commission had stated (232 I.C.C. at 689):

> "If publication is made in the applicable rate tariff, the latter should show appropriate concurrences of the motor carriers performing the substituted service. If publication takes place in the form of a directory, the latter should be published with appropriate concurrences of the rail and motor carriers listed therein, and the rate tariffs should contain concurrences of the motor carriers and appropriate reference by I.C.C. number to the directory."

It can be seen that the Commission was pointing out that one of the requirements of a substituted service arrangement was a list of the *concurrences* of the carriers involved. A concurrence is, of course, an agreement or an approval of the arrangement being entered into. If a motor carrier could act as a shipper and use a railroad's open tariff, there would be no need to either publish, or indeed, secure the concurrence of any rail carrier, since a rail carrier *must* accept shipments tendered in conformity with its tariffs to the extent that the shipper may lawfully act as a shipper.

At 322 I.C.C. 333, the Commission bolsters its present novel interpretation of *Substituted Freight Service, supra,* by stating that the Commission in that case did not intend to proscribe the type of substituted service arrangement

originally intended by the parties involved in *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435 (1936). It states that in *Substituted Freight Service* the language was directed at the use of an open TOFC service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. It then states that if the carrier utilizing the substituted service gives proper notice in its own tariffs of that use, there is nothing to prevent it from using another mode's tariffs. The incredible thing about this statement is that six pages later (322 I.C.C. 339), in discussing joint intermodal TOFC service, the Commission, in this very case, cites with approval an earlier finding that the status of a motor carrier substituting the service of a rail carrier is that of a connecting carrier. The case cited is *Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245 (1936). In that case, the Commission rejected the argument that a motor carrier, substituting rail service, would be in the position of a shipper.[55]

Moreover, and this is equally amazing, immediately before this discussion, the Commission report in the instant case recognized that the basis for the decision in *Trucks on Flat Cars Between Chicago and Twin Cities, supra,* was that motor carriers were not then subject to Federal regulation as "carriers", and thus could utilize the services of railroads as "shippers". The Commission stated (322 I.C.C. at 338):

> "Prior to August 1935, when part II of the Interstate Commerce Act became law, the motor carrier industry was not subject to Federal regulation and such carriers, *therefore,* could utilize the services of railroads as could any shipper. *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435." (Emphasis supplied)

[55] See 219 I.C.C. 245, 274.

The Commission cannot justify its conclusions in this matter. Nevertheless, in what appears to be an attempt to give some aura of respect to its interpretation of *Substituted Freight Service,* the Commission stated that nowhere in the *Substituted Service* case did the Commission specifically overrule, or attempt to distinguish *Trucks on Flat Cars Between Chicago and Twin Cities, supra.*[56] It conceded further on in its report that certain of its later decisions followed a contrary interpretation of *Substituted Freight Service.* In *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, (1954), however, the Commission had no doubt about the effect of *Substituted Freight Service* on its earlier decision in *Trucks on Flat Cars.* At 293 I.C.C. 104-105, the Commission said:

> "Question 4.—Under the conditions stated in question 3, may a railroad transport such trailers if the prior and/or subsequent highway movement is by a common carrier by motor vehicle? If so, to what extent must the railroad ascertain and be subject to the limitations in the motor common carrier's certificate as to (a) territory and (b) commodities?
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> "This question, like number 3, is to be answered against the background of an *open tariff published by the railroad naming rates open to the general public and applicable on freight-laden highway trailers to be*

[56] The Commission ignored the fact that in *Substituted Freight Service,* 232 I.C.C. 683 (1939), the Commission in note 2 on page 690 referred to its earlier decision in *Trucks on Flat Cars,* but pointed out that joint motor-rail-motor rates were subsequently filed covering this same service and found justified in *Motor-Rail-Motor Traffic in East and Midwest.* This is a substantial indication that the approval in *Trucks on Flat Cars* was based on the fact that motor carriers were not then federally regulated and that once they were, the way in which they could coordinate service with railroads was under § 216(c) with joint rates and through routes. Thus, the Government's assertion (p. 55, Government brief) that in *Substituted Freight Service* no reference was made to the Commission's contrary holding in *Trucks on Flat Cars Between Chicago and Twin Cities,* supra, is simply incorrect.

transported by the railroad on flatcars. In *Trucks on Flat Cars between Chicago and Twin Cities, supra,* we found such an arrangement to be lawful. The motor carrier was said to have the status of a common carrier as to the entire haul and the status of a shipper as to that portion of it performed by the railroad.

"Three years later, in *Substituted Freight Service,* 232 I.C.C. 683, 690, *we again adverted to this principle and rejected it,* observing that for the motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act. See also *Motor-Rail-Motor Traffic in East and Midwest, supra,* page 274. The view so stated is obviously sound. It follows, therefore, that if the railroad is on notice that trailers tendered it in this manner are being operated in common-carrier service subject to part II of the act, it should not thus knowingly join with the motor common carrier in a violation of the law. *It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers."* (Emphasis supplied)

In the instant case, as shown above, the majority attempted to temper the effect of the clear holding in *Substituted Freight Service* by stating that there the emphasis was placed upon proper publication and notice to the public, "and that there is no requirement that what is called a 'joint service' can only be performed under joint rates and not pursuant to a properly published substitution arrangement using the open-tariff rates of the underlying carrier."[57] Aside from the fact that this

[57] 322 I.C.C. at 334.

conclusion is completely inconsistent with the Commission's later holding in this case that a substituted rail for motor service is a joint-rate through-route arrangement,[58] the statement completely ignores the fact that in *Movement of Highway Trailers by Rail, supra,* the Commission, two pages after stating that a motor carrier could not act as a shipper, discusses at some length the publication requirements for a substituted service arrangement as a lawful joint rate and through route, 293 I.C.C. 93, 106-107 (1954). In short, for the Commission now to say that the prior holdings that a motor carrier could not act as a shipper were simply because of a failure to meet certain publication requirements, implies that the Commission, in *Movement of Highway Trailers by Rail,* stated the prohibition on one page, but did not see the need to relate it to the publication requirements discussed two pages later.

Indeed the Commission specifically limited the prohibition to the situation where a motor carrier was attempting to act as a shipper.[59] In other words, the Commission clearly distinguished and forbade a motor carrier's use of rail TOFC service as a shipper, but recognized such use was permissible under a lawfully published through-route arrangement.

Congress reenacted the Motor Carrier Act of 1935 as Part II of the Interstate Commerce Act in 1940. No change was made in the interpretation of the Act in *Substituted Freight Service.* Indeed the interpretation prevailed for

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[58] "There thus came into existence two fundamental types of coordinated motor-rail piggyback services and arrangements, both of which have been sanctioned by this Commission as lawful joint-rate and through-route arrangements. One form of operation—which has come to be known as plan I TOFC service—provides for the 'substitution' of rail for motor service at rates which are the equivalent of corresponding all-highway rates published by the participating motor carrier." (322 I.C.C. 301, 342 (1964).

[59] "It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers." 293 I.C.C. 93, 105.

approximately the next twenty-five years. It was constantly repeated in subsequent decisions governing many different aspects of rail-motor transportation. In *Greer Broker Application*, 23 M.C.C. 417 (1940) a motor carrier filed an application for a broker's license to cover the arrangement of transportation by motor vehicle of oilfield equipment and supplies. The applicant owned four trucks, which he used in his own common carrier operations, but turned certain of the traffic over to other motor common carriers under their published tariffs. In holding that the activities considered were not those contemplated by the brokerage provisions of the Act the Commission discussed its previous decision in *Substituted Freight Service* and stated that the practice of a motor carrier accepting traffic for transportation from origin to destination as a common carrier, and then turning the traffic over for a portion of the route to a rail carrier under its tariffs, was repugnant to the Act. The Commission continued in the *Greer* decision by citing seven specific sections of the act which gave rise to the repugnancy, and concluded that the practice of the applicant disclosed in this proceeding could not be approved for reasons similar to those set forth in *Substituted Freight Service*.[60]

The next case in the Commission's long line of consistent interpretations of the Act was *Stones Express, Inc. Common Carrier Application*, 32 M.C.C. 525 (1942). That proceeding involved a grandfather application for a certificate of convenience as a general commodity common carrier. Applicant had been in part utilizing underlying rail service at published rates in substitution for over-the-road vehicle service. The Commission specifically stated that if the applicant desired to continue such operations it would have to bring them into conformity with the

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[60] 23 M.C.C. at 420. Interestingly, but mysteriously, the Commission in the instant proceeding cites *Greer* as consistent with its present interpretation of *Substituted Freight Service*. See 322 I.C.C. at 334.

tariff provisions of the Act in accordance with the views expressed in *Substituted Freight Service.*[61]

Three years after the decision in *Stones Express* the Commission reiterated its position that a motor carrier could not act as a carrier and shipper at the same time with respect to the same shipment. *Ringsby Truck Lines, Inc.* v. *Atchison, Topeka and Sante Fe Railway Co.*, 263 I.C.C. 139 (1945) involved a complaint by a motor common carrier that certain railroads were violating Section 1(4) of the Act and the National Transportation Policy by refusing to establish rates for the transportation of motor carrier freight on flat cars between Chicago, Illinois and Denver and Los Angeles. Complainant wanted rates set for its use in hauling its own less-than-truckload traffic instead of moving it over the road "at least during the present emergency period due to the War." Complainant cited the Commission's decision in *Trucks on Flat Cars.* The Commission dismissed the complaint, holding that the motor carrier would be acting as a carrier vis-a-vis the shipper, and a shipper vis-a-vis the railroad. Citing both *Substituted Freight Service* and *Stones Express*, the Commission stated that this created a situation which was repugnant to the Act.[62]

Again, two years later in a proceeding concerning an application for a certificate to operate as a water common carrier transporting loaded and empty trailers between Norfolk and Baltimore, *Savage Application*, 265 I.C.C. 157 (1947), the Commission reiterated its previous interpretation. The applicant proposed to handle, *inter alia*,

[61] 32 M.C.C. at 527. Again, this is a case cited by the Commission as consistent with its present interpretation of *Substituted Freight Service.* While it is true that in the *Stones Express* decision there was reference to the fact that the shipper was not being informed of the substituted service, the mandate to bring its operations into conformity with the tariff requirements of the Act must have included one of the requirements clearly set forth in *Substituted Freight Service*, viz., that the motor carrier obtain the concurrence of the participating rail carrier.

[62] 263 I.C.C. at 141-42.

trailers of motor common carriers at published rates. As to this the Commission, citing *Substituted Freight Service*, stated that such service would have to be performed under joint service arrangements similar to those in effect for joint motor-rail service.[63]

Similarly, in *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157 (1954), the Commission dismissed the complaint by a motor carrier which alleged that a water carrier's refusal to accept its vehicles for transportation while accepting those of another motor carrier was in violation of the Act. It also alleged that the defendant was, in effect, performing a motor carrier service without authority. The Commission dismissed the complaint on the ground that as to part of its operation defendant was an unregulated "ferry" company, and with respect to another portion of the transportation performed between the ports, the service was a joint service which must necessarily be rendered under joint service arrangements, citing *Savage Application* and *Substituted Freight Service*.[64]

As indicated above,[65] the interpretation was reaffirmed and reenforced in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93.

Legislative action has been sought to change this interpretation of the statute. The Presidential Message of April, 1962 sought legislation which would have changed it. Specific bills[66] to carry out the suggestions in the Presi-

[63] 265 I.C.C. at 167.

[64] 292 I.C.C. at 164.

[65] See pp. 38-39, *supra*. Similarly the Commission's enforcement arm, the Bureau of Inquiry and Compliance, had no doubt that a motor carrier could not act as a shipper. After citing an instance where a motor carrier did tender traffic to a railroad through an agent, and wherein it falsely billed the weight and contents of the shipment, and for which the motor carrier was fined $10,000, the Bureau strongly argued the "repugnancy" in a motor carrier's purporting to act as a shipper. (R. 183-85).

[66] S. 3242 and H.R. 11584, 87th Congress; H.R. 4701, 88th Congress.

dential Message were introduced. They were not enacted. In none of the reports of the Executive Departments submitted in support of these bills, nor in any of the hearings, was there any suggestion that this legislation was unnecessary, because the Commission already possessed the power to accomplish this result by rule. The Comptroller General in his report on H.R. 4701 recognized that, if enacted, the bills would alter the prior interpretation of the Commission that one could not act as a common carrier by motor vehicle and a shipper by rail as to the same shipment.[67]

To overcome this clear and unambiguous principle that the Commission lacks the power to reverse its prior interpretation, the Commission cited for its authority a single proceeding. That citation is *Norwegian Nitrogen Co. v. U.S.*, 288 U.S. 294 (1933). That proceeding involved a *refusal* by the court to approve a change in a longstanding consistent administrative practice, which the court said had peculiar weight "when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion. . ." The case holds that an administrative practice "will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."[68] Without giving any reasons, cogent or otherwise, and without any showing of how the command could be so clear for twenty-five years, and now become doubtful, the majority of the Commission has completely ignored the rule of the *Norwegian Nitrogen* case and enshrined the exception.

In summary, it is clear beyond the possibility of contradiction that, in view of the Commission's longstanding consistent interpretation that one could not act as both a carrier by highway and shipper by rail as to the same

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[67] See Hearings on H.R. 4700 and H.R. 4701 before the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st Sess., p. 20.

[68] 288 U.S. at 315.

shipment, which interpretation has been both expressly and impliedly sanctioned by Congress, the Commission lacked the power to adopt Rules 2 and 3.

CONCLUSION

The judgment below setting aside and enjoining the enforcement of Rules 2 and 3 should be affirmed.

Respectfully submitted,

BENSON T. BUCK
Terminal Tower
Cleveland, Ohio 44101

JOHN T. CLARK
Midland Building
Cleveland, Ohio 44115

KEMPER A. DOBBINS
Roanoke, Virginia 24011

RENE J. GUNNING
300 St. Paul Place
Baltimore, Maryland 21202

EUGENE E. HUNT
54 Meadow Street
New Haven, Connecticut

CHESTER A. PRIOR
North Station
Boston, Massachusetts 02114

ROBERT J. WILLIAMS
Reading Terminal
Philadelphia, Pa. 19107

CHARLES C. REITBERG, JR.
Two North Charles Street
Baltimore, Maryland 21201

PAUL R. DUKE
1138 Transportation Center
Six Penn Center Plaza
Philadelphia, Pa. 19104

Attorneys For
Eastern Railroads,
Appellees

APPENDIX

Section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), provides:

> (c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> (1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

Section 203(a)(10) of the Interstate Commerce Act, 49 U.S.C. 303(a)(10) provides:

(a) As used in this part—

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

Sections 203(a)(12), (13), and (14) of the Interstate Commerce Act, 49 U.S.C. 303(a)(12), (13) and (14) provide:

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such

transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 206(a)(1) of the Interstate Commerce Act, 49 U.S.C. 306(a)(1) provides:

> (a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition

requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

Section 217(a) of the Interstate Commerce Act, 49 U.S.C. 317(a) provides:

(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money

of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff rejected by the Commission shall be void and its use shall be unlawful.

EASTERN RAILROAD APPELLEES

The Baltimore & Ohio Railroad Company
Boston & Maine Company
The Chesapeake & Ohio Railway Company
Erie-Lackawanna Railroad Company
Grand Trunk Western Railroad Company
New York, New Haven and Hartford Railroad Company
Norfolk and Western Railway Company
The Pennsylvania Railroad Company
Reading Company
Western Maryland Railway.

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A. *Acme Fast Freight* and *Substituted Freight Service* were decided by men who wrote Part II and who were charged with initiating its administration 41

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF WESTERN AND SOUTHEASTERN RAILROADS

OPINIONS BELOW

The opinion of the District Court (R. 17) is reported in 244 F. Supp. 955. The report of the Interstate Commerce Commission (R. 795) appears at 322 I.C.C. 301.

STATUTES AND RULES INVOLVED

Interstate Commerce Commission Rules 500.1-500.3, 49 C.F.R. 500.1-500.3, are printed in Appendix A hereto, page 92, and in 322 I.C.C. at 413, R. 795.

The National Transportation Policy, 49 U.S.C. preceding § 1, and §§ 1(4), 2, 3(1), 15(3), 202(c), 203(a)(12)(13)(14)(15)(16), 206(a)(1), 208(a)(b), 209(a)(1), 216(c), 216(d), 302(d)(e), and 309(a)(f) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4), 2, 3(1), 15(3), 302(c), 303(a)(12)(13)(14)(15)(16), 306(a)(1), 308(a)(b), 309(a)(1), 316(c), 316(d), 902(d)(e), 909(a)(f), are printed in Appendix B.

QUESTIONS PRESENTED

In addition to the questions set forth by appellants, these appeals raise these further questions:

(1) Whether the action of the Interstate Commerce Commission may be sustained on the basis of findings of fact and conclusions of law not relied upon in the Commission's report.

(2) Since neither Rules 2 and 3, nor any other rules embracing the use of rail open tariffs by motor and water carriers, were included in the proposed rules presented to the parties at the outset of the proceeding, can the findings and conclusions establishing Rules 2 and 3 be sustained?

APPELLANTS' BRIEFS

One brief has been filed by the United States and the Interstate Commerce Commission and will be referred to as the Government brief. One brief has been filed by American Trucking Associations, Inc., and certain motor carriers, and by the National Automobile Transporters Association, and will be referred to as the ATA brief. While the Commission's TOFC Rules apply to both motor and water carriers, the issues of law here presented are substantially the same as to each mode. Therefore we follow the Government and ATA in discussing the issues in terms of motor carrier use of rail open TOFC tariffs.

STATEMENT OF THE CASE

The Government's statement (Br. pp. 3-18) and ATA's statement (Br. pp. 3-11) omit facts that are necessary for consideration of the case, and contain inaccuracies and argumentative material.

It is unnecessary to duplicate here the history of TOFC services and these proceedings as developed in their statements by the Eastern Railroads and Southern Railway, nor to cover every unsupported statement of fact of the appellants as reviewed by Southern. Our statement will supply certain important facts omitted from appellants' statements and correct other allegations.

1. A Comparison of the Traffic and Revenues of the Motor Carriers and the Railroads

Appellants' statements (and the rest of their briefs) assume as a fact that the railroads' TOFC practices are putting the motor carriers at an economic disadvantage with the railroads. For example the Government says (p. 4): "The competitive balance between the railroad and the truck has been altered by the development and growing utilization of the piggyback technique (322 I.C.C. at 307-308, 322) . . . ." The record shows that the competitive balance continues to favor the motor carrier industry and that the growth of TOFC services has not succeeded in reversing the motor carrier industry's continuing improvement in its relative proportion of the nation's traffic.

The following table (R. 316) is self-explanatory. When the table was prepared the figures for 1959 were the latest available. Figures for the later years are from the cited official sources. The table at R. 316 was reproduced as Appendix III to the Examiners' Recommended Report (R. 766) and is the subject of comment by them (R. 610).

We suggest comparison of the figures before and after 1954, since appellants say that that year marked the commencement of the intensive growth and development of TOFC service (Govt. p. 7, ATA p. 14).

TON MILES AND FREIGHT, EXPRESS AND MAIL REVENUE OF RAILROADS AND CLASS I, II AND III MOTOR CARRIERS—YEARS 1939 THROUGH 1964

	Ton Miles			Freight, Express and Mail Revenue		
Year (1)	Railroads (Billions) (2)	Class I, II & III Motor Carriers (Billions) (3)	Percentage Motor Carriers of Railroads (4)	Railroads (Millions) (5)	Class I, II & III Motor Carriers (Millions) (6)	Percentage Motor Carriers of Railroads (7)
1939	338.850	19.646	5.80	$3,473.1	$ 792.2	22.81
1940	379.201	20.683	5.45	3,765.3	867.0	23.03
1941	481.756	26.835	5.57	4,703.4	1,095.7	23.30
1942	645.422	28.083	4.35	6,268.7	1,212.7	19.35
1943	734.829	28.768	3.91	7,156.3	1,304.7	18.23
1944	746.912	27.253	3.65	7,400.2	1,351.9	18.27
1945	690.809	27.289	3.95	6,927.0	1,406.3	20.30
1946	602.069	30.448	5.06	6,120.2	1,654.5	27.03
1947	664.523	37.693	5.67	7,464.3	2,213.6	29.66
1948	647.267	46.706	7.22	8,445.2	2,698.1	31.95
1949	534.694	47.891	8.96	7,487.4	2,911.2	38.88
1950	596.940	65.648	11.00	8,427.6	3,737.1	44.34
1951	655.353	72.292	11.03	9,211.8	4,169.2	45.26
1952	623.373	70.843	11.36	9,409.4	4,417.5	46.95
1953	614.199	76.510	12.46	9,563.5	4,926.4	51.51
1954	556.557	72.301	12.99	8,373.3	4,737.1	56.57
1955	631.385	82.906	13.13	9,110.5	5,535.2	60.76
1956	655.891	83.015	12.66	9,527.8	5,828.9	61.18
1957	626.222	84.408	13.48	9,483.9	6,165.9	65.01
1958	558.738	84.339	15.09	8,630.1	6,131.2	71.04
1959	582.497	101.377	17.40	8,900.9	7,144.9	80.27
1960	579.130	104.355	18.02	8,594.1	7,213.9	83.94
1961	566.997	104.595	18.45	8,294.4	7,462.7	89.97
1962	599.977	111.877	18.65	8,550.6	8,131.1	95.09
1963	629.337	120.566	19.16	8,698.0	8,548.3	98.28
1964	666.207	N/A	N/A	8,992.4	9,154.8	101.81

N/A = Not Available

SOURCE:

Years 1939-1959:—R. 316

Years 1960-1964:—Col. (2)—Annual Reports of Interstate Commerce Commission to Congress.
Col. (3)—"Transport Economics," May 1966, Bureau of Economics, I.C.C.
Col. (4)—Columns (3) ÷ (2).
Col. (5)—"Statistics of Railways in the United States," published annually by I. C. C.
Col. (6)—"Transport Economics," October 1966.
Col. (7)—Columns (6) ÷ (5).

We call attention to a few features of the table. The freight, express, and mail revenues of the railroads have shown but little growth between 1954 and 1964 (the last year for which statistics are available), while the same revenues of the regulated motor carriers have almost doubled. In 1954 the motor carriers' revenues were 56.57 per cent of the railroads' revenues, while in 1964 the corresponding ratio had risen to 101.81 per cent. In 1954 ton miles handled by Class I, II and III motor carriers were 12.99 per cent of the ton miles handled by the railroads. In 1963, the last year for which these data are available, such motor carriers had increased this relationship to 19.16 per cent. Thus in the period of the most rapid growth of TOFC service, regulated motor carriers improved their relative competitive standing in relation to the railroads from both a volume and revenue standpoint. In 1963, the last complete year of the table, the regulated motor carriers' revenues were 98.28 per cent of the railroads', but the motor carriers' ton-miles were only 19.16 per cent of the railroads' ton-miles. "These figures show clearly that motor carriers have been able to attract generally the higher rated commodities, while the railroads have hauled a much greater ton-mile volume than the motor carriers but at much lower rates per ton-mile." (T. H. Maguire, commenting on similar percentage relationships for the years before 1960, R. 303.)

The Director, Department of Research and Transport Economics, ATA, after noting that tons and ton-miles handled by the trucking industry have continued to increase during the period that piggyback service has been growing, and while railroad traffic has changed only modestly, concluded that railroads were not recapturing large volumes of traffic from the highways with piggyback service. (Transport Topics, January 24, 1966, p. 4.) There is evidence "that

freight forwarder piggyback shipments consist in large measure of former rail traffic, which had moved in boxcars." (Piggyback Traffic Characteristics, 1966, p. 22.)

TOFC service offered one opportunity to the railroads to change a competitive trend that was very obviously adverse to them, particularly in respect to the handling of the relatively higher rated manufacturing and miscellaneous category of traffic. Even with the benefits of TOFC service the railroads have not been able to reverse the adverse trend in the relative proportions of traffic handled by railroads and motor carriers.

2. There is No Shipper Support of Record for Rules 2 and 3

Note should be taken of the fact that the Government goes directly to a discussion of the competitive balance between the motor carrier industry and the railroads. There is no claim that Rules 2 and 3 have been issued responsive to any demand of record by shippers for such regulations. No record references are cited to shipper testimony and indeed the Commission's discussion of the open-tariff question does not cite shipper support as a justification for the rules. (322 I.C.C. at 327-337.)

3. "The Root of the Problem"

After sketching the growth of trailer-on-flatcar (TOFC) service, the government concludes that "[P]iggyback service did not follow in the 1950's the course of mutually beneficial rail-motor cooperation that these beginnings presaged." (Br. p. 10) Below we deal with this conclusion factually. Here we go to the Government's next sentence:

> "The root of the problem was the suggestion by the Commission in 1939 in *Substituted Freight Service*, 232 I.C.C. 683, that a motor carrier could not act as both a common carrier by motor vehicle and as a shipper by rail."

The root of the problem lies in the provisions of Part II which the Commission properly construed in *Substituted Freight Service,* 232 I.C.C. 683. The Commission did not inadvertently reach its conclusion in that case. It referred to *certificate* provisions of the Act, stated that the issue before them was one of law, i.e., squaring the substitute services with the *certificate* and tariff provisions of the Act, put a question as to whether such services could *only* be performed in accordance with Section 216(c), and held that they had to comply with that Section, citing in the course of their analysis cases dealing with certificate and authority issues. (See Part II—A, *infra.*) Congress, with full knowledge of the holding in *Substituted Freight Service* and similar holdings has failed to change that holding to permit motor carriers to be shippers and has refused to amend Section 216(c). (See Part III-C, *infra.*)

4. Motor Carrier Participation in TOFC Service

At page 12, the Government states:

> "Thus piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads."

This follows a paragraph in which the only discussion relates to the fact that some railroads have declined to enter Plan I arrangements with motor carriers. In the study by the Commission's Bureau of Economics, quoted at pages 5-6 of the Government's brief, it is noted that:

> "While the 1962 and 1964 percentages may not be fully comparable, it is known that there has been a considerable amount of 'in and out' piggyback activity by motor carriers." (Piggyback Traffic Characteristics (1966) p. 19.)

Thus one factor affecting the growth of joint, coordinated service has been the election of motor carriers not to make use of arrangements that were available to them. Motor carrier participation in TOFC service is also limited by Teamster labor agreements. (R. 358-359, 749; 322 I.C.C. at 381-383.)

Furthermore, the study goes on to say that:

> "For one quarter of 1964, a high ratio of empty to loaded units were reported by five carriers, one showing 3,440 empty to 143 loaded units. These returns, combined with the data reported in a presentation by A. C. Flott before the Highway Research Board, [27] tend to confirm information that some motor carriers were making use of piggyback primarily for empty return movement." (p. 20.)[1]

There is no traffic or economic study of record to indicate who actually performed the highway portion of TOFC services under the various Plans nor that the present flexibility of service does not better meet the needs of shippers than a system regulated so as to force the expansion of joint-coordinated service of regulated long-haul motor carriers and railroads in preference to local and short haul carriers and railroads. Local and short haul motor carriers perform the highway portion of movements in connection with all five of the basic types of TOFC service. (R. 786-787.) They are also able to handle the highway portion of Plan II½ services, a more recent development in which the railroad provides the trailer or container but the shipper makes his own arrangement for the highway movement to

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1. Footnote reference in original text refers to Footnote 25 on page 19 "A presentation by A. C. Flott, Director — Department of Research and Transport Economics, American Trucking Association, Inc., entitled 'Effect of Piggyback Operation on Volume of Highway Truck Traffic, Highway Research Board, January 1966 . . . .'" See also pages 41-42.

and from the ramps. (Piggyback Traffic Characteristics (1966) p. 9.) The data on page 12 as to number of trailers handled under each Plan bear only on the volume of joint coordinated service, but do not demonstrate that the railroad provided the entire movement.[2] With reference to the status of TOFC statistics, the Bureau of Economics has said:

> "Until the present time, available statistical data on TOFC operations and services have not been sufficiently detailed or comprehensive to give an adequate account of piggyback.
>
> • • •
>
> The Commission understood that it would be in a much better position to assess the importance of piggyback and of the various plans if data were available as to total piggyback traffic and revenues, and for each of the several plans." (Piggyback Traffic Characteristics (1966) pp. 4, 5.)

The Commission acted in Ex Parte 230 without the benefit of statistical data just now becoming available.

5. The Trucking Industry's Position

The long-haul portion of the trucking industry took a position in support of proposed Rules C-1 and C-3 as distributed at the prehearing conference. These rules would have abolished Plans III and IV. (R. 703, 704.) Counsel for the American Trucking Associations, Inc. said in oral argu-

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2. The comparison of data from Railway Age and Transport Economics in Footnote 9 on Page 12 of the Government's brief is improper. The Railway Age data covers only 24 railroads whereas the Transport Economics data covers 69 railroads, a different base. The conclusions drawn from the March 1966 Transport Economics are invalid. The data pertain to only three quarters of 1965, not the full year. The number of highway trailers transported by railroad were shown in total including all Plans, not just those moving on Plans II, II½, III and IV. See Piggyback Traffic Characteristics (1966) p. 45.

ment: "I feel it incumbent upon me to state that the Regular Common Carrier Conference which I speak for also is of the view that the motor carrier cannot use an open tariff." (322 I.C.C. at 388.) A spokesman for A.T.A. told a Senate Committee that "We earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers as carriers." (See page 49, *infra*.)

6. All TOFC Service Is Not Bimodal

The Government (Br. p. 15) and ATA (Br. p. 10) repeat the statement of the Commission (322 I.C.C. 329) that "[A]ll TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation. . . ." (Emphasis is in text.) That expression is repeated throughout the appellants' briefs.

This conclusion is both factually and legally erroneous. For example, TOFC service can be performed from industry location to industry location with shipper and receiver loading and unloading the trailer and with no movement over the public highways. Such service may be desired to avoid damage in transit that may be encountered in other types of rail equipment.

Congress, by virtue of the terminal area exemption of § 202(c), 49 U.S.C. 302(c), has treated pick-up and delivery service within the terminal areas as incidental to railroad service. Congress has not considered that such operations so relate to the inherent advantages of Part II motor carriers as to require evaluation of the potential competitive impact in applications for operating authority nor are separate charges required to be established for the terminal services and their competitive impact upon Part II motor carriers assessed. The National Transportation Policy calls for ". . . regulation of all modes of transportation subject

to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each . . ." The modes are to be dealt with in accordance with the provisions of the Act and those provisions do not make all TOFC service bimodal.

7. The Proposed Rules of October 9, 1962, Did Not Include TOFC Rules 2 and 3 Nor Any Other Open-Tariff Rule

The Commission's order instituting the proceeding under review, Ex Parte No. 230, dated June 29, 1962 (27 F. R. 6434), stated in part:

> "Specific issues to be considered and determined in this proceeding, among others, are:
>
> • • •
>
> "II. The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV TOFC rail rates and service in their operations. If so permitted, under what conditions and limitations." (R. 56.)

The order invited interested parties to submit representations to the Commission on or before September 4, 1962, and assigned the matter for a prehearing conference on October 9, 1962. (R. 57-58.)

At the prehearing conference on October 9, 1962, the Commission distributed "Proposed TOFC Rules." These appear in Appendix II to the Commission's report, 322 I.C.C. at 406-410, and in the Record, pp. 141-148. These Proposed Rules did not include issue II, set forth above, that was in the Commission's notice of June 29, 1962 instituting the proceeding. The Proposed Rules did not include any issue or rule that in any way involved the question whether motor and water carriers could lawfully use railroad Plans II, III and IV open tariffs for the transportation of freight ten-

dered to them by shippers. The Proposed Rules were thereafter published in 27 Federal Register 10174, along with special rules of procedure for their submission (R. 152).

The direct contradiction between issue II of the June 29, 1962, notice, and the proposed Rules of October 9, 1962, is affirmatively shown by proposed rule C-1. Rule C-1 (322 I.C.C. at 408; R. 145) *would have abolished TOFC Plans III and IV*. (R. 183; see the Examiners' proposed report, R. 703, 704.) The Examiners rejected this proposal as unreasonable and not in the public interest (R. 713). As a result, one of the main issues considered by the parties was the possible effects of abolition of Plans III and IV. (R. 198-9, 204, 210, 219, 231, 258-60, 265, 270-8, 280, 284-6, 297-9, 306, 345-6, 369-71, 440, 443-8, 451-9, 462, 466-9, 471-3, 493, 496, 501-2, 507-8, 512, 519, 528, 533-4, 553, 558, 581-2, 586-90, 593.)

Along with these Proposed Rules the Commission distributed an explanatory statement describing them. After relating that the Commission had received information from the respondents through representations and answers to questionnaires, this document continued: "Based on all available information, a draft of proposed rules has been prepared. . . ." (R. 129.) One of the presiding Commissioners at the prehearing conference made it plain that the proposed rules distributed there defined the issues insofar as the Commission was concerned (R. 151).

These were the Proposed Rules upon which the parties submitted all of their evidence (R. 183-597), upon which the Examiners' proposed report was based (R. 605-790), and which were before the parties when they filed their exceptions to the proposed report of the Examiners and their replies to exceptions. During all of these extensive proceedings the issue whether motor and water carriers could utilize rail open tariffs was not before the parties, and no evidence directed to it was submitted. Since it was not

embraced in the Proposed Rules, the parties took no interest in it.

The Examiners' report was served August 23, 1963 (R. 605). It dealt with the questions embraced in the Proposed Rules of October 9, 1962. The open-tariff issue was, of course, not considered by the Examiners since it was not before them.

On November 8, 1963, the Commission notified the parties that an oral argument would be held on December 10, 1963, on a number of issues including:

> "Whether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight forwarders, express companies, and common and contract motor and water carriers, exempt or regulated)." (R. 792.)

That was the first time that issue had appeared since it had been abandoned by the Commission in formulating the Proposed Rules of October 9, 1962. The first mention of Section 2 of the Act occurred in the Commission's Report.

Thus, in the most critical period of the proceedings before the Commission, the presentation of evidence and arguments to the Examiners, the railroads had no notice that the open-tariff issue was going to become involved in the proceeding. Instead, by reason of its omission from the October 9, 1962, rules, the presumption existed that it was not.

SUMMARY OF ARGUMENT

I

A motor carrier may perform the service which it is authorized to conduct under Part II of the Interstate Commerce Act only by operating motor vehicles upon the public

highways. It may not perform its authorized service by shipping its trailers under a railroad open tariff. These related principles are established by the plain meaning of the relevant provisions of Part II, and this plain meaning is confirmed by an unbroken line of Commission and court cases construing these statutes, except for the case at bar. Not only do the statutes specify that authorized motor carrier service must be performed upon the public highways, but in addition they in terms exclude the use of a vehicle or car operated exclusively on rails.

These same principles apply to water carriers. Under the plain terms of Part III of the Act water carriers must perform their authorized service in vessels upon waterways, and not by shipping their traffic by other carriers, and the Commission has so held.

Apparently conceding that a motor carrier must perform some of its authorized service upon the public highways in order to maintain its status as a motor carrier under the Act, appellants claim that a motor carrier may perform a "portion" of its "authorized service" by shipping its trailers by rail under a rail open tariff. This claim is without merit. A motor carrier may accept traffic from a shipper for carriage only as authorized by Part II of the Act. Under this authority the service of a motor carrier must be performed exclusively upon the public highways.

Since a motor carrier, under these provisions, may not perform its authorized service by using open-tariff TOFC service, it may not tender traffic it is handling as a carrier to a railroad, and therefore questions relating to discrimination under §§ 1(4), 2 and 3(1) of the Interstate Commerce Act are not reached.

II

Relying on the certificate or authority provisions of Part II of the Act and the voluntary through route and joint rate

provisions of Section 216(c), as well as the tariff publishing requirements, the Commission held in *Substituted Freight Service,* 232 I.C.C. 683 (1939) that coordinated motor-rail services could only be established under the voluntary procedures of Section 216(c). Stated differently, the Commission held that it was repugnant to the Act for a carrier to act as both a carrier and shipper as to the same traffic. For 25 years the Commission adhered to that construction of the Act, repeating the statutory foundation for the decision in later cases.

III

The construction of the Act described in Parts I and II above was adopted by Commissioner Joseph B. Eastman, who wrote Part II of the Act, and by other Commissioners who with Commissioner Eastman guided Part II through Congress and initiated its administration. Their construction is entitled to great weight, and it has been followed without a break by the courts, and by the Commission until the case at bar.

Repeated proposals have been made to amend Section 216(c) to give the Commission authority to order through routes and joint rates into effect between motor and rail carriers but none has been approved by Congress. More recently, proposals have been made to amend Section 2 to apply new rules to coordination of Rail TOFC services with other modes. The President of the United States and many executive departments all agreed the legislation was needed to change present voluntary arrangements. No one advised Congress that the legislation was unnecessary, including the Commission. The Commission is not now at liberty to change the settled construction of the law pertaining to voluntary coordination of motor-rail services.

IV

Rules 2 and 3 would result in the compulsory establishment of through routes in violation of Section 216(c). Those rules authorize through carriage over a motor-rail-motor route without intervention of the shipper at the transfer points under arrangements that are fixed at the time the traffic is first tendered by the shipper to the motor carrier. Joint rates are not required to establish a through route. The through route would be established as a result of the compulsory effect of the promulgation of Rules 2 and 3, the authorized holding out of rail service by a motor carrier under those rules being substituted for the voluntary concurrence provided for in Section 216(c).

V

Section 2 is inapplicable for reasons beyond those set out above. It relates to discrimination in the terms of compensation paid by shippers. Section 3(1) relates to discrimination in services but is inapplicable because of the proviso. The plain meaning, the legislative history and the case law all make it plain that section 3(1) does not apply to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description. Motor and water carriers would be tendering their traffic to railroads under Rules 2 and 3. Accordingly, section 3(1) does not apply to that traffic.

VI

The specific provisions of the Act do not require railroads to accept traffic under their open tariffs from other carriers acting as carriers. The general policies relating to the prohibition against discrimination among shippers do not provide a legal substitute upon which to base Rules 2 and 3, nor does the National Transportation

Policy. The Commission's authority to interpret the Act does not permit the issuance of Rules that contradict specific provisions of the Act.

VII

The proposed rules that were before the parties during all of the evidence-taking stage of this proceeding did not include TOFC Rules 2 and 3. The proposed rules did not include any issue or rule directed to the question of whether motor and water carriers could or should lawfully use TOFC Plans II, III, and IV open tariffs for the transportation of freight tendered to them by shippers. As a consequence the record made before the Commission did not include evidence directed to the issues raised by Rules 2 and 3. Because of the revolutionary nature of these Rules it must be presumed that, given notice, the shippers, motor and water carriers, freight forwarders, and railroads would have presented evidence with respect to these rules and the underlying principle. Because the notice was inadequate, adequate evidence to support Rules 2 and 3 was not presented and findings thereon could not be made. The effect of this lack of notice is the same as if substantial evidence had been wrongfully excluded. As a result of inadequate notice, Rules 2 and 3 are not supported by adequate evidence nor findings of fact based on such evidence.

VIII

A motor or water carrier remains at all times a carrier and must operate in accordance with its authorized service. If a carrier tries to assume the additional mantle of a shipper under Rules 2 and 3, it becomes a violator of § 410(c) of the Act, 49 U. S. C. § 1010(c), regulating freight forwarders, as pointed out in the separate brief of the freight forwarders.

ARGUMENT

I

RULE 3 IS UNLAWFUL BECAUSE IT EMPOWERS FOR-HIRE INTERSTATE MOTOR CARRIERS TO PERFORM THEIR "AUTHORIZED" MOTOR CARRIER SERVICE BY SHIPPING THEIR FREIGHT-LADEN MOTOR VEHICLES BY RAILROAD. THE INTERSTATE COMMERCE ACT SPECIFICALLY REQUIRES THAT A MOTOR CARRIER MAY PERFORM ITS AUTHORIZED SERVICE ONLY BY OPERATING MOTOR VEHICLES UPON THE PUBLIC HIGHWAYS.

Rule 3(a) grants to *motor common* and *contract carriers* the right to "utilize TOFC service in the performance of all or any portion of their *authorized service* through the use of open-tariff TOFC rates published by a rail carrier." (Emphasis supplied.) Other parts of Rule 3 implement paragraph (a). Rule 3 is unlawful because the Interstate Commerce Act requires that the motor carrier's "authorized service" be performed only by operating motor vehicles upon the public highways. It may not be performed by shipping the motor vehicles by rail. This principle is established by the plain language of the Act and by the decisions of the Commission and the courts, including this Court, construing the Act.

It seems clear that it is now appellants' position that a motor carrier must perform a substantial part of its "authorized service" by motor vehicle upon the public highways in order to maintain its status under the Act as a motor carrier (Govt. p. 53, 58; ATA p. 37). After this concession the Government goes on to say (p. 53):

> "The Act nowhere states, however, that a motor carrier who also offers to perform (unless otherwise directed by the shipper) a portion of his authorized service by rail piggyback rather than over the highway exceeds his authority."

Similarly, ATA says (p. 37), referring to authorities cited on this question by the District Court:

> "Clearly, these cases do not support the conclusion that a carrier, operating as a carrier, may never substitute the transportation service of another."

Appellants thus recognize that the Interstate Commerce Act defines the authorized service of a motor carrier as transportation performed *by motor vehicles upon the public highways.* But their contention that a motor carrier may at times perform its service authorized under the Act by shipping its trailers by rail is erroneous.

Our argument will first discuss the relevant sections of the Act and the decisions construing them. Then we will deal with appellants' arguments by showing that the motor carrier service authorized by the Act must be performed exclusively by operating motor vehicles upon the public highways.

A. The plain language of the Interstate Commerce Act confines the performance of a motor carrier's "authorized service" to the operation of motor vehicles upon the public highways, and does not permit performance of that service by shipping motor vehicles by railroad.

Motor common and contract carriers are defined by the Interstate Commerce Act as persons who operate *motor vehicles upon the public highways* in the transportation of property for compensation. These definitions and the terms of the regulatory provisions of the Act show clearly that a motor carrier may perform its authorized service only by operating motor vehicles upon the public highways.

The District Court so held, saying in part (R. 30-31):

> "The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority conferred on the carrier. Each mode of transportation is

the subject of a separate formal part of the Act: part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by 'motor vehicle,' not by rail or other modes, and on the 'public highway'[13]"

"13. Secs. 203(a)(1) and (c), 206(a)(1), 209(a)(1); 49 U.S.C. §§ 303(a)(1) and (c), 306(a)(1), 309 (a)(1)."

Section 203(a) of the Interstate Commerce Act, 49 U.S.C. § 303(a), provides in part:

"(12) The term 'highway' means the roads, highways, streets, and ways in any State.

"(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property . . . but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails. . . .

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property . . . for compensation, whether over regular or irregular routes. . . .

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate

> or foreign commerce, for compensation (other than transportation referred to in paragraph (14). . . ."

Section 206(a)(1), 49 U.S.C. § 306(a)(1), provides that with exceptions not here material—

> "[N]o common carrier by motor vehicle . . . shall engage in any interstate or foreign operation *on any public highway*, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission *authorizing* such operations. . . ." (Emphasis supplied.)

Similarly, § 209(a)(1), 49 U.S.C. § 309(a)(1), provides that—

> "[N]o person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce *on any public highway* or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, *authorizing such person to engage in such business*. . . ." (Emphasis supplied.)

The foregoing provisions of the Act, and § 208 hereafter cited, 49 U.S.C. § 308, were part of the original "Part II" of the Act, the "Motor Carrier Act, 1935." 49 Stat. 543. Their language has remained the same in all particulars relevant to the issues in the case at bar. Decisions construing these provisions in their early years apply with equal force to the present Act.

B. Construing the above cited provisions of the Interstate Commerce Act, the Commission held for twenty-seven years, and until the case at bar, that a motor carrier must perform its authorized service by operating motor vehicles upon the public highways, and that a motor carrier could not perform its authorized service by shipping, by rail, freight it had accepted from shippers for carriage. The courts, including this Court, have uniformly sustained that holding.

Referring to decisions described in the foregoing heading, the District Court, agreeing with them, held (R. 38-39):

> "In the courts, a similar principle is established in holdings to the effect that a person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the 'grandfather' provisions of the Act. *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (D.C. N.Y. 1940), aff'd p. c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. The *relevant premise* of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad." (Emphasis supplied.)

Appellants present patently erroneous analyses of this holding and of *Acme Fast Freight,* 30 F. Supp. 968, which was cited as authority by the District Court (Govt. p. 56; ATA pp. 36-37). To show how wide of the mark are appellants' claims, we will first explain *Acme* and the decisions that have followed its holding and then we will return to appellants' contentions.

As indicated in the District Court's holding, some of the decisions upon which we rely involved issues arising under the "grandfather" clause of § 206(a)(1) of the Act, 49 U. S. C. § 306(a)(1).[3] Those decisions are directly applicable here.

To obtain a "grandfather" certificate or permit an applicant had to prove that during the "grandfather" period it was engaged in operation as a motor common or contract carrier. *Thompson* v. *United States*, 321 U. S. 19, 23 (1944):

> "Under the 'grandfather' clause of § 206(a) of Part II of the Interstate Commerce Act, a certificate of public convenience and necessity can be awarded only to one who is a 'common carrier by motor vehicle' within the meaning of the Act."

The Commission and the Courts uniformly held that an applicant who, during the "grandfather" period, shipped by rail open tariff, freight tendered to it as a carrier, was not engaged in operating as a "common carrier by motor vehicle" or as a "contract carrier by motor vehicle," since it was not performing its service by operating motor vehicles upon the public highways. Therefore, they held, it was not entitled to a "grandfather" certificate or permit.

In our case the question is precisely the same as in the "grandfather" cases, whether the service of a common or contract carrier by motor vehicle may be performed by shipping its loaded motor vehicles by rail under an open tariff, and the answer, similarly, must be in the negative.

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3. [I]f any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation . . . "

In 1937, two years after the enactment of Part II of the Act, 49 Stat. 543, the Commission, Division 5, held that a motor carrier must perform its authorized service by operating a motor vehicle upon the public highways, and that it could not perform such service by shipping by rail, as a shipper, the freight held by it as a carrier. *Acme Fast Freight, Inc., Common Carrier Application,* 2 M. C. C. 415. The entire Commission, in a report by Commissioner Eastman, affirmed. 8 M. C. C. 211 (1938.) This holding was sustained in *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (S. D. N. Y. 1940), and this Court affirmed, 309 U. S. 638.

The *Acme* principle was followed by other Commission and court decisions, and was never departed from until the Commission established Rules 2 and 3 in 1964. On four occasions, the last in 1965, this Court affirmed without opinion the judgments of district courts that followed the *Acme* rule. No court ever has held contrary to the *Acme* rule.

In *Acme* the facts were these. Acme sought a certificate of public convenience and necessity as a motor common carrier under the "grandfather" clause of § 206(a)(1), 49 U.S.C. § 306(a)(1). (See note 3, *supra.*) During the "grandfather" period Acme performed some transportation services by motor vehicle upon the highways. But for the most part during that time it shipped, by railroad, water, and motor carriers, freight it had accepted from shippers for carriage. Its rail shipments moved on rail bills of lading at regular rail tariff rates, (an arrangement that would be authorized by TOFC Rule 3).

The Commission held that in shipping freight by other carriers Acme was not performing the service of a motor common carrier as defined in Part II, and was therefore not entitled to "grandfather" rights as to that service.

The Commission, Division 5, said in part (2 M. C. C. at 424-425):

> "The kind of a carrier which the act was designed to regulate is indicated by the opening words of section 206(a) [49 U.S.C. § 309(a)], as follows:
>
> "'No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation *on any public highway,* or within any reservation subject to the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. (Emphasis supplied.)'"
>
> [Note: Emphasis and words "emphasis supplied" are in original text.]

Because of the importance of this question reargument before the entire Commission was granted. 8 M.C.C. 211 (1938). Commissioner Eastman wrote the report for the Commission, saying in part:

> *"A principal issue here is whether applicant is a 'common carrier by motor vehicle,' as defined in the act, and if so, to what extent.* In considering this issue, applicant's operations as a carrier may for convenience be divided into those which are direct and those which are indirect. The direct operations are those in which the carriage is performed by vehicles under the immediate ownership or control of applicant and without utilization of the services of any other carrier, and *are confined to motor-vehicle operations.* The indirect operations, which are much more extensive, are those in which the services of other carriers, *by rail,* by water, or by motor vehicle, are utilized.
>
> "Division 5 found that applicant is a common carrier by motor vehicle only with respect to its direct operations, and not with respect to its indirect operations.

As to the latter, applicant sought a certificate covering indirect operations in connection with rail, express, and water carriers, as well as motor carriers. The prior report considered at length applicant's argument in support of such a certificate, and reached the conclusion that 'applicant is not a common carrier by motor vehicle as to all of its operations, but only as to its motor-vehicle operations in interstate or foreign commerce,' page 426. We regard the discussion and conclusion of division 5 with respect to this matter as adequate and sound." (8 M.C.C. at 215.)

• • •

"[V]arious provisions of the act are significant. Section 206(a) provides, as shown above, that no motor common carrier 'shall engage in any interstate or foreign operation on any public highway' without a certificate. *Can it be said that a forwarding company is engaged in 'operation' on a highway merely because goods in its custody are transported on that highway by an independent motor carrier?*" (8 M.C.C. at 219-220.) (Emphasis supplied.)

1. Appellants' Erroneous Analyses of Acme

As we stated above, appellants have presented erroneous analyses of *Acme*. The Government says (p. 56):

"The court below cited *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 . . . for the proposition that the *Substituted Freight Service* dictum had received a judicial imprimatur. But that decision held only that a motor common carrier could not establish *joint rates* with a freight forwarding company, since Section 216(c) of the Act . . . requires that both parties be regulated common carriers, and forwarders were, at the time, unregulated. The opinion recognizes that forwarders could and did avail themselves of *open tariffs*, and does not intimate that a regulated carrier could not." (Emphasis is in text.)

To show how wrong that statement is calls for a little more analysis of *Acme* than would otherwise be required. The Court said in *Acme* (30 F. Supp. at 971):

> "We hold that the Commission was right both (1) in refusing to issue a certificate of public convenience and necessity to the forwarders and (2) in striking from its files the joint tariffs filed by Acme Fast Freight Inc."

The Government overlooked holding number (1) and the conclusions of law underlying it. These are determinative of the issues under discussion in the case at bar.

Immediately following its description of its two holdings, the District Court in *Acme* went on (p. 971) to explain its holding number (1):

> "The business of forwarders is to collect small shipments of goods, consolidate them and then reship them in bulk. In their business they employ rail and water carriers and also trucks. In their railroad operations, which are the larger part of their business, their profit is derived from the spread between the carload rates under which they ship and the less-than-carload rates which the owner would have to pay."

The Court held on these facts, as the Commission had, that a person thus shipping goods under a rail open tariff, precisely as would be authorized by TOFC Rule 3, was not engaged in transportation of property by motor vehicle upon the highways, and therefore was not operating as a common carrier by motor vehicle. The Court said in part (p. 972):

> "The Commission declined to grant a certificate of convenience and necessity to the four forwarders on the ground that they were not engaged as common carriers by motor vehicle within the purview of the Motor Carrier Act. This seems justified by Sec. 203(a)(14)

> . . . which defines a common carrier by motor vehicle as any person 'who . . . undertakes . . . to transport property . . . by motor vehicle for compensation, whether over regular or irregular routes. . . .'"

The Government states (p. 56) that the *Acme* opinion "does not intimate that a regulated [motor] carrier could not" use rail open tariffs. While that precise factual question was not presented in *Acme*, the Court held that shipping its traffic by rail under an open tariff is not the service that a motor carrier is authorized to perform by the plain terms of the Act. That holding is irreconcilable with the view that a motor carrier may use rail open tariffs in the performance of its "authorized service." A regulated motor carrier may accept goods for carriage and issue a bill of lading therefor only under the authority of and the terms imposed by the Act. It has no other rights as a motor carrier when it accepts traffic for transportation. "[A] common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations . . ." by assuming authority to perform service under alleged non-statutory rights. *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 764 (1931).

ATA's erroneous analysis of *Acme* and related cases is summarized by the statement (p. 37): "[T]hese cases do not support the conclusion that a carrier, operating as a carrier, may never substitute the transportation service of another." We show the error in that and a similar objection of the Government (p. 53) in our Part I-D below.

2. Decisions Following the Acme Principle—Motor and Water Carrier Cases

Denials by the Commission of applications for "grandfather" motor carrier authority, based on the *Acme Fast Freight* principle, were also sustained in *Kline* v. *United*

States, 41 F. Supp. 577 (Nebr. 1941); *Moore* v. *United States,* 41 F. Supp. 786 (Minn. 1941), aff'd 316 U. S. 642; *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N. D. Ill. 1941), aff'd 314 U. S. 580; and in *Andrews Van Lines, Inc.* v. *United States,* 240 F. Supp. 763 (Nebr. 1965), aff'd 382 U. S. 67.

Numerous other applications for "grandfather" motor carrier authority have been denied by the Commission, either in whole or in part, on the basis of the *Acme* principle. See the list of these in Appendix C hereto.

In 1942 the Commission cited *Acme,* in applying the *Acme* principle to water carriers, in *Strickroot Common Carrier Application,* 250 I. C. C. 211, 216. The Commission quoted § 902 of Title 49, which defines a common carrier by water as one who engages in transportation by water, and held that water carrier service must be performed in water borne vessels upon waterways.

C. In 1965 the United States and the Commission successfully urged the District Court and this Court to follow the Acme Fast Freight principle in Andrews Van Lines, Inc. v. United States, 240 F. Supp. 763 (Neb. 1965), aff'd 382 U. S. 67.

In *Mollerup Van Lines Alaska Grandfather Application,* 95 M. C. C. 338, the Commission on December 18, 1963, denied a number of applications for "grandfather" motor common carrier certificates between the 48 contiguous states and Alaska on the ground that, during the "grandfather" period, the applicants had not been performing a transportation service between Alaska and the other states by motor vehicle. Instead, applicants had been linking their highway operations in the 48 states to Alaska by water, rail, or air transportation between Seattle, Washington, and Alaska

points. The Commission adopted the Examiner's report, which stated its principal conclusion as follows:

> "One thing is abundantly clear: this Commission is not here concerned with movements other than those performed by applicants as *common carriers by motor vehicle*. The Commission is without authority to grant certificates under the provisions of section 206(a) of the act except in respect of operation by motor vehicle. Transportation by water, rail, or air is not transportation by motor vehicle and cannot form the basis for a grant of authority for motor vehicle operations under the 'grandfather' provisions of the act." (95 M. C. C. at 342.) (Emphasis is in text.)

The Commission's order was upheld in *Andrews Van Lines, Inc.* v. *United States*, 240 F. Supp. 763 (Nebr. 1965), aff'd 382 U. S. 67. The District Court said in part:

> "The Interstate Commerce Commission does not have the power to grant a certificate under the 'grandfather' provision to allow the continuance of operations other than that of motor vehicle." (p. 767.)

This Court granted the motion to affirm filed by the United States and the Commission. The principal argument in the motion proceeded as follows (p. 4):

> "The statute requires that, in order to qualify for grandfather authority, the transportation that the carrier performed on the critical date must have been entirely by motor vehicle, and cannot have been a combination of motor vehicle and ship, plane or rail carriage. Section 206(a)(4) provides that 'any common carrier by motor vehicle * * * [which] was engaged in the transportation of * * * property as a common carrier by motor vehicle between places in the United States and places in Alaska' on August 26, 1958, is entitled to grandfather rights. Section 203(a)(14) of the Act, 49 U. S. C. 303(a)(14), defines 'common carrier by motor vehicle' as 'any person which holds itself out * * * to

> engage in * * * transportation by motor vehicle,' and Section 203(a)(13), 49 U. S. C. 303(a)(13), defines a motor vehicle as '* * * any vehicle, machine, tractor, trailer, or semitrailer * * * used upon the highways.' Plainly the statute did not intend to treat carriage by ship, plane or train as carriage by motor vehicle."

The reasoning set forth in the *Andrews Van Lines* decisions and motion to affirm is precisely the same as that appearing in the *Acme* opinions and in other cases cited above, including the three other district court decisions that were affirmed by this Court, and in the opinion of the District Court in the case at bar (R. 31, 38-39). In each case the basic issue was, as stated by Commissioner Eastman in *Acme* (8 M. C. C. at 215), "whether [the person involved] is a 'common carrier by motor vehicle' as defined in the Act." In each case it was held that a person is not a "common carrier by motor vehicle as defined in the Act" when he is shipping by rail (or by another carrier) freight that he has accepted from a shipper for carriage. He is not performing his "authorized service" under the Act (Rule 3(a)).

We submit that the judgment of the District Court should be affirmed on the authority of the foregoing decisions. The position of the United States and the Commission was correct in *Andrews Van Lines* in 1965 and in *Acme* in 1937, and their position in 1937 and in 1965 cannot be reconciled with TOFC Rule 3 of 1964.

D. Appellants' contention that a motor carrier may perform a portion of its authorized service by shipping its loaded trailers by rail is erroneous.

We return now to appellants' contention, which we touched upon earlier, that if a motor carrier performs a substantial portion of its authorized service by operating motor vehicles upon the public highways, thereby maintaining its status as

a motor carrier, it may "perform . . . a portion of [its] authorized service by rail piggyback rather than over the highway. . . ." (Govt. pp. 53, 58; ATA p. 37.) There is no merit in this claim.

Not only do the authority provisions of Part II affirmatively require that authorized service be performed by motor vehicle on a public highway, but in addition they specifically and clearly state that the term 'motor vehicle' ". . . does not include any vehicle, locomotive, or car operated exclusively on a rail or rails." § 203(a)(13). Therefore, the authorized service performed by a motor carrier is defined by the statute to specifically exclude use of a flat car operated exclusively on rails. Contrary to the assertion of appellants that there is no prohibition of motor carrier use of rail TOFC services (Govt. p. 53; A.T.A. p. 37), the plain language of the Act excludes use of a rail car in performing motor carrier service.

In *Movement of Highway Trailers by Rail*, 293 I. C. C. 93, 100-101 (1954), sometimes called the *New Haven* case, the Commission held, as it now provides in Rule 1, that transportation of a trailer on a flat car is exclusively railroad transportation. Under § 203(a)(13) the trailer or semitrailer is a "motor vehicle" only so long as it is propelled or drawn by mechanical power upon the public highways. Therefore, neither the trailer nor the flat car is a 'motor vehicle' within the terms of the Act when in use in TOFC service.

Beyond the plain meaning of § 203(a)(13), the whole structure of Part II makes the appellants' argument untenable.

The whole of Part II is so drawn that the basic requirements prevail unless exceptions thereto are expressly provided. So it does not suffice to say that there is nothing in

the Act that forbids a motor carrier to ship by rail. The structure of Part II is such that a motor carrier's diversion of his vehicle from the highways to a railroad car under Rule 3 cannot be lawful, even for one occasion, unless affirmative statutory provisions exist that authorize that diversion. Admittedly, none exist.

Sections 202(c), 203(b), and 206(a), 49 U. S. C. §§ 302(c), 303(b), and (306(a), set forth exemptions from Part II. Persons, practices, services, and commodities not within these exemptions are covered by the Act. *McDonald* v. *Thompson*, 305 U. S. 263, 266 (1938); *United States* v. *Drum*, 368 U. S. 370, 373-374; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312 (1932). There is no provision that by even the remotest implication exempts or relieves a motor carrier from the general requirement that it must perform its authorized service by operating motor vehicles upon the highways.

On the other hand, there is a profusion of statutory provisions describing motor carrier service solely in terms of using motor vehicles on the highways. Sections 203, 206, and 209, containing many of these, were set forth above. Section 208(a), 49 U.S.C. § 308(a), provides in part:

> "Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate. . . ."

The words "routes" and "territory within which" mean, respectively, regular and irregular routes over public highways. *United States* v. *Maher*, 307 U. S. 148, 154-155 (1938). "The words 'route' and 'routes' are manifestly used to signify the highways where the motor vehicle operates and

not just the areas between terminal points. . . . ." *Consolidated Freightways, Inc.* v. *United States,* 136 F.2d 921 (8th Cir. 1943), cert. den. 320 U. S. 781. It was there held that a motor common carrier may not operate on highways not specified in its certificate, even though they lie between points which it is authorized to serve and their use would increase the carrier's efficiency.

In *Manhattan Coach Lines, Inc.* v. *Adirondack Transit Lines, Inc.,* 43 M.C.C. 477, 482-483 (1944), the Commission held that a "grandfather" certificate authorizing a motor carrier to operate "across the Hudson River" between New Jersey and New York did not permit use of the Lincoln Tunnel under the river at approximately the same crossing site, since the tunnel was not in existence during the "grandfather" period and thus was not a "route" within the meaning of § 206(a)(1) upon which the carrier had been operating during the "grandfather" period. This holding was sustained in *Adirondack Transit Lines, Inc.* v. *United States,* 59 F. Supp. 503 (S. D. N. Y.), aff'd 324 U. S. 824. The Commission said that Adirondack could apply under § 207 for a certificate of public convenience and necessity to operate through the tunnel (p. 483).

Since a motor carrier may not leave the highways specified in its certificate or permit, even to use another highway, it follows that it may not leave its authorized highways to perform its authorized service by shipping its motor carrier traffic by rail.

Section 208(b) authorizes motor common carriers to "occasionally deviate" from their routes, under regulations prescribed by the Commission. The only deviations authorized by the Commission are to other highways. 49 C.F.R. § 211.1.

The only provision of the Act which specifically authorizes a motor carrier to put its trailers upon a railroad flat-

car is § 216(c), the through-route, joint-rate section, and this arrangement is voluntary. See Part IV, *infra*.

Neither the Commission in its report nor appellants here have attempted to invoke the aid of the common law, perhaps because it is so clear that the common law would not support their position. The reasoning in *Allied Van Lines, Inc., Common Carrier Application*, 46 M.C.C. 159 (1946), defeats any reliance on the common law. Allied was held not to be a motor common carrier under Part II because it was not operating motor vehicles upon the highways but was, instead, purchasing transportation from others. Allied contended that its operations met all of the requirements of a common carrier at common law. The Commission held that this was not enough; that to be a motor common carrier within the meaning of Part II a carrier must perform its service by operating motor vehicles upon the public highways. Quoting the definition of "common carrier by motor vehicle" in the Act, § 203(a)(14), the Commission said (at p. 189):

> "The definition of a common carrier in the Act is similar to the definitions usually given at common law . . . except the statutory definition is limited to transportation in interstate and foreign commerce and the qualification 'by motor vehicle' is added. . . . While the concept of a common carrier at common law is utilized in the statutory definition, that definition construed in the light of other provisions of the act is clear that a person who in fact operates motor vehicles is contemplated."

A similar holding was made in *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D.N.Y. 1940), aff'd 309 U. S. 638. After holding that forwarders who did not operate motor vehicles upon the highways were, for that reason, not motor common carriers within the meaning of Part II, the Court said (p. 973):

> "While the four forwarding companies are doubtless responsible to their customers as common carriers at common law, we think it clear that none of them is 'a common carrier by motor vehicle' within the meaning of the Motor Carrier Act. . . ."

To free a motor carrier on occasions of his own choosing from compliance with his statutory description—one who uses motor vehicles upon the highways in the transportation of property—is to create a mode of transportation unknown to and plainly not contemplated by the Act. It frees the motor carrier from his one essential and identifying feature, and leaves him, under appellants' theory, a free agent to do anything not expressly forbidden by the Act. The Commission has no such creative powers.

II

IN HARMONY WITH THE AUTHORITIES CITED ABOVE, THE COMMISSION IN COGNATE HOLDINGS ADHERED, UNTIL THE CASE AT BAR, TO THE PRINCIPLE THAT AN INTERSTATE MOTOR CARRIER MAY NOT PERFORM ITS AUTHORIZED SERVICE BY SHIPPING BY RAILROAD, OR BY OTHER CARRIER, FREIGHT TENDERED TO IT BY SHIPPERS.

A. The Substituted Freight Service Case

In *Substituted Freight Service,* 232 I.C.C. 683, 690 (1939), the Commission held that "[T]o act as a common carrier by motor vehicle and as a shipper by rail as to the same service is . . . repugnant to the act . . ." The Government's characterization of that decision as "dictum" (p. 55) is wrong. It was a necessary holding upon issues presented by the facts. Consolidated Freight Lines was operating as a motor common carrier from the Pacific coast through Terry, Montana, to Minneapolis. Because of motor truck weight restrictions on the North Dakota highways, Consolidated adopted the practice of shipping in railroad boxcars

between Terry and Minneapolis freight tendered to it by shippers. It paid the railroad's carload rates and charged its shippers its own higher less-truckload rates. The Commission held (pp. 690, 691, 685) that Consolidated must discontinue shipping the freight by rail, and that any future joint traffic relations with the railroad must be handled by arranging through routes and joint rates as authorized by § 216(c) of the Act, 49 U.S.C. § 316(c). In discussing this problem the Commission cited (p. 688) *Acme Fast Freight*, 2 M.C.C. 415 (1937), 8 M.C.C. 211 (1938).

Substituted Freight Service was cited and followed in *Greer Broker Application*, 23 M.C.C. 417, 420 (1940); *Stone's Express Common Carrier Application*, 32 M.C.C. 525, 527 (1942); *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139, 141 (1945); *Savage Application*, 265 I.C.C. 157, 167 (1947); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 104-105 (1954); and in seventeen other cases cited in Appendix D to this brief.

The Commission overruled *Substituted Freight Service* and the cases that have followed it to the extent that they are in conflict with TOFC Rule 3. 322 I.C.C. at 336. In pages 331 to 336 the Commission attempts to explain its reasons.

In *Substituted Freight Service* the Commission specifically referred to the certificate provisions of the Act (p. 684), and said the principal issue was one of law, namely, whether the involved operations could be squared with the certificate and tariff provisions of Part II (p. 686). It posed the following specific question:

> "3. Why, when such through transportation is performed in fact partly by a common carrier subject to part I and partly by a motor carrier subject to part II of the Interstate Commerce Act, as amended, should

it not be performed *only* under duly filed joint rates, in accordance with the provisions of section 216(c) of part II of the act and of Rule 31 of the Commission's Tariff Circular No. 20, as amended!" (232 I.C.C. 692) (Emphasis supplied)

The Commission specifically rejected arguments, similar to those presented here, that a carrier could act simultaneously as a common carrier and a shipper (p. 687), by referring to the authority and certificate requirements of the Act (pp. 687, 688). In answer to the third question it held:

"3. The furnishing of the so-called substituted service without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs is in contravention of sections 216-217 and our regulations thereunder, including rule 31 and section 2 of Tariff Circular 20." (232 I.C.C. at 691.)

The rule mentioned in the finding was quoted earlier in the report as follows:

"Pursuant to section 217 and 218, we have issued regulations governing the filing and publishing of rates in connection with motor carriers, including section 2 of Tariff Circular 20, which deals with joint rates between motor carriers and common carriers subject to Part I, and rule 31 of that circular, which provides as follows:

'Where it is desired to establish arrangements for through transportation with motor carriers, joint rates in accordance with the provisions of section 216(c) of Part II of the Interstate Commerce Act and of the regulations applicable to joint rail-motor rates as provided in section 2 of this circular, as amended, should be established.'" (232 I.C.C. at 684-685)

Contrary to the Government's argument (Govt. p. 55), there was statutory authority cited for the holding.

A plea of inadvertence cannot survive here, because for more than twenty years after *Substituted Freight Service*, in a series of important cases, the Commission stoutly adhered to its *Substiuted Freight Service* holding, and each time it did so, it repeated those exact words of its original holding. The Commission itself admits (322 I.C.C. at 334) that "[C]ertain of our decisions, including *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139, 141, *Savage Application*, 265 I.C.C. 157, 167, and the *New Haven* case" [*Movement of Highway Trailers by Rail*, 293 I.C.C. 93], followed its literal holding in *Substituted Freight Service*, from which it now wishes to depart.

The Commission also says (p. 334) that *Greer*, 23 M.C.C. 417, and *Stone's Express*, 32 M.C.C. 525, are consistent with TOFC Rule 3, but that it is not correct; they plainly are in accord with *Ringsby*, *Savage*, and *New Haven*, and the other cases applying the plain language of *Substituted Freight Service*.

In *Ringsby*, 263 I.C.C. 139, the Commission denied the request of a motor common carrier that it compel a railroad to establish rates under which the motor carrier could ship its highway trailers by rail. The Commission cited *Substituted Freight Service* and said:

> "The principle announced, that such practices of common carriers by motor vehicle and by rail are repugnant to the provisions of the act, was adhered to in *Stone's Express, Inc. Common Carrier Application*, 32 M.C.C. 525, by division 5, and in other proceedings concerning applications of motor carriers for certificates of public convenience and necessity." (pp. 141-142.)

In *Greer*, 23 M.C.C. 417, 420, the Commission condemned as unlawful an arrangement under which a motor carrier shipped by another motor carrier freight tendered to it by shippers, citing seven sections of the Act and *Substituted Freight Service* as authority for the holding that this practice is "repugnant to the act."

B. Movement of Highway Trailers By Rail

In *Movement of Highway Trailers by Rail*, 293 I. C. C. 93 (1954), sometimes called the *New Haven* case, the Commission relied upon the *Acme Fast Freight* principle that transportation is not subject to Part II of the Act unless it is conducted by motor vehicles upon the public highways, and upon the *Substituted Freight Service* holding "that for a motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act."

The Commission held (pp. 100-101) that a railroad did not need authority under Part II of the Act to carry a highway trailer on a flatcar, since the trailer was not being operated upon a public highway, and the flatcar by definition in §203(a)(13) was not a motor vehicle. The Commission further held, therefore, that TOFC service is railroad transportation subject to Part I, "whether the trailers are owned or operated by railroads, shippers, or motor common carriers" (pp. 101, 106). The Commission reaffirmed this holding in the case at bar. 322 I. C. C. at 343.

In consonance with its foregoing holding, the Commission in *Movement of Highway Trailers by Rail* expressly reaffirmed the principle of *Substituted Freight Service* by pointing out that it would be unlawful for a railroad to accept for transportation under its open tariffs a trailer, tendered by a motor carrier, that was being operated in motor common carrier service subject to Part II of the Act (pp. 105-106).

III

ACME FAST FREIGHT AND SUBSTITUTED FREIGHT SERVICE WERE DECIDED BY MEN WHO WROTE PART II OF THE INTERSTATE COMMERCE ACT AND WHO WERE CHARGED WITH INITIATING ITS ADMINISTRATION. THEIR INTERPRETATION OF PART II IS ENTITLED TO SPECIAL WEIGHT AND SHOULD BE UPHELD. THEIR CONSTRUCTION OF THE ACT IN THESE CASES WAS FOLLOWED FOR MANY YEARS AND RECEIVED EXECUTIVE AND CONGRESSIONAL RECOGNITION AND ACCEPTANCE.

A. Acme Fast Freight and Substituted Freight Service were decided by men who wrote Part II and who were charged with initiating its administration.

In *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294 (1933), the Court said in respect to administrative construction of a statute:

> "The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (p. 415.)

This statement was repeated in *United States* v. *Leslie Salt Co.,* 350 U. S. 383, 396 (1956), and in *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

Commissioners Eastman, Aitchison, Porter, Miller, Caskie, McManamy were members of the Commission during 1934-1935 while proposed Part II was before Congress. All of them joined in the report of the entire Commission written by Commissioner Eastman in 1938 in *Acme Fast Freight Application,* 8 M. C. C. 211. All of them except Commissioner McManamy joined in the report of the entire Commission in 1939 in *Substituted Freight Service,* 232 I. C. C. 683. Mr. McManamy had retired by then.

Commissioner Eastman literally wrote Part II of the Act while a member of the Commission and Federal Coordinator of Transportation, and guided it through Congress.[4] The Chairman of the Subcommittee of the House Interstate Commerce Committee called the bill which became Part II the "Eastman Bill." (Hearings on H. R. 5262, p. 1.) The Chairman of the Commission at that time, Mr. McManamy, testified before the Congressional Committees in support of proposed Part II; and it is clear from what he said that he and the other members of the Commission understood Part II and took an active interest in obtaining its passage.[5]

Additionally, the Commission conducted its own very extensive investigations of motor carrier transportation with a view to possible regulation in 1926-1927, *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, and in 1930-1932, *Coordination of Motor Transportation*, 182 I.C.C. 263. Commissioners Eastman, Aitchison, and Porter were members of the Commission during both investigations.

A better case than this could not be found for following the administrative construction of a statute or for giving effect to the principle stated in the three decisions of this Court last cited.

B. The Construction of Part II adopted by the Commission in Acme Fast Freight and Substituted Freight Service should be upheld here.

Having reviewed the decisions cited in preceding portions

4. S. Doc. 152, 73rd Cong., 2d Sess.; H. R. Doc. 89, 74th Cong., 1st Sess.; Hearings Before Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1629, pp. 44-100; Hearings Before House Committee on Interstate Commerce, 74th Cong., 1st Sess., on H. R. 5262, pp. 23-49.

5. See note 4 supra, and Senate Hearings, pp. 116-123, and House Hearings, pp. 49-53.

of this brief, the Court below stated:

> "In the face of this settled interpretation of the Act by the Commission itself as well as the courts, the deference ordinarily due to the [new] construction of the Act by the administrative agency responsible for its enforcement is not called for." (Citing cases) (R. 40).

Where, as here, there has been a long continued and well supported construction of a statute by members of an administrative agency whose opinions are entitled to special weight, followed after many years by a reversal of that construction, the new interpretation is not entitled to the deference commonly accorded the construction of a statute by the agency charged with its enforcement. *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956). After quoting the excerpt from *Norwegian Nitrogen*, 288 U.S. at 294, set forth above, the Court said in *Leslie Salt* (p. 396):

> "Against the Treasury's longstanding and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied Congressional acquiescence."

To the same effect is *Blau* v. *Lehman*, 368 U. S. 403, 412-413 (1962).

C. The Commission's long continued construction of the Act, that a regulated motor carrier may not perform its authorized service by shipping by rail open tariff freight tendered to it by a shipper, was recognized and accepted by the Executive Department of the Government and by Congress in 1962 and 1963 in their proposals to amend § 2 of the Act so as to permit regulated motor carriers to ship their vehicles by rail.

Acme Fast Freight, 8 M. C. C. 211 (1938), aff'd 30 F. Supp. 968, aff'd 309 U. S. 638; *Substituted Freight Service*, 232 I. C. C. 683 (1939); *Movement of Highway Trailers by Rail*, 293 I. C. C. 93 (1954); and many other cases made it very plain that the Interstate Commerce Act does not permit a regulated motor carrier to perform its authorized service by shipping under a rail open tariff freight tendered to it by a shipper, or as otherwise stated, does not permit a regulated motor carrier to act as a carrier by motor vehicle and as a shipper by rail as to the same service. Acting under this principle for twenty-five years, the Commission denied many applications for motor carrier authority and entered numerous other orders vitally affecting motor, rail, and water carriers. See Appendices C and D hereto. Although Congress amended the Act many times during that period it took no action to disturb that construction of the Act.

Then in 1962 the President asked Congress to amend the Interstate Commerce Act to change that construction. H. R. Doc. 384, 87th Cong., 2d Sess., p. 5. The President's message proposed legislation to:

> "(4) Assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers. This change will put the various carriers in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques."

To implement the President's recommendation, the Secretary of Commerce in 1962 submitted identical bills to the Senate and the House. S. 3242, 87th Cong., 2d Sess., contained the following provision (Hearings on S. 3242 before the Senate Commerce Committee, 87th Cong., 2d Sess., p. 18):

> "Sec. 3. (a) Section 2 of the Interstate Commerce Act (49 U.S.C. 2) is amended by inserting '(a)' after 'Sec. 2' and by adding at the end thereof the following new subsection:
>
> "'(b) Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated.'"

In the hearings on these bills before the Senate and House Commerce Committees, the Secretary of Commerce urged their enactment. To provide a more detailed explanation, the Secretary introduced the Under Secretary of Commerce for Transportation, who stated that the purpose of Section 3 of the bill was to change the principle "set forth in the key decision Movement of Highway Trailers by Rail (293 I.C.C. 93 (1954)) and other decisions" so as to require railroads to accept shipments of trailers tendered by motor carriers as shippers. (Senate Hearings, pp. 29, 33.)

The Assistant Attorney General, representing the Department of Justice, after making a statement respecting other proposed legislation before the Committee said (Senate Hearings, p. 67):

> "In connection with S. 3242 on which the committee is also hearing testimony, the Department defers to the Commerce Department for presentation of the Administration's proposals contained in that bill since the provisions of that bill do not directly relate to our enforcement responsibilities under the antitrust laws."

It may be noted that the Government could find no competitive or monopoly problems warranting its attention in 1962.

The Chairman of the Interstate Commerce Commission told the Senate Committee that the Commission agreed with the "basic objective" of the proposed legislation but that its enactment "could have far reaching effects" and that the "ramifications" of the bill "are far reaching and could drastically affect basic and long-established relationships between carriers." Therefore, he said, the Commission wanted more time to study the proposal. (Senate Hearings, pp. 165-167.)

Near the end of the I.C.C. Chairman's testimony the following colloquy took place between him and the Chairman of the Senate Committee:

"The Chairman. At that point, Mr. Chairman, where the Commission ruled that one could not act as a common carrier by motor vehicle and as a shipper by rail as to the same shipment, supposing that a contractual arrangement was made by a motor common carrier with a railroad to ship piggyback certain items. In order to do that they would have to have a change in the law, would they not?

"Mr. Murphy. I am not certain of that, Mr. Chairman. They can today enter into joint rates—

"The Chairman. I suppose part of the way by piggyback and truck and then you put it on the railroad. Say the motor carrier made a contract with the railroad.

"Mr. Murphy. I think perhaps there would have to be some clarification for him to do that, even though today they can enter into joint rates and routes." (Senate Hearings, p. 166.)

Mr. Murphy. "Other questions to be explored would be the propriety of a motor carrier hiring transportation from another mode for a portion of a haul and assessing the shipper or consignee all motor rates under its own tariff, and to what extent a motor carrier may be permitted to substitute rail for motor service without, in effect, constituting an abandonment of service.

The Chairman. "That is what I was talking about. It would seem to me the present law—I am thinking out loud here—and the proposed law, would have to be clarified in either or both cases.

Mr. Murphy. "Yes sir." (Senate Hearings, p. 167.)

At no time did Mr. Murphy, or anyone else on behalf of the Commission, tell the Committee that no legislation was necessary because the Commission had the power it now seeks to exert in the form of TOFC Rules 2 and 3. Instead, the Chairman of the Commission admitted that the "present law" and the "proposed law" would have to be "clarified" in order to make lawful the practices that would be authorized by those Rules. Clarification of a Federal statute is exclusively a function of Congress. *Blau* v. *Lehman*, 368 U. S. 403 (1962).

Statements to the Senate Commerce Committee were made in support of S. 3242 in 1962 by the General Counsel of the Department of Commerce, the General Counsel of the Department of Defense, the General Counsel of the Treasury, the Secretary of Agriculture, the Comptroller General of the United States, the General Services Administration, the Executive Office of the President, the Executive Director of the Military Traffic Management Agency of the Department of Defense, the Commissioner of the Transportation and Communications Service of the General Services Administration, and the Post Office Department. (Senate Committee Hearings, pp. 122-130, 189-207.)

These statements were all to the effect that the proposed legislation was necessary to accomplish the announced purpose of the President's proposal, and no one indicated in any way the view that all of this effort was unnecessary because the Commission already had authority under § 2 or some other provision to require railroads to accept vehicles or containers tendered by other carriers as shippers.

The presentation so made to the Senate Committee on behalf of S. 3242 was duplicated in the same session of Congress before the House Interstate Commerce Committee in support of the House counterpart of the Senate bill, H. R. 11584. (Hearings Before The House Committee on Interstate Commerce on H. R. 11584, 87th Cong., 2d Sess.)

No action was taken on either bill in the 87th Congress, 2d Session.

In 1963, in the 88th Congress, 1st Session, similarly worded bills to amend § 2 were introduced, S. 1062 and H. R. 4701. Committee hearings were held. Both bills were supported by the same government departments and other interests that had advocated enactment of the similar bills in 1962. (Hearings Before the Senate Committee on Commerce, 88th Cong., 1st Sess., on S. 1062; Hearings Before the House Committee on Interstate Commerce, 88th Cong., 1st Sess., on H. R. 4701.)

The Assistant Attorney General made the following position statement in the Senate hearings:

> "Mr. Orrick. Thank you, Mr. Chairman, I have with me a man I would like to introduce, Joseph Saunders, who is Chief of our Public Counsel Section.
>
> "I appear today to present the views of the Department of Justice on S. 1061 and S. 1062. The Department of Justice continues to favor enactment of these measures.
>
> "With respect to S. 1062, we defer generally to the view of the Department of Commerce. However, we do suggest an amendment to section 2 of the bill which relates to experiments in rate, classification, and documentation systems, as well as service combinations." (pp. 854, 857)

While most of the statements were duplicates of those

made in 1962, a few witnesses added to their earlier testimony.

The Chief Counsel (Public Affairs), American Trucking Associations, Inc., said in Part:

> "[S]ection 3 . . . is intended to carry out the President's recommendation that all carriers should have the right to—ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers.
>
> "Now we strongly endorse this objective but we think the proposal itself is seriously defective. Modern piggyback service, which is the innovation responsible for this recommendation, involves some rather complex and complicated carrier-shipper relationships. It is far easier to recognize a need for broadened use of the service than to enunciate a proper solution of the problem created.
>
> "Among other things to be considered is the maintenance of carriers as carriers and not to dilute their position by forcing them into a behavior pattern which is basically shipper oriented.
>
> "We earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers as carriers." (Senate Committee Hearings, p. 479.)

The proposed legislation, section 3 of the bills to implement the proposals of the President and the Department of Commerce, was not enacted. Commissioner Webb, commenting on the record of the hearings stated: "That record shows that legislation to require the performance of open-tariff TOFC service attracted virtually no support." (322 I.C.C. 388)

The only Congressional Committee Report that emerged from these hearings, H. R. Report No. 1144, 88th Cong., 2d Sess., recommended enactment of some of the provisions of

H. R. 4701, but it called attention to the fact that it was omitting section 3 from consideration (p. 7). So section 3 died in Committee.

In these Committee hearings in 1962 and 1963 the Commission took occasion to urge enactment of legislation which it had proposed to amend § 216(c), 49 U. S. C. § 316(c), to give the Commission power to compel railroads and motor carriers to enter into joint carrier arrangements for through routes and joint rates. These bills were S. 3510 and H. R. 12362, 87th Congress, and S. 676 and H. R. 2088, 88th Congress. (In 87th Cong., 2d Sess., Hearings on S. 3242, pp. 165-166, 167; Hearings on H. R. 11584, pp. 130, 131. In 88th Cong., 1st Sess., Hearings on S. 1062, p. 800; Hearings on H. R. 4701, p. 742.)

The District Court concluded that the construction of the Act adopted in the Court and Commission decisions which we have cited in Parts I and II of our brief had been recognized and accepted by both the executive and legislative branches of the Government. (R. 40-41.) "This contemporaneous interpretation of the [Act] by the agency charged with its supervision—an interpretation followed by all agencies of the Government—together with acquiescence of the Congress, must be given great weight." *United States* v. *Bergh*, 352 U. S. 40, 46-47 (1956). For similar holdings see *Blau* v. *Lehman*, 368 U. S. 403, 412-413 (1962), and *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956).

IV

RULES 2 AND 3 WILL COMPEL ESTABLISHMENT OF THROUGH ROUTES IN VIOLATION OF SECTIONS 216(c) AND 15(3) OF THE INTERSTATE COMMERCE ACT.

The court below, upon careful analysis, found that Rules 2 and 3 would compel the railroads to participate in through routes and thus are in violation of sections 216(c) and 15(3) of the Act (R. 30-35).

The Government and ATA argue that through routes would not be established if operations were undertaken pursuant to Rules 2 and 3. (Govt. pp. 59-62, ATA pp. 31-33.) The first error occurs in defining the factual elements of a through route. With respect to a through route, the Government urged that:

> "Under such an arrangement the rail carrier and the motor carrier jointly publish a tariff whose rates, terms and conditions they have jointly established, and they share in an agreed-upon division of the revenues." (p. 61)

The argument improperly assumes that joint rates or some other express arrangements jointly arrived at are essential to the creation of a through route. The Commission did not make that mistake. It acknowledged that:

> "It is, of course, well established that what is a through route is a matter of fact, and that a through route may be found to exist in the absence of a joint rate or any other express arrangement between the carriers involved." (322 I.C.C. at 334)

In *Thompson* v. *United States*, 343 U.S. 549 (1952), the Court stated:

> "The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> > 'A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals"

> on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I.C.C. 163, 166.
>
> • • •
>
> In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." (pp. 556-557.) (footnotes omitted.)

In *Denver & R.G.W. R.R.* v. *Union Pacific R.R.*, 351 U.S. 321, 327 (1956), it was made plain that through routes may exist even though not provided for in formal contracts or tariffs.

Apart from asserting that railroads would not be subject to compulsion, the Commission's report sets out no analysis of the facts surrounding a proposed arrangement under Rules 2 and 3 to justify a conclusion that through routes are not involved.

The tests of a through route laid down in *Through Routes and Through Rates*, 12 I.C.C. 163, 165-66 (1907), are clearly met by operations under Rules 2 and 3. A shipment moving under Rules 2 and 3 moves upon a rate existing at the time the bill of lading is issued by the motor carrier to its shipper. It moves upon one through journey, not upon a succession of journeys. When the shipment is tendered to the initiating motor carrier, for movement over one of two routes, all-motor or motor-rail-motor, and accepted by the motor carrier, a contract for a through movement from A to D has been created, not a contract for movement from A to B by motor, a separate contract for a TOFC movement from B to C, and a third contract for motor service from C to D.

Under the so-called open-tariff rules, a route will be created by continuous motor-rail-motor service formed by an arrangement, not expressly created by the carriers, but by the Rules of the Commission, between connecting carriers. The route offered will be a new unit, one line of service formed of two or more connecting carriers, and the rate tendered to the shipper for every service will be a unit. The through carriage, motor-rail-motor, will be covered by a single through rate for the shipper, all the terms of which will be fixed at one and the same time.

No intervention of the shipper is required under Rules 2 and 3 at the transfer points between carriers, thus creating a through route.[6] The manner in which the entire rate charged the shipper is apportioned among the carriers is unimportant.[7] Any arrangement for continuous carriage over the lines of two or more carriers in interstate traffic constitutes assent to a through route, since through carriage implies the existence of a through route.

Appellants assert that there is no holding out by the railroad of service, yet it is acknowledged that the shipper is advised that rail TOFC service may be used unless he stipulates to the contrary. (Govt. p. 61, ATA p. 31.) That advice to the shipper constitutes a holding-out to the shipper of two possible routes for performing his transportation, one involving rail service. To advise the shipper by tariff is to hold out to him. The court below properly disposed of the argument that no through route exists because the holding out on behalf of the railroad is by the motor carrier without railroad concurrence.

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6. *Hausman Steel Co.* v. *Seaboard Freight Lines*, 32 M.C.C. 31, 38 (1942); *Lourie Mfg. Co.* v. *Cincinnati Northern R. R.*, 42 I.C.C. 448, 450 (1916).

7. *United States* v. *Pennsylvania R. R.*, 153 Fed. 625 (W.D. N.Y. 1907); see, also, *United States* v. *Wood*, 145 Fed. 405, 411 (E.D. Pa. 1906).

> "By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route." (R. 33)

Furthermore, there is no essential difference in the "holding out" of through service under Plan I and the "holding out" of through service under the so-called open tariff arrangements except for the railroads' voluntary concurrence in the publication of tariffs applying to Plan I operations. The court so found (R. 34), and the government at no point answers the finding by distinguishing Plan I arrangements from the so-called open tariff arrangements. The Commission found that Plan I involved the establishment of through routes (322 I.C.C. at 343, 349.) Substitute services involve a joint service requiring compliance with Section 216(c) and the filing of concurrences in applicable tariffs.[8]

The substitute for a voluntary holding-out is a compulsory holding-out under the impact of Rules 2 and 3. Rule 2 reads in terms of "shall" not "may". The court below correctly appraised the degree of compulsion involved should these rules be implemented (R. 33).

The common law contemplated voluntary relationships between carriers.[9] Section 216(c) specifically preserves that relationship as between motor carriers and railroads.

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8. *Truck Trailers on Flatcars, Utah, Idaho, Oregon and Washington*, 292 I.C.C. 395, 396-397; 298 I.C.C. 533, 533-536; *Iron and Steel Articles—Eastern Common Carriers*, 305 I.C.C. 309; *Union Pacific Motor Freight Co.—Key Point Restrictions*, 74 M.C.C. 279, 283.

9. *Express Cases*, 117 U.S. 1, 26-29; *Central Stock Yards Co.* v. *Louisville & N. Ry.*, 192 U.S. 568, 571 (1904); *Louisville & N. Ry. Co.* v. *West Coast Naval Stores Co.*, 198 U.S. 483, 497-500 (1905); *Southern Pacific Co.* v. *I.C.C.*, 200 U.S. 536, 556 (1906).

In *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945) this court said:

> "The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers.7"

> "7. 10 M.C.C. (F) 235, 236:
> "We are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates and we have no power to require their establishment. It follows that any such plan must be dependent on voluntary cooperation * * * *"

Here the Commission is attempting to reverse the Supreme Court and its own prior decisions and amend the Interstate Commerce Act by establishing Rules 2 and 3 that *will* "compel rail carriers to coordinate their service with motor carriers."

The principle so stated by the Supreme Court in *Parker* was at the heart of its decision. The question was whether the Commission had power under Part II to grant motor carrier operating authority to a rail-owned motor carrier in order to supplement rail service. Independent non-rail motor carriers protested that they were available and willing to furnish the railroad all the coordinated service it needed. The Court held (p. 73) that "in the absence of power to compel coordination between modes of transportation" the Commission could grant the desired rights to a rail-owned motor carrier whose complete cooperation with the owning railroad was assured.

That decision became the foundation for a governing principle that has prevailed ever since and under which

there has been granted a large amount of motor carrier authority to railroads and rail-owned motor carriers, restricted to service supplemental to rail operations.

The Commission's statement of the law in *Kansas City Southern Transport Company, Inc., Common Carrier Application,* 10 M.C.C. 221 (1938), relied upon by the Supreme Court was not an isolated expression on the subject. In *Gulf, M. & No. R.R. Common Carrier Application,* 18 M.C.C. 721 (1939), the Commission said at page 726:

> "Furthermore we are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates, and we have no power to require their establishment. Any such plan must be dependent upon their voluntary cooperation."

Similar language was used in *Rock Island Motor Transit Co. Common Carrier Application,* 21 M.C.C. 513, 518 (1940); *Louisiana, A. & T. Ry. Co., Common Carrier Application,* 22 M.C.C. 213, 216 (1940); *Missouri Pacific R. Co. Common Carrier Application,* 22 M.C.C. 321, 331 (1940); *Kansas City Southern Transport Co., Inc., Common Carrier Application,* 28 M.C.C. 5, 8 (1941); *Chicago & N. W. Ry. Co. Extension of Operation—Iowa,* 31 M.C.C. 455, 458 (1941); and *Lake Shore Cartage Co., Inc., Extension—Elyria, Ohio,* 42 M.C.C. 684, 686 (1943).

The Commission has consistently held that one carrier may not absorb the line-haul charges of another carrier and thereby create an involuntary through route.[10] It has per-

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10. *Commodity Rates on Brick From Danville to Bronson,* 63 I.C.C. 277, 278; *Coal Rates on the Story Fork Branch,* 26 I.C.C. 168, 173; *Cord and Pulp Wood to Canton,* 78 I.C.C. 593, 596; *Handling Carload Shipments in West,* 246 I.C.C. 57, 72 (modified on other grounds 246 I.C.C. 715).

mitted motor carriers to publish tariff provisions to insure that their local rates were not used in the creation of through routes.[11]

Where Congress has specifically provided for the means of coordinating motor and rail services, the specifics of that provision must prevail over any general non-specific authority. Cf. *Maurer* v. *Hamilton,* 309 U.S. 598, 612-615.

In its 59th Annual Report to Congress, 1945, the Commission reported on this court's decision in *Parker*, supra, p. 72. It subsequently requested Congress to amend Section 216(c). (See page 50, *supra.*) In spite of repeated requests Congress has refused to amend that section. In these circumstances, the Act should not be construed to contain some ambiguous authority that permits the Commission to issue Rules 2 and 3.[12]

The Court below correctly pointed out that the "full hearing" required for the establishment of through routes for water carriers has not been held.

Rules 2 and 3 illegally compel the establishment of through routes.

V

THE RAILROADS' REFUSAL TO PERMIT MOTOR CARRIERS TO USE THE RAILROADS' TOFC OPEN TARIFFS DOES NOT VIOLATE THE ANTI-DISCRIMINATION PROVISIONS OF THE INTERSTATE COMMERCE ACT.

The Government (pp. 24-52) and ATA (pp. 24-29) argue that the railroads' refusal to permit motor carriers to use the railroads' TOFC open tariffs violates the anti-discrimination provisions of the Interstate Commerce Act, and that

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11. *East South Joint Rates and Routes, Cancellation,* 44 M.C.C. 747; *Southeast Shippers Association, Inc.,* 54 M.C.C. 770.

12. *Maurer* v. *Hamilton,* supra; *Blau* v. *Lehman,* 368 U.S. 403, 412-413 (1962); *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U.S. 284, 296 (1954).

TOFC Rules 2 and 3 are a valid exercise of the Commission's power to prevent that discrimination.

Although Rules 2 and 3 unleashed a novel and unprecedented sweep of power, no statutory authority for their promulgation is suggested in the Commission's report except by an indirect reference to § 2 of the Act, 49 U. S. C. § 2, and the circumstance that Rule 2 paraphrases a part of § 2. (322 I. C. C. at 335-336, 413). The District Court concluded that the Commission had rested its authority on that section, albeit "[W]e cannot say that the Commission's Report is a model of clarity, guiding the court unerringly to the statutory source of the power relied upon." (R. 23-25.)

Then, holding that § 2 must be read *in pari materia* with § 3(1) of the Act, 49 U. S. C. § 3(1), the Court held Rules 2 and 3 were in conflict with the proviso to § 3(1). Paragraph (1) of § 3, after detailing forbidden discriminatory practices, goes on to say:

> "Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The Court held that the proviso was effective to exclude "from the railroad's obligation of equal service 'the traffic of any other carrier of whatever description.'" (R. 25-27.)

Appellants' briefs now cite §§ 1(4) and 3(1) as additional authority to support Rules 2 and 3. The task of trying to establish a violation of the anti-discrimination provisions has not and cannot be accomplished. In the first place, the arguments presented are not those used by the Commission in reaching its decision. Secondly, the arguments call for a construction of §§ 2 and 3(1) that is contrary to their plain language, their settled construction by the Commission and courts, and their legislative history. Lastly, § 1(4) has

not been held to apply to demands for service by a carrier acting as a carrier.

A. Statutory grounds not invoked and analyzed by the Commission may not be used here to support the Report.

As the court below said, the administrative action must be measured solely against the statutory grounds invoked by the agency and the court may not seek its own justification or accept appellate counsel's *post hoc* rationalizations (R. 23).

At no point in the brief two paragraphs adverting to the only statutory provision mentioned (322 I.C.C. at 335-36) does the Commission specifically hold that § 2 affirmatively requires railroads to offer TOFC service to competing carriers. The Commission stopped short of such a holding, stating only that it could see ". . . no reason why the fact that a user of TOFC service was another carrier rather than a private shipper would compel the conclusion that dissimilar circumstances and conditions were present" (322 I.C.C. at 335-36). In the same vein, it was stated that ". . . when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers . . ." These negative findings were the only ones that could be made in the state of record. Since the issue of the similarity between carriers and private shippers was not tried, affirmative findings based on evidence of record could not be made.

Nevertheless, the court below said:

> "We may accept, therefore, the argument of counsel for the government, despite the ambiguity of the Report's reference and discussion, that the Commission invoked Section 2 as authority for its Rules." (R. 25)

Quite evidently, counsel for the government in the court below did not urge that the Commission had invoked §§ 1(4) or 3(1) as authority for its Rules.

The vast implications of holding that a competing carrier, acting in the performance of its authorized service, should have the same right as an ordinary shipper to demand transportation under § 1(4) were nowhere examined by the Commission. The term "transportation" includes cars and other vehicles. 49 U.S.C. § 1(3)(a). Would it be in the public interest to permit a rail, motor or water carrier to limit its investment in equipment, with the knowledge that it would be able to demand that a railroad supplement its equipment supply in times of shortage by reason of the obligations created by § 1(4)? Is it in the public interest, and will it stimulate competition, to require a railroad that has devoted great energy and substantial funds to the development of a major improvement in equipment to forthwith make that equipment available for use by competing rail, water or motor carriers in other than a joint service? See *Grain in Multiple-Car Shipments—River Crossings To The South,* 318 I.C.C. 641, 321 I.C.C. 582; reversed *Cincinnati, N. O. & T. P. R. Co.* v. *United States,* 229 F.Supp. 572 (DC Ohio 1964), vacated *Arrow Transp. Co.* v. *Cincinnati, N. O. & T. P. R. Co.,* 379 U.S. 642 (1965); 325 I.C.C. 752 (1965). Whether the Commission would have made this sweeping and revolutionary change in transportation cannot be determined from the Report, for there was no analysis of § 1(4). The implications of the conclusion sought by Government counsel go far beyond the area of TOFC service.

Set out below are numerous commission decisions holding that § 3(1) does not apply to the relations between carriers. The Commission did not meet the plain language of § 3(1), did not distinguish its past decisions and did not set out a

construction of § 3(1) in the manner suggested by counsel for the Government here.

Accordingly, arguments with reference to §§ 1(4) and 3(1) are not properly available to support the Commission's decision as to Rules 2 and 3.

B. Section 2 deals only with discrimination in Compensation between shippers.

The court below found that, by its terms, § 2 "deals only with discrimination in rates, and does not extend to a discriminatory refusal to provide service at all." (R. 25) In addition to the plain meaning of the section, the courts and the Commission have uniformly held that § 2 applies to discrimination in compensation and that § 3, while broad enough to cover every form of unjust discrimination, is the section dealing with discriminations in service.[13] The Government concedes that section 2 in terms applies only to differences in the charge exacted for a service. It argues that the practical economic effect of a refusal to serve and of a discriminatorily high rate are often the same (Govt. pp. 30-31). The fact that two different courses of conduct may produce the same practical effect does not result in making § 2 applicable to both situations. Section 2 must be read and applied as Congress has written it, particularly when § 3(1) makes it plain that no omission in statutory structure is involved.

This court said in *Wight* v. *United States*, 167 U.S. 512, 517 (1897), that: "The wrong prohibited by the section is a discrimination between shippers." The Commission said in

13. *United States* v. *Delaware, L. & W. R.R.*, 40 Fed. 101, 103 (N.Y. 1889); *United States* v. *Hanley*, 71 Fed. 672, 673 (N.D. Ill. 1896); *Pacific Lumber Co.* v. *Northwestern Pac. R. R.*, 51 I.C.C. 738, 760 (1918); *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. R.*, 229 I.C.C. 497, 500 (1938); *Board of Trade, City of Chicago* v. *Grand Trunk W. R. R.*, 255 I.C.C. 141, 148 (1943).

Eastern Central Motor Carriers Assn. v. *Baltimore & O. R.R.*, 314 I.C.C. 5, (1961),[14] that:

> "It should be observed, also, that sections 2 and 3(1) are intended to protect shippers, not competing carriers."

The courts and the Commission have taken competitive circumstances into account in Section 2 proceedings. In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896), the railroads were permitted to place in effect lower rates for import traffic originating outside the country than for domestic shipments in order to meet water competition. In *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960) the Commission analyzed section 2 and the prior Court and Commission cases stating at page 368:[15]

> "In its report, the division concluded that the decision in Wight v. United States, supra, [167 U.S. 512] whereby a carrier may not accord to one shipper a lower charge than is accorded another for the transportation of the same commodity between the same points, did not change the principle established in Texas & P.

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14. *Aff'd sub nom. Cooper-Jarrett* v. *United States*, 226 F. Supp. 318 (W.D. Mo. 1964); *aff'd* 379 U.S. 6. See also, *Sioux City & N. O. Barge Lines* v. *Chicago & N. W. Ry.*, 303 I.C.C. 537, 562 (1958); *Federal Barge Lines, Inc.* v. *Alton & S. R.* 303 I.C.C. 669, 679 (1938); *Pickup and Delivery—Official Territory—Less than Carload and Any Quantity*, 314 I.C.C. 313, 318 (1961); *Volume Rates on Processed Meat—Midwest to Ports*, 322 I.C.C. 456, 470 (1964).

15. For other cases in which the economics of the situation and competition were condensed as relevant see *Reduced Rates on Coal From The East to the Southwest* 292 I.C.C. 119, 137 (1954); *Soybean Oil, Tank Car Lots from Iowa to Hammond, Ind.*, 309 I.C.C. 663, 670-671 (1960); *Coal from Ill., Ind., and Ky. to Ill. and Ind.*, 308 I.C.C. 673, 678 (1959); *Koppers Co. Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 394 (1958) aff'd 166 F. Supp. 96. *Coal From Clinton, Linton Districts, Ind., to Milwaukee*, 311 I.C.C. 788, 793 (1960); *Volume Rates on Processed Meal—Midwest to Ports*, 322 I.C.C. 456, 469 (1964).

> Ry. Co. v. Interstate Commerce Commission, supra, [162 U.S. 196] that it is necessary to look to the total transportation service, and accord due consideration to the economic as well as the physical facts. Similar conclusions reached in Koppers Co. Inc., v. Chesapeake & O. Ry. Co., supra, [301 I.C.C. 284, 303 I.C.C. 383] were upheld in Koppers Co., Inc. v. United States, 166 F. Supp. 96."

Accordingly, § 2 standing alone does not constitute authority for Rules 2 and 3.

The Government contends that it need not stop with § 2, but goes on to invoke §§ 1(4) and 3(1). We set to one side for the moment treatment of § 1(4) and go to § 3(1).

C. TOFC Rules 2 and 3 are unlawful because of their conflict with Section 3(1).

1. THE EFFECT OF THE PROVISO TO SECTION 3(1).

The Government attempts to escape from the proviso by way of two related theories which it summarizes as follows (pp. 36-37):

> "[S]o elastic is section 3(1) that a carrier which suffered a diversion of traffic to a competing carrier by reason of the latter's lower rates or superior service could conceivably invoke Section 3(1). The proviso to the section was intended to close that avenue of attack. It was not intended to go further and permit a railroad to discriminate as between shippers because one shipper was also a carrier. This is apparent from the language of the proviso itself. It exempts only discrimination against the 'traffic' of another carrier. This term signifies the custom of the carrier—the business it enjoys when a shipper entrusts his goods to it for transportation, not a carrier's tender of trailers—its own or others', laden or empty—for rail transportation like a conventional shipper. . . . The legislative history strongly supports this construction."

The Government is totally wrong on all details of that statement, and on the conclusion it attempts to draw from them. "Traffic" as used in the Interstate Commerce Act is a term of art which means the goods that have been delivered to the carrier by a shipper for transportation. The TOFC Rules use the word "traffic" in exactly that same sense. Both the Act and the Rules plainly identify "traffic" as meaning the loaded or empty trailers tendered by the motor carrier to the railroad. And the legislative history of the proviso shows that the proviso authorizes railroads to discriminate against exactly that kind of "traffic." We turn first to that legislative history.

2. Legislative History of the Proviso to Section 3(1)

Section 3(1) had its origin in the first paragraph (unnumbered) of § 3 of the original Interstate Commerce Act of 1887. 24 Stat. 380. The proviso was added in 1940. 54 Stat. 902. When Part II of the Act was passed in 1935 it included § 216(d) which was obviously intended to be a counterpart of § 3(1), except that § 216(d) contained its present proviso. 49 Stat. 558. The first sentence of the present § 216(d) was added in 1940. 54 Stat. 924.

I.C.C. Commissioner Joseph B. Eastman, appearing before the Senate Committee on Interstate Commerce in April, 1939, explained the origin of the proviso to § 216(d) in the Act of 1935, and recommended that a similar proviso be added to § 3(1). The Bill before the Committee was S. 2009, which became the Transportation Act of 1940. Mr. Eastman said:

> "With regard to preference and prejudice provisions: Section 216(d) of the Motor Carrier Act is the equivalent of section 3(1) of part 1 and prohibits, among other things, undue preference of or prejudice to any particular 'description of traffic.' The motor carriers feared that this might be construed to include

railroad traffic, and therefore this proviso was added by the Senate committee:

> *"Provided, however,* That this paragraph shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.
>
> "In section 6 of S. 2009, which contains equivalent provisions, this proviso has been omitted. I can see no sound reason for this omission."
>
> (Hearings before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1310, S. 2016, S. 1869, and S. 2009, p. 793.)

To the plain language of the proviso to § 216(d) was thus added the plain language of Commissioner Eastman that the proviso was intended to assure motor carriers that § 216(d) would not apply to practices of motor carriers that bring about discriminations, prejudice, or disadvantage to the traffic of railroads. There are no exceptions or limitations in the purpose described by Mr. Eastman or in the language adopted to effectuate that purpose. Mr. Eastman literally wrote Part II of the Act while a member of the Commission and Federal Coordinator of Transportation, and guided it through Congress. See note 4, *supra.* The House Bill that became Part II was referred to as the "Eastman Bill" by the Chairman of a Subcommittee of the House Committee on Interstate Commerce that conducted the hearings on the Bill. (Hearings on H. R. 5262, p. 1.) Mr. Eastman as a member of Division 5 of the Commission was one of the men charged with administering Part II in its early years. His views on Part II and its legislative history are entitled to unusual weight. *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956).

"Section 6 of S. 2009," referred to by Mr. Eastman, was a proposed composite of §§ 3(1) and 216(d) and a similar

provision in the pending bill for a Water Carrier Act, but the proviso of §216(d) had been omitted from the composite. He recommended that the proviso be restored, and this was done by the Committee. S. Rep. No. 433, 76th Cong., 1st Sess., p. 11.

The Conference Committee on S. 2009 split the composite into the present §§ 216(d), 3(1), and 305(c), 49 U. S. C. § 905(c), and added the proviso to the last two. H. R. Rep. No. 2832, 76th Cong., 3d Sess., August 7, 1940, pp. 65-66. The Conference Committee said in respect to § 3(1):

> "The conference substitute in section 5 . . . adds a proviso that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(1) was enacted, with the proviso, 54 Stat. 902, in the form recommended in the Conference Committee Report, p. 6. Its language remains the same today.

If follows that the proviso to § 3(1) must be given the same plain meaning construction as that expressed by Commissioner Eastman in respect to the proviso to § 216(d): That § 3(1) does not apply to practices of railroads that bring about "discriminations, prejudice, or disadvantage to the traffic of" motor carriers.

3. Senator Wheeler's Statement

The Government and ATA do not mention Commissioner Eastman's explanation of the origin and purpose of the proviso to § 216(d). They rely upon a statement by Senator Wheeler (79 Cong. Rec. 5656) which is set forth in full in ATA's brief (ATA pp. 27-28; Govt. pp. 37, 62). Appellants' reliance upon this material is misplaced. It actually supports our position.

(1) Senator Wheeler said that adding the proviso to § 216(d) was not necessary for the protection of motor carriers from claims of discrimination against railroads, since the language of § 3(1) without the proviso, from which § 216(d) had been copied, had always "been interpreted as covering unequal and unjust treatment by a carrier of its *patrons*. However, as I said, to make assurance double sure, this provision was added." (Emphasis supplied.) The Senator plainly used *patrons* as meaning someone other than carriers competing with railroads; he obviously meant ordinary shippers as contrasted with carriers.

(2) The Senator's reference to rates was, in the whole context of his remarks, only an illustration of one application of the proviso, not a description of its total coverage. For example, he said that words in § 3(1) similar to those in § 216(d) cover "unequal and unjust treatment." Surely it cannot be maintained that a legislator of Senator Wheeler's background and experience was telling the Senate that the broad language of these sections applied only to rates.

(3) In any event, no legislative history has been revealed that overcomes the plain meaning of § 216(d) that it applies to service as well as rates. *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945).

The District Court considered the same argument that appellants make here and rejected it (R. 27).

4. The "Traffic" of a Carrier

The "traffic" of a carrier means the goods that have been delivered to the carrier by a shipper for transportation.[16]

16. Interstate Commerce Act, Part II (motor carriers):
Sec. 216(i) 49 U.S.C. § 316(i). "In the exercise of its power to prescribe just and reasonable rates . . . the Commission shall give due consideration. . . . to the effect of rates upon the move-

Note that the word "traffic" in §§ 216(i) and 3(4) in the note is in the same sections, and is used in the same context, as the same word in the provisos to §§ 216(d) and 3(1).

The Commission's TOFC Rules use the same meaning of "traffic." Rule 2 employs the words "a like and contemporaneous service in the transportation of a like kind of *"traffic."* Rule 3(e) requires in respect to open-tariff service that motor and water carriers "shall tender *traffic* to and

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ment of *traffic* by the carrier . . ."

Sec. 218(b). "[T]he Commission shall give due consideration to the . . . effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of *traffic* by such carriers."

Part I (railroads):

Sec. 3(4), 49 U.S.C. § 3(4). "All carriers subject to the provisions of this part shall . . . afford all reasonable, proper, and equal facilities for the interchange of *traffic* between their respective lines and connecting lines . . ." [including water carriers subject to Part III.]

Sec. 15(4). "[I]n prescribing through routes the Commission shall . . . give reasonable preference to the carrier by railroad which originates the *traffic.*"

Sec. 15a(2). "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of *traffic* by the carrier or carriers for which the rates are prescribed . . ."

Sec. 15a(4). "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the *traffic* by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the *traffic* of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

Sec. 5(1). "Except upon specific approval by order of the Commission . . . it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of *traffic,* or of service, or of gross or net earnings, or of any portion thereof . . ."

receive *traffic* from rail carriers only at points which the motor and water carriers are authorized to serve." Rule 4(d) provides that "Carriers participating in joint intermodal TOFC service shall interchange *traffic* only at a common point of service." (322 I.C.C. at 413-414.)

The *traffic* denominated in the provisions of the Act recited in note 16, supra, and in the TOFC Rules, is one and the same with the "*traffic* of any other carrier of whatever description" as these words are used in the proviso to § 3(1). If motor carriers tender to railroads under the railroads' open tariffs, traffic which the motor carriers have accepted from shippers for carriage, the railroads are free, by force of the proviso to § 3(1), to reject that traffic without violating any provisions of the Act.

D. Carriers acting as carriers are not subject to Section 3(1).

The government states that "A refusal to perform the same service for a carrier *qua* shipper as for other shippers is both unjust discrimination and unreasonable prejudice." (Br., p. 34). The Commission on the contrary stated:

> "We can see no justification, either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariffs, it can substitute another's service for its own in this way. . . ." (322 I.C.C. at 335)

At no point does the Commission say that motor or water carrier may act qua shipper. It must at all times be a carrier for that is in fact what it is. Rule 3 specifically states that the motor or water carrier is to be performing its authorized service at the time it is using TOFC

service. Accordingly cases, such as those cited by the government are not controlling for they only deal with carriers acting as ordinary and bona fide shippers and not when acting in their capacity as carriers.

Section 3(1) was held to be inapplicable to relations between common carriers even before the addition of the proviso in 1940.[17] There are numerous decisions to the same effect after the addition of the proviso in 1940.[18]

These decisions apply not only to discrimination as to rates but in addition to discrimination as to the provision of services. Therefore the effort to assert that the plain language of the proviso can be rewritten so as to limit its application is directly contrary to the settled construction of the section.

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17. *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, 774 (1932). See also, *Kansas City S. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I.C.C. 291, 296 (1935); *Nicholson Universal S. S. Co.* v. *Pennsylvania R. Co.*, 203 I.C.C. 637, 647 (1934); *Quanah, A & P. Ry. Co.* v. *A. T. & S. F. Ry. Co.*, 205 I.C.C. 253, 261 (1934); *Oregon Short-Line & U. N. Ry. Co.* v. *No. Pacific R. Co.*, 61 Fed. 158, 159-160 (9th Cir. 1894); *Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557, 560 (1939).

18. For similar decisions after the addition of the proviso to section 3(1) in 1940, see *Chicago, Milwaukee St. P & P. R. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 456 (1957), aff'd, 182 F. Supp. 81 (E.D. Wis.), 366 U.S. 745; *Denver & Rio Grande Western R. R. Co.* v. *Union Pacific R. R. Co.*, 287 I.C.C. 611, 619 (1953), aff'd, 351 U.S. 321; *Atlantic Coast Line R. R. Co.* v. *Southern Rwy. Co.*, 302 I.C.C. 711, 716 (1958); *Consolidated Mining & S. Co. of Canada* v. *N. Y. Central R. R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Eastern Central Motor Carriers Assn.* v. *Baltimore & Ohio R. Co. et al.*, 314 I.C.C. 5, 50 (1961). Aff'd *sub nom. Cooper-Jarrett* v. *United States*, 226 F. Supp. 318 (W.D. Mo. 1964), aff'd 379 U.S. 6; *Sea Train Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, 220 (1940); *Hoboken Mfrs. R. Co.* 248 I.C.C. 109, 119 (1941);

And for similar decisions under the discrimination and prejudice section of the Motor Carrier Act, see *Freight, All Kinds, Chicago & I.H.B. Ind., Mich., Ohio*, 322 I.C.C. 423, 427 (1964); *Proportional Rates Between Harrisburg, Pa., and Points in Penna.*, 315 I.C.C. 499, 503 (1962); *Commodities Between Illinois, Kansas and Missouri*, 31 M.C.C. 323, 325-326 (1941); *Fort Smith & Western Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 216 I.C.C. 411, 432 (1936).

E. Appellants have not cited a case holding that Sections 1(4), 2 or 3(1) require one carrier to perform service for another carrier acting in its capacity as a carrier as Rules 2 and 3 would require.

The court below, after having had most of this court's decisions referred to on brief here called to its attention, said (R. 39-40):

> "Although it is settled that a common carrier may not discriminate against (or in favor of) another carrier shipping its own property for its own purposes,[32] Sections 2 and 3 of the Act have never, so far as appears, been interpreted by the Commission or the courts to require one carrier to perform service as a substitute for another carrie [sic], *qua* carrier, as the Commission's new rules would command.
>
> "32. *I.C.C.* v. *Baltimore & Ohio R. R.*, 225 U.S. 326 (1912). Freight forwarders, not entitled to establish through routes and joint rates with common carriers under the Act, are in the same position as ordinary shippers and are thus protected from discrimination under the Act. *I.C.C.* v. *Delaware, L. & W.R.R.*, 220 U.S. 235 (1911)." (R. 39-40)

Appellants have submitted no decision of the Commission or the courts here that calls for an amendment of that statement.

In *Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 Fed. 912, 915 (8th Cir. 1892), cert. den. 146 U.S. 354, the court said:

> "No power existed at common law, and none is given by the Act to court or Commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite on a joint tariff. *Express Cases*, 117 U.S. 1; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. Rep. 567; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. Rep. 559. The whole matter is left to the voluntary action of the companies. . . ."

At common law a common carrier could not be compelled to enter into arrangements with another common carrier for the handling of either passenger or freight traffic.[19] Since it is asserted that Section 1(4) merely codified the common-law duty to serve, (Govt p. 26) it is a duty qualified by the absence of any common law obligation to enter into arrangements with other carriers.

Appellants cite *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.* 220 U. S. 235 (1911) as a case most nearly in point (Govt p. 29). Freight forwarders have been given a unique status as a carrier whose defined services ". . . (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." (49 USC § 1002(a)(5)). No other part of the Act contains a comparable provision. When Congress wanted to authorize a carrier's utilization of another carrier, it did so explicitly and may be presumed to have omitted the provision from other parts because it did not choose to create a comparable status for carriers operating under the other parts. The point is put beyond doubt by § 203(a)(13) which specifically excludes any vehicle or car operated exclusively on rails from the definition of equipment that a motor carrier may use in performing its authorized service. Forwarders are authorized by statute to use the services of railroads whereas motor carriers are precluded by statute from using the services of rail carriers. Since forwarders hold this unique status, it cannot be concluded that the language used in *Delaware* applies to carriers acting as carriers under the other parts of the Act.

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19. *Oregon Short Line Ry. Co.* v. *Northern Pacific R. Co.*, 51 Fed. 465, 472-473 (Oregon 1892), aff'd, 61 Fed. 158, 162 (9th Cir. 1894); *St. Louis Drayage Co.* v. *Louisville & Nashville R. Co.*, 65 Fed. 39, 41-42 (E.D. Mo. 1894).

One year later the *Delaware* case was cited in *I.C.C.* v. *Baltimore & O. R.R.*, 225 U.S. 326, 342 (1912), where this court said:

> "It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges."

A distinction was drawn between the relationship of a carrier to another carrier conducting operations as a carrier and the relationship of a carrier to another carrier acting as a patron in the movement of its own goods. The language in *Delaware* must be read in the light of the latter distinction.

A careful reading of *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 745-755 (1931), will show that the finding of discrimination applied only when the passenger cars were being moved solely for the benefit of the owning line, not when the cars were in revenue service, i.e. when being used by a carrier as a carrier. *Kansas City Sou. Ry.* v. *U.S.*, 282 U.S. 760 (1931), follows the same analysis.

Operations under Rules 2 and 3 would be entirely different from any case cited by appellants, in that the motor carrier is acting as a *carrier* in respect to the traffic in its possession and which it tenders to the railroad. Appellants' arguments are devoted to trying to bridge the wide gap between their authorities and that situation. They are trying to bridge the wide gap between their authorities and TOFC Rules 2, 3(a) and 3(e) which would empower motor carriers "in the performance of" . . . their *authorized service as carriers* to "tender *traffic* to" railroads for shipment under TOFC open tariffs.

Appellants cannot bridge that gap because it is already occupied by the wall of the proviso to § 3(1), which says

that § 3(1) "shall not be construed to apply to discrimination, prejudice, or disadvantage to the *traffic* of any other *carrier* of whatever description." (Emphasis supplied.) The direct authority that appellants could not find in decisional law is precisely supplied by the proviso, but the proviso is exactly opposite to the theory and conclusion which appellants hoped to reach.

VI

THE REVOLUTIONARY CHANGES WROUGHT BY RULES 2 AND 3 CANNOT BE LEGALLY SUPPORTED BY GENERAL REFERENCES TO ANY LANGUAGE IN THE NATIONAL TRANSPORTATION POLICY, THE PURPOSES AND POLICIES OF THE DISCRIMINATION PROVISIONS OR TO THE COMMISSION'S LIMITED AUTHORITY TO FILL IN THE INTERSTICES OF THE ACT.

With no direct authority holding that Section 2 requires one carrier to serve another carrier acting as a carrier, appellants seek to have comments made in cases dealing with ordinary bona fide shippers, and forwarders having the same legal rights as shippers, extended to apply to carriers acting as carriers. Recognizing that Section 2 standing alone affords inadequate authority for Rules 2 and 3, resort is had to Sections 1(4) and 3(1). The common law makes it plain that the construction sought to be placed on Section 1(4) is invalid and the proviso of Section 3(1) stands squarely in the way of its use to justify Rules 2 and 3. The road then leads to an argument that the Commission ought to have authority to work this revolution in transportation because of some general policies underlying the discrimination sections and the National Transportation Policy, even if the statutory provisions don't directly cover the situation.

Where Congress has dealt extensively throughout the Act with coordination of different modes of transportation, where the settled construction of the Act by both Commis-

sion and the Courts has carried into effect the plain meaning of the Act, and when Congress, with knowledge of the case law, has been given numerous opportunities to change the law and failed to do so, it is clear that a change in public policy on the matter must come from Congress and the Commission is not free to radically change the format established by Congress. *Maurer* v. *Hamilton* 309 U.S. 598 (1940).

A. Use of TOFC services by shippers and by carriers acting as carriers involves dissimilar circumstances and conditions.

The Court is urged to go beyond the terms of the statutes on the assertion that " . . . the discrimination that the Commission questioned in this case has many of the same injurious consequences as the traditional forms encompassed by the prohibitions of the Act." (Govt p. 40). This is a factual assertion and yet no record support for it is cited and it is followed by a hypothetical discussion of a situation, apparently intended to suggest the need for Rules 2 and 3. Because the open tariff issue was effectively brought into the proceeding after the record was completed, such arguments as these must be resorted to in place of a solid analysis of actual shipper and carrier testimony. In this day and age, major structures or major policy changes are not made without the most careful and factual studies possible. No such study was placed in this record, because the issues as to Rules 2 and 3 were not dealt with until oral argument, at which time factual presentations were not in order.

The argument assumes that there is such comparability between ordinary shippers and motor carriers that failure to accord them identical treatment will result in ". . . many of the same injurious consequences . . ." for the motor

carrier as for the shipper. Apart from the public policy established by Congress to govern this situation and apart from the lack of any record support for the assumption as to identity of interests, it is readily apparent that there are some very significant factors that will influence motor carrier use of TOFC service that do not apply to the manufacturers constituting the shippers in the government's hypothetical example.

Highway carriers will use TOFC service only where it is to their advantage to do so. Their criteria for determining this advantage are not the same as for an ordinary shipper. The Government contends that the Commission's rules only permit the motor carriers to compete with railroad and shipper trucks in the truck segment of piggyback (Govt. 50). There is no record reference to support that statement. The Rules would permit the motor carriers to do much more.

Under Plans II, III and IV, a motor carrier could help solve some of its carrier problems by taking the following actions:

(a) Handle "balloon type" freight that is not attractive to the highway carrier in TOFC service under Rules 2 and 3.

(b) Where the motor carrier has temporary shortages of equipment or manpower, assign the problem of handling the excess to the railroads under Rules 2 and 3.

(c) Selectively assign equipment and drivers to handle traffic to regular customers offering desirable freight, thus virtually guaranteeing service to favored shippers.

(d) During periods of inclement weather, such as winter months in northern sections of the country, when highway routes are either hazardous or closed or expensive to

operate over, turn over significantly larger proportions of traffic and let the railroad solve the operating problems.

(e) Turn over to the railroads any overweight, overwidth or overheight movements requiring special height permits, escorts or restricted hours of travel, and thus relieve motor carriers of these added costs.

(f) Assign to the railroads shipments with excessive pickup or delivery costs, such as longer-than-average runs, runs in congested districts, shipments involving hand loading versus palletized loading.

(g) Use TOFC movements to offset any imbalance of operations. The motor carrier could use his equipment and drivers to achieve a completely balanced movement over the highway and send any unbalanced traffic via the railroads, thus adding generally to the imbalance in railroad equipment in both vans and flat cars. The empty return problem is one of the most important problems confronting a common carrier. As noted above, there is information that some motor carriers have been making use of piggyback primarily for empty return movements, (*supra,* p. 8).

It would appear that railroads had good reason to be somewhat cautious about entering into unlimited joint, coordinated service where the primary use of the existing coordinated service was to reposition empty motor carrier equipment. The course of mutually beneficial rail-motor cooperation would presumably require mutual efforts to meet the needs of the shipping public, taking into account both the loaded and empty movements, not an arrangement performed to solve motor-carrier operating problems. Contrary to the Commission's conclusion, blanket orders requiring the highest degree of coordination, but which are not mutually beneficial and produce one sided advantages, will not give the freest play to the inherent advantages of each

mode of transportation and encouragement of such indiscriminate coordination is not in the public interest. (322 I.C.C. at 330.)

(h) Tender very little traffic on weekdays, but very large proportions of the motor carrier's traffic on Fridays to escape penalty teamster wage costs and other weekend loading and unloading problems occasioned by the five-day business week.

Through direct contacts with shippers, railroads can undertake to maximize efficiency in the operation of TOFC services. Under Rules 2 and 3, motor carriers could in part tender traffic to the railroad in order to solve their own operating problems. Motor carriers are unlikely to keep railroads fully informed about their operating problems and thus hand their competitors an additional basis for solicitation of traffic.

There is no basis in this record for a finding that ordinary shippers and motor carriers have an identity of interest or that failure to treat them the same has the same consequences.

B. Since open tariff TOFC plans are available directly to shippers, Rules 2 and 3 cannot be justified on grounds of any savings in the nation's resources.

Rules 2 and 3 have not been justified as responsive to the demands of shippers. By hypothesis the TOFC service is already available to them directly without the intervention of the motor carrier under Rules 2 and 3. If the railroads are able to offer a lower cost or a better service via TOFC than the motor or water carriers, some traffic may well be diverted from their competitors, just as traffic has been diverted from the railroads to other modes when they could offer the shipper their advantages. Such consequences do

not provide any foundation for an argument in favor of Rules 2 and 3 on grounds of maximizing the efficient use of the nation's resources. But appellants say some shippers may remain loyal to the motor carrier. (Gov't p. 41). How many shippers would fail to follow their own economic best interests is not explained. Thus there is no basis for judging the substantiality of the argument. "Other factors [than costs] including service, play a large part in determining how trailers shall move." (Piggyback Traffic Characteristics (1966) p. 36.) The argument in effect is that the motor carrier should be protected against TOFC competition so that it can retain business it might otherwise lose and in order, apparently, that shippers choosing to route their traffic on grounds of loyalty to motor carriers rather than economics may continue to do so. There is no showing on the record that shippers will gain any benefit by reason of Rules 2 and 3 in terms of lower rates or better service than is already available to them under the open tariffs. A conclusion on the subject could only be made after making a study of rates and services available under present voluntary arrangements with rates and services that would be available under the compulsory arrangements of Rules 2 and 3. No such study was made.

Every TOFC rate and service is now directly available to the shippers. There is no issue as to efficient use of national transportation resources involved in this case. The issue is whether railroads will be permitted to compete for traffic. The short answer to the hypothetical example on pages 40-42 of the Government's brief is that bona fide shippers are protected by the anti-discrimination provisions of the Act against discrimination in rates or services.

C. Rules 2 and 3 are anti-competitive.

Rules 2 and 3 would virtually nullify the railroad's ability to offer a unique rate or service to a shipper and thus create

competition with other modes of transportation. Every reduced Plan II, II½, III or IV rate made for the specific purpose of competing with motor or water carriers would automatically become available to those very motor or water carrier competitors under Rules 2 and 3. To the extent these reduced rates were made possible by the inherent cost advantage enjoyed by the railroads, making these rates automatically available to rail competitors would deny the railroad the enjoyment of its inherent advantage. In *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83 (1957), this court stated:

> "The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the Congressional policy requires the Commission to recognize." (p. 91)
>
> ". . . a rate benefit attributable to differences between the two modes of transportation [rail and truck] is an 'inherent advantage' of the competing type of carrier and cannot be ignored by the Commission." (p. 92)

The I.C.C. Bureau of Economics states:

> "Piggyback rates may have important effects on the revenues of the modes publishing the rates, on the competitive position of other modes, on the structure of freight rates, and on shippers and commodity movements." (Piggyback Traffic Characteristics (1966) p. 10.)

Making Plan III and Plan IV TOFC all-freight rates available to motor carriers will disrupt the structure of rail rates in ways not available to ordinary shippers and forwarders. Higher rated traffic moving in either conventional rail or TOFC rail equipment can be solicited by motor carriers and then offered back to the railroads under

Rules 2 and 3 at lower all-freight rates. Implementation of Rules 2 and 3 will inhibit the growth of TOFC services. Rail traffic officers will be compelled to evaluate not only the costs and market potentional for each rate, based on facts relating to ordinary shippers, but in addition the added costs and disruption of the rate structure that may be anticipated when other modes use TOFC services under Rules 2 and 3.

D. No factual showing has been made that railroads dominate the highway portion of TOFC services.

Next it is asserted that "Railroad domination of piggyback may also fester monopoly conditions in the vital truck segment of piggyback service." (Govt. p. 43) There is, first of all, no record support for an assertion that railroads are monopolizing the truck segment of piggyback service. There is no traffic study to determine who has actually performed the highway portion of the TOFC service under the various plans. The availability of Plans I, II½, III, IV and V make it perfectly evident that railroads have not undertaken to monopolize the performance of the highway movement in connection with TOFC service.

Since motor carriers perform the highway service in Plans I and V and since the shipper can select any motor carrier he desires under Plans II½, III and IV any argument about monopilization must relate to Plan II. The latest data indicates Plan II service declined from 39 percent of terminations in 1964 to 38 percent of terminations in 1965. Plans II½, III and V have shown a greater rate of growth recently. (Piggyback Traffic Characteristics (1966) pp. 15, 18.) There simply is no factual foundation for the argument that railroads are monopolizing the highway portion of TOFC service.

E. Present coordination practices are in accordance with Congressionally approved policies.

1. PLANS I AND V.

Appellants complain that railroads may and do refuse to enter into through-route and joint-rate arrangements with motor carriers for TOFC Plans I and V. (Govt. pp. 11-12; ATA pp. 18, 20-21.) But that practice cannot be an infringement of the National Transportation Policy; ever since Part II was enacted in 1935 Congress has knowingly maintained a steadfast course in refusing to amend § 216(c) so as to make motor-rail through-routes and joint-rates compulsory. *It is the Congressional policy of which appellants complain.*

Where Congress has concluded that the Commission should have authority to order into effect coordination of services, it has so provided in § 15(3) at 216(a).

In explaining proposed § 216(c) in the Senate in April, 1935, Senator Wheeler said:

> "Paragraph (a), as amended by the committee, is confined to common carriers of passengers by motor vehicle. They are required to establish reasonable through routes with other such common carriers and to establish just and reasonable rates and equitable divisions thereof. In the original bill there was a provision for mandatory through routes and joint rates between all motor common carriers and carriers by rail, express, and water. There was substantially unanimous disapproval of this provision.
>
> "However, in my judgment, it should have been done; and I think the Congress should have been asked to do it, but many of the small operators were afraid that if this were done it would give preference to the railroads, and therefore they were afraid to ask it. Hence paragraphs (b) and (c) have been introduced by the

committee in order to make joint through routes and rates permissive between motor carriers of property and between motor carriers of passengers or property and other agencies of transportation. The Commission is, however, given authority to pass on the reasonableness of any joint rates so established and to adjust the divisions thereof." (79 Cong. Rec. 5655.)

Before the Senate Committee on Interstate Commerce, in April, 1939, in hearings on S. 2009, which became the Transportation Act of 1940, Commissioner Eastman said:

"When we first drew the Motor Carrier Act we had provisions for making it a duty to establish reasonable through routes and joint rates generally. . . ."

"In other words, it would be the duty of the railroads and the motor carriers to establish reasonable through routes and joint rates, and the Commission could require their establishment if that were not voluntarily done. In the hearings on that bill it developed that, so far as joint rates between railroads and motor carriers were concerned, the railroads did not want such a provision; the motor carriers did not want it; and the shippers did not want it. There were various differing reasons for these views by the different parties but nobody seemed to want it, and everybody seemed to be against it. So the bill was changed to the form of the present Motor Carrier Act; in other words, making reasonable through routes and joint rates between motor carriers of passengers compulsory, but through routes and joint rates between motor carriers of property voluntary; and also through routes and joint rates between either passenger or property motor carriers and railroads. Personally, I have always thought that the Commission ought to have the power to establish through routes and joint rates broadly. . . . However, in view of the reception which our recommendation to that effect got back in 1935, the Commission has been reluctant to bring forward any such suggestion unless there was evidence that

somebody really wanted it to be done." (Hearings before Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 2009, pp. 817-818.)

At various times the Commission has asked Congress to amend § 216(c) so as to empower the Commission to compel railroads and motor carriers of property to enter into through-routes and joint-rates, but Congress has failed to grant the power sought. See the Commission's 75th Annual Report to Congress, 1961, p. 186; 76th Annual Report, 1962, p. 201; 77th Annual Report, 1963, p. 19. Bills to effectuate these recommendations were introduced in Congress but were not enacted. These were S. 3510 and H. R. 12362, 87th Congress; and S. 676 and H. R. 2088, 88th Congress. See 1962 and 1963 Annual Reports, pages cited.

Appellants are predicating certain of their arguments upon a disagreement with Congressionally approved public policies. They are in the wrong forum in seeking to change those policies. *American Trucking Associations* v. *United States,* 364 U.S. 1, 5 (1960).

2. Plan II

Appellants point to the popularity of Plan II TOFC service and draw the conclusion that Plan II is a device that wrongfully excludes motor carriers from participation in TOFC operations (ATA Br. pp. 19-22-23). The Government puts it this way (Br. p. 12), in describing the effects of Plans II and III:

> "Thus piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads."

Again it is *the policy of Congress* against which appellants complain, since Congress has intentionally made Plan

II a railroad service, "as opposed to a joint, coordinated service of the regulated motor carriers and the railroads." That highway-rail-highway movement is made possible by specific Congressional intent expressed in § 202(c) of the Interstate Commerce Act, 49 U.S.C. § 302(c). Section 202(c) exempts from regulation under Part II (which governs motor carriers) the railroad's "performance within terminal areas of transfer, collection, or delivery services," and makes such services subject to Part I (which regulates railroads). This Court held that § 202(c) is a manifestation of Congressional intent that the National Transportation Policy favors certain truck operations by railroads, including pick-up and delivery in terminal areas, in *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60 (1945).

3. Plans III and IV

Appellants complain that TOFC plans III and IV, particularly the former, have diverted large volumes of traffic from motor carriers (Govt. p. 12; ATA pp. 18-20). But here again, as we have pointed out before in respect to the other TOFC plans, it is the policy of Congress, manifested in the Interstate Commerce Act, that has made Plans III and IV possible.

If the shipper is a private carrier, it is exempt from economic regulation under Part II, since by definition it is neither a common nor contract motor carrier. Section 203(a)(17), 49 U.S.C. 303(a)(17). The policy of Congress favors maintenance of the right of a private carrier to transport his own goods in furtherance of his own "primary business enterprise." *Red Ball Motor Freight, Inc.* v. *Shannon,* 377 U. S. 311 (1964).

If the shipper engages a local cartage trucker to move the trailer from the shipper's loading dock to the sidetrack,

the movement by the local trucker is exempt from Part II regulation by force of § 203(b)(8). If the shipper is a freight forwarder subject to Part IV of the Interstate Commerce Act, his "transfer, collection, or delivery services" by motor vehicle within the terminal area are exempt from Part II and made subject to Part IV by § 202(c), just as the railroad terminal area services described above are exempt from Part II and made subject to Part I by § 202(c). Whether the highway portion of the haul is within an exempt terminal area or involves movements beyond the terminal area, motor carriers are of course in a position under the tariffs to compete for the highway haul.

F. Rules 2 and 3 are not justified by the National Transportation Policy.

Finally, it is asserted that Rules 2 and 3 are consistent with the objectives of the National Transportation Policy (Govt. pp. 46-52).

In no Part of the Interstate Commerce Act has Congress adopted a blanket policy in favor of coordination in all circumstances. The specific expression of congressional policy on rail-motor carrier coordination is that stated in section 216(c) which provides for voluntary coordination. The specific expression of congressional policy on rail-water coordination is that stated in section 15(3) which empowers the Commission "after a full hearing" to establish through routes and joint rates between rail and water carriers. In the debates concerning the necessity for the last sentence in the National Transportation Policy, it was stated that:

> "... [The policy] cannot supersede the specific proposals contained in the body of the bill." (84 Cong. Rec. 9685.)

This court has confirmed that the National Transportation Policy's language must be construed in relation to the provisions in the Interstate Commerce Act. *Interstate Com. Comm'n* v. *New York, N.H. & H. R.R.*, 372 U.S. 744, 762 (1963).

In contrast to *United States* v. *Pennsylvania Railroad Co.*, 323 U.S. 612 (1945), where the Court was implementing a specific set of statutory provisions calling for through routes and joint rates, the request here is to approve rules requiring coordination in a manner not provided for in the Act. In fact, the coordination would be in violation of specific sections of the Act, namely §§ 15(3), the certificate provisions of Part II, and § 216(c).

Apart from the violation of specific sections of the Act noted above, it is clear that the arguments are without equity and are not founded in fact.

1. Fair and impartial regulation of all modes of transportation requires that motor carriers not be allowed to follow the traffic back to railroads. The follow the traffic theory was not available to the railroads. What is proposed is not compulsory joint through rates in which motor carriers enjoy the benefits of their own operations but a direct invasion of rail services and facilities.

2. Motor carriers are now able to compete for the traffic they are best able to handle. They are able to handle the traffic over the highways and they are able to handle traffic in connection with TOFC service under Plans I, II½, III, IV and V and under II by arrangement with the railroad. Their inherent advantage does not embrace direct operation over a railroad. If they are given the privileges under Rules 2 and 3, motor and water carriers will have full access to the only inherent advantage the railroads

have. There is a direct inroad on the railroads' ability to make TOFC rates because, as every traffic officer knows, rates are made to reflect all the transportation characteristics of the traffic. These characteristics, empty return movement, etc. will not be the same for motor carrier traffic as they are for ordinary shipper traffic.

3. Since Plans II, II½, III and IV are now available directly to the shippers, Rules 2 and 3 do not promote adequate and economical service or sound economic conditions in transportation. The do enhance the competitive position and the financial fortunes of the long-haul motor carriers.

4. There is not a single rate increase cited as resulting from present TOFC arrangements. The argument that these arrangements may lead to higher rates is without support in fact.

VII

AS A RESULT OF INADEQUATE NOTICE, RULES 2 AND 3 ARE NOT SUPPORTED BY ADEQUATE EVIDENCE NOR FINDINGS OF FACT BASED ON SUCH EVIDENCE.

The proposed rules that were before the parties during all of the evidence-taking stage of this proceeding did not include TOFC Rules 2 and 3. The proposed rules did not include any issue or rule directed to the question of whether motor and water carriers could or should lawfully use TOFC Plans II, III, and IV open tariffs for the transportation of freight tendered to them by shippers. See part 7 of our Statement of the Case.

As a consequence the record as made before the Commission did not include evidence directed to the issues raised by Rules 2 and 3. Nevertheless, it is argued here, among other things, that Rules 2 and 3 will conserve national transportation resources, that railroads are domi-

nating the highway portion of TOFC operations, that the consequences of differing treatment of connecting motor carriers is the same as discrimination as between shippers, and that the balance of competition between railroads and motor carriers needs altering. (Govt. 19, 22, 40, 42, 43.) Each of these factual allegations could have been dealt with at the fact finding stage of the case. They are presented here on the basis of broad assertions, extra-record references, and the most minimal reference to the record.

Rules 2 and 3 and the new principle upon which they are based, i.e., that any carrier may use the open tariffs of any other carrier, is unquestionably one of the most revolutionary issues to ever come before the Commission. It must be presumed that, given proper notice, the shippers, motor carriers, water carriers and railroads would have presented evidence with respect to these rules and the underlying principle.

Because the notice was inadequate, adequate evidence to support Rules 2 and 3 was not presented and findings thereon could not be made. The Proposed Report of the Examiners dealt with the case on the basis on which it was tried.

In setting aside an order of the Commission in which a large amount of evidence bearing upon the pattern of motor-rail competition had been systematically excluded, this Court said:

> "Those affected are entitled to fully develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information." *American Trucking Associations, Inc.* v. *United States,* 326 U.S. 77, 86 (1945).

Here the railroads were deprived of the opportunity "to fully develop the bearing" of Rules 2 and 3 upon themselves, and the Commission exercised its discretion without the consideration of necessary information directed to the effect of the open-tariff rule upon the railroads. The order here is just as defective as the order in *American Trucking Associations*, supra.

A document was distributed by the Commission at the prehearing conference advising the parties that the proposed rules did not contemplate the use of TOFC service by motor contract carriers (R. 130). Nevertheless, Rule 3 authorizes such carriers to use rail TOFC open tariffs. And as Commissioner Webb pointed out, the parties were never advised that open tariff TOFC service involving Plan II was contemplated (322 I.C.C. at 395).

VIII

THE FREIGHT FORWARDERS' ARGUMENT

The freight forwarders are presenting argument as to reasons why Rules 2 and 3 violate statutory provisions of direct interest to them. A motor or water carrier remains at all times a carrier and must operate in accordance with its authorized service. If a carrier tries to assume the additional mantle of a shipper under Rules 2 and 3, it runs squarely into the violation of Section 410(c) of the Act, 49 U.S.C. § 1010(c), as pointed out by the forwarders. No extended comment need be made about footnote 40 on page 63 of the Government's brief concerning the invalidity of certain TOFC arrangements since it obviously does not take account of specifically authorized joint arrangements permitted carriers under §§ 15(3) and 216(c).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

THORMUND A. MILLER
AMOS M. MATHEWS
J. D. FEENEY
ROBERT F. MUNSELL
Attorneys for Western Railroads

JAMES W. HOELAND
Attorney for Southeastern Railroads

APPENDIX A

(322 I.C.C. 413)

49 CFR 500. *Practices of for-hire carriers participating in trailer-on-flatcar service*

500.1 *Definition of TOFC service.*—Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

APPENDIX B

THE INTERSTATE COMMERCE ACT

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

DUTY TO FURNISH TRANSPORTATION AND ESTABLISH THROUGH ROUTES; DIVISION OF JOINT RATES.

SEC. 1(4). [*49 U. S. C. § 1(4).*] It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and

classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SPECIAL RATES AND REBATES PROHIBITED

SEC. 2. [*49 U. S. C., § 2.*] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

PREFERENCES; INTERCHANGE OF TRAFFIC; TERMINAL FACILITIES

SEC. 3. [*49 U. S. C. § 3.*] (1) It shall be unlawful for any common carrier subject to the provisions of this part to

make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

ESTABLISHMENT OF THROUGH ROUTES, JOINT CLASSIFICATIONS, JOINT RATES, FARES, ETC.

SEC. 15(3) [*49 U.S.C. § 15(3)*] The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare,

charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

APPLICATIONS OF PROVISIONS

SEC. 202. [*49 U.S.C. § 302.*] (c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery

service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

DEFINITIONS

SEC. 203. [*49 U.S.C. § 303.*] (a) As used in this part—

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*49 U.S.C. § 306.*] (a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by a motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its opera-

tion and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

TERMS AND CONDITIONS OF CERTIFICATE

SEC. 208. [*49 U.S.C. § 308.*] (a) Any certificate issued under section 206 or 207 shall specify the service to

be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE

SEC. 209. [*49 U. S. C. § 309.*] (a) (1) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive juris-

diction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed

to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 216(c). [*49 U.S.C. § 316(c)*] Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular

person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

DEFINITIONS

SEC. 302(d). [*49 U.S.C. § 902(d).*] (d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I.

(e) The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract ca-

rier by water". Whenever the Commission, upon its own motion or upon application of any interested party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in this Act, it shall by order exempt such person or class of persons from the provisions of this part for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing.

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND PERMITS

SEC. 309. [*49 U. S. C. § 909.*] (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such

operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

(f) Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission

shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (g), and such permit shall be issued or denied accordingly. Any person, not included within the provision of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operation shall be lawful pending the determination of such application.

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Lone Star Package Car Company, Inc., Common Carrier Application, 19 M.C.C. 603 (1939)

Flynn Forwarding Co., Inc., Common Carrier Application, 19 M.C.C. 614 (1939)

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Gulf Carloading Company of Texas, Inc., Common Carrier Application, 19 M.C.C. 623 (1939)

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H. S. Dorf & Co., Inc., Broker Application, 30 M.C.C. 626 (1941)

Clingerman, Extension of Operations, 31 M.C.C. 143 (1941)

Boston & Maine Transportation Co., Common Carrier Application, 30 M.C.C. 697 (1941), 34 M.C.C. 599 (1942)

Signal Cartage Service, Inc., Common Carrier Application, 33 M.C.C. 140 (1942)

Strickroot, Common Carrier Application, 250 I.C.C. 211 (1942)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 60

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois

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BRIEF FOR FREIGHT FORWARDER APPELLEES

STATUTES INVOLVED

In addition to the statutes specified in appellants' briefs, this case also involves Section 410(c) of the Interstate Commerce Act (49 U.S.C. 1010(c)), which is printed in the Appendix hereto, p. 78.

STATEMENT

All of the appellees for whom this brief is filed are freight forwarders, operating under permits issued by the Interstate Commerce Commission pursuant to Section 410(c) of the Interstate Commerce Act. These freight forwarders were parties to the proceeding in which the Commission entered the order promulgating the rules that are involved in these appeals. They filed a complaint in the court below (R. 9) to set aside the portion of the Commission's order in which the Commission promulgated Rules 2 and 3 (322 I.C.C. at 336-337).*

Freight forwarding is authorized and regulated in Part IV of the Interstate Commerce Act, which was enacted in 1942 (49 U.S.C. 1001 *et seq.*). The term "freight forwarder" is defined in Section 402(a)(5). A freight forwarder holds itself out to the general public as a common carrier to transport or provide transportation of property but, except in terminal areas, it cannot perform the physical transportation (49 U.S.C. 1010(h)). It assembles individual shipments and consolidates them; it ships the consolidated shipment by an operating line-haul common carrier (usually a railroad) to a destination point. The freight forwarder there separates the individual shipments and distributes them to the consignees.

The principal competitors of freight forwarders are the common and contract carriers of property by motor vehicle, which are defined and regulated by Part II of the Interstate

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* In a suit pending in the United States District Court for the Northern District of Texas (*Lone Star Package Car Co.* v. *United States*, Civil Action No. 4-355) certain freight forwarders and railroads seek to set aside the Commission's ruling in the same Commission proceeding that Plan I TOFC service is authorized as a through route arrangement under Section 216(c) of the Act. That issue is not involved in these appeals.

Commerce Act (49 U.S.C. 301 *et seq.*). The volume of traffic handled by the motor carriers dwarfs that of the forwarders and has increased very rapidly in the recent years in which TOFC service has expanded.* The Class I intercity motor carriers of property had revenues of $4 billion in 1956 and $7 billion in 1965. In contrast, the Class A freight forwarders had less than half a billion dollars in revenues in each year, and their 1965 revenues were only $42 million more than in 1956.

Notwithstanding the marked and increasing competitive success of the motor carriers vis-a-vis the forwarders, however, the activities of the forwarders meet the needs of certain shippers** and provide the public with the benefits of competition from a mode of transportation that differs from the highway carriers.

Unlike motor carriers, the freight forwarders do not have the important competitive benefit of being authorized by Congress to enter into through routes and joint rates with rail carriers or with motor or water carriers. Authority to make such arrangements, on a voluntary basis for all participating carriers, is given to motor carriers in Section 216(c) of the Act (49 U.S.C. 316(c)), but not to freight forwarders. Because of the forwarders' lack of authority to make joint rate arrangements, the forwarder, unlike the motor carrier, cannot negotiate private agreements

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* 80th Annual Report of I.C.C., 1966, pp.170 (Table 34) and 180 (Table 56).

** Section 406(d), regarding rates of freight forwarders, provides that "the Commission shall give due consideration . . . to the inherent nature of freight forwarding . . . [and] to the need, in the public interest, of adequate and efficient freight-forwarder service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable freight forwarders, under honest, economical, and efficient management, to provide such service." (49 U.S.C. 1006(d))

under which a railroad agrees to accept, for its "division" of the total charge, an amount lower than the tariff rate.*

On the other hand, the traditional and unique right of freight forwarders was specifically recognized by Congress. The sole provision of the Act for a carrier that "utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act"—*i.e.*, a rail, motor or water carrier—is in the statutory definition of a freight forwarder (Section 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)). In utilizing the services of a rail carrier pursuant to this authority, by making shipments under rail tariffs like any other shipper, the forwarder must pay the full tariff rates.

One of the provisions in Part IV of the Act, concerning permits to engage in freight forwarding, is as follows:

> "No such permit shall be issued to any common carrier subject to part I, II, or III of this act . . . ." (Sec. 410(c); 49 U.S.C. 1010(c)).

As explained by the House Committee on Interstate and Foreign Commerce in recommending enactment of the bill to regulate freight forwarding, these provisions "are intended to carry out the policy of permitting such carriers [rail, motor and water carriers] to engage in freight forwarding indirectly, through control of subsidiary corporations, but of *not permitting them to engage directly in the freight-forwarding business.*"** H. of R. Report No. 1172,

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* The Pennsylvania Railroad, for example, receives a "materially lower" amount from motor carriers in handling TOFC traffic under Plan I (held by the Commission to be a through route arrangement) than it does for handling TOFC traffic for the public under its tariff Plan III service (R. 382-3).

** Italics in this brief are ours except where otherwise indicated.

77th Cong., 1st Sess., Aug. 13, 1941, p. 15) Neither that policy nor Section 410(c) was mentioned in the present Commission report.

In a general investigation proceeding in 1939, three years after the motor carrier Part II of the Act became effective, and three years before adoption of Part IV, the Commission held it to be unlawful, under the provisions of Part II, for a rail carrier to act as a shipper of its traffic by motor carrier and similarly unlawful for a motor carrier to act "as a forwarder or shipper" and ship its traffic over a railroad. *Substituted Freight Service,* 232 I.C.C. 683, 688, 690. In various other decisions, some of which also preceded adoption of Part IV, the Commission reiterated this holding regarding both rail boxcar service and rail TOFC service. In a declaratory order proceeding in 1954, reaffirming the interpretation, the Commission held that it is unlawful for a motor carrier to utilize rail TOFC service by acting as a shipper under the railroad's tariffs, and the Commission warned the railroads that they should not "knowingly join" with a motor carrier "in a violation of the law." *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 104-105.

The Commission has repeatedly sought from Congress an amendment to the Act to give the Commission authority to order through routes and joint rates into effect between motor carriers and railroads.* Congress, however, has declined to amend the Act as requested and has left such arrangements to be made on the voluntary basis that is set out in Section 216(c) (49 U.S.C. 316(c)).

No proposals that we know of have been made to Congress to amend the Act to extend to rail, motor or water carriers the forwarder's comprehensive authorization of

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* 75th Annual Report of I.C.C., 1961, p. 186; 76th Ann. Rep., 1962, p. 201; 77th Ann. Rep., 1963, p. 19.

shipping traffic over another carrier. The President's Transportation Message of 1962, however, said that certain "changes to the Interstate Commerce Act . . . are needed" and, among other things, recommended "that legislation be enacted to . . . assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers." (H. of R. Doc. No. 384, 87th Cong., 2d Sess., p. 5). Under that proposal, the Act would be amended so that the general statutory rule that it is unlawful under the Act for a rail carrier to ship its customers' property over a motor carrier, and for a motor carrier to ship its traffic over a rail carrier, would have the one exception, namely, the right to ship vehicles or containers, loaded with the customers' goods.

Bills intended to provide that exception to the general statutory principle were introduced in Congress. Shortly thereafter, on June 29, 1962, the Commission, on its own motion, instituted the proceeding in this case. Committee hearings were held on the bills and various witnesses appeared at the hearings, expressing differing views. No witness, as far as we have been able to ascertain, expressed a view that it would be lawful, under the Act without amendment, for a motor carrier to ship either loaded vehicles and containers or any other property of their customers over another carrier; or for a railroad to do so with respect to its traffic.

Rules 2 and 3, which are at issue here, are set out in the Commission's report (322 I.C.C. at 336-337). A copy of that report is in the printed record opposite page 794. The essence of Rule 3, reversing the previously established statutory interpretation, is that:

> "motor common and contract carriers [and] water common and contract carriers . . . may utilize TOFC

service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier." (322 I.C.C. at 337)*

Previously the Commission had warned rail carriers against knowingly participating in a motor or water carrier's violation of the Act by providing rail service for TOFC or other freight traffic tendered by motor and water carriers acting as shippers under a rail tariff. Under Rule 2, however, the railroads would be required to carry such TOFC freight under their tariffs whenever requested to do so by those carriers.

The dissent of Commissioner Webb, who was then Vice Chairman, pointed out that the new rules violated the terms and purposes of the Act and that Rule 2 "may very well destroy the freight forwarding industry"** (322 I.C.C. at 394). For reasons discussed in our argument below, he aptly observed that "Although Rule 2 is apparently designed to place motor carriers in a position of equality with forwarders in the use of all-rail TOFC service, a greater regulatory inequality would be hard to imagine . . . . Rule 2 would confer upon motor carriers all of the advantages flowing from the forwarder's status as a shipper but would impose none of the correlative disadvantages set forth in Part IV of the act" (*Id.* at 395).

The three-judge District Court unanimously ordered the Commission report and order set aside insofar as it pre-

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* The rule also includes freight forwarders but forwarders have the statutory right to utilize the services of railroads (Sec. 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)).

** "[T]he prescription of open-tariff TOFC service is rash, contrary to law, and harmful to carriers of all modes and shippers of all sizes" (322 I.C.C. at 387).

scribes Rules 2 and 3 (R. 45). The rules were held invalid on several bases. One basis was that the rules violated the terms and purposes of Part II of the Act. Another basis was that the rules run counter to the provisions of Part IV of the Act which forbid any person to act as a freight forwarder without a permit issued by the Commission and which prohibit the issuance of such a permit to a common carrier by rail, motor or water. Both the violations of Part II and the violations of Part IV would have drastic effects upon the freight-forwarding industry.

SUMMARY OF ARGUMENT

The basic scheme of the Interstate Commerce Act is for each transportation agency to provide service to the public in its own particular mode. The agencies compete in getting the shippers' goods from origin to destination by their respective modes of operation. There are exceptions to this basic scheme, such as for through route arrangements or for a motor carrier permit to a railroad. None of the provisions, however, includes permission for rail, motor or water common carriers to engage in freight-forwarding operations on all or part of their traffic rather than providing transportation in the manner described in their I.C.C. certificates or in the part of the Act that regulates their particular mode.

Congress has adopted a "policy . . . of not permitting [common carriers by motor, water or rail] to engage directly in the freight-forwarding business." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15) Under the policy, those line-haul carriers are permitted only "to engage in freight forwarding indirectly, through control of subsidiary corporations . . ." (*Ibid.*) Congress "believed that this policy will result in more satisfactory administra-

tion of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted" (*Ibid.*). To "carry out the policy" Congress specifically directed the Commission not to grant a freight-forwarding permit to any common carrier by rail, motor or water. (Sec. 410(c); 49 U.S.C. 1010(c))

Congress has not repealed or amended the policy or the terms of Section 410(c). To permit motor carriers and water carriers to act as shippers or forwarders under rail tariffs, thus permitting them to engage in freight forwarding, is contrary to Section 410(c) and to the clear intent of Congress.* This is true regardless of whether the motor carriers ship on rail boxcar tariffs or on rail TOFC tariffs. And it is true regardless of which line-haul carrier seeks to ship over another.

As the Commission repeatedly held, in cases both prior to and after enactment of Part IV in 1942, transportation performed by motor carriers in accordance with the provisions of Part II does not include shipping the customers' goods by rail instead of transporting them. If a motor carrier were to act as a shipper, such shipping would not be an activity performed as a carrier subject to Part II and would not be exempted from Part IV.

There is no merit to appellants' attempts to justify Rules 2 and 3 on the grounds: that a motor carrier engaged in shipping traffic would still have to handle at least some shipments in actual motor carriage over the public highways in order to prevent his motor carrier certificate or permit from becoming dormant; that he would have to perform actual motor carriage if any shipper specifically

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* Examples of the motor-carrier forwarding activity that Rules 2 and 3 would permit are provided in Point I below.

requested it; that the Commission somehow would prevent "excessive" shipping by a motor carrier or his "over-enthusiastic embracing of piggyback"; and that a motor carrier would only be permitted to act as a shipper for TOFC service between points which it is authorized to serve by motor vehicle over public highways. Under the Act, the Commission has no authority to permit motor or water carriers to engage in freight forwarding with respect to any of their traffic. The rules would render nugatory the efforts of Congress to prevent such carriers from engaging in the freight-forwarding business.

Where a motor carrier would be tendering to the railroad a single shipment in a single trailer, without consolidation, Part IV would not apply because the consolidating function is an element in the definition of a freight forwarder (Sec. 402(a)(5)(A); 49 U.S.C. 1002(a)(5)(A)). But Part II does not allow a motor carrier to perform his regulated service by rail shipping. The statutory definition of "common carrier by motor vehicle"; the prohibition against engaging in business "by motor vehicle . . . on any public highway" without a motor carrier certificate or permit; the provisions for specification of particular highway routes in the certificates or permits; and the prohibition against deviating from the specified highway routes all unequivocally evidence the intention that motor carriers must perform their service in ways authorized in Part II. Motor-carrier shipping by rail would be much less consonant with the purposes and terms of Part II than would the prohibited use of private roads or unauthorized highway routes.

Section 216(c) of Part II is the statutory provision for motor-rail coordinations; it permits voluntary arrangements for through routes and joint rates between motor and rail carriers. Neither it nor any other section permits

a motor carrier to ship traffic under a rail tariff for any type of rail service.

Despite their professed objective, Rules 2 and 3 would create gross inequalities, damaging to the freight-forwarding industry, rather than produce equality between motor carriers and forwarders. In the words of the Government: "A railroad may, if it wishes, forego piggyback open tariffs altogether—in which event it will not be in violation of the Commission's rules" (Govt. Br. 23). Freight forwarders and private shippers would thereby be totally excluded from direct access to TOFC service, since their only right to participate in TOFC is the right to ship under open tariffs. Motor carriers, however, would continue to participate in TOFC under Plans I and V, which are not open tariff plans. With freight forwarders totally excluded from TOFC, and with motor carriers being allowed access to TOFC, the present inequalities that handicap forwarders in competing with motor carriers would be drastically compounded.

Even if and where existing TOFC tariffs were continued in full effect, the rules would permit a railroad to continue to make private negotiated contracts with motor carriers under Plans I and V under which the railroad would accept a *lower* amount for its services than the amount of the tariff rates paid by forwarders. Payment of such a lower amount by a forwarder, however, and acceptance by a railroad, would be an illegal rebate. These inequalities would exist and be permitted under the rules, since the rules apparently would apply only to TOFC open tariff service.*

The motor carriers would retain every one of their operating rights under which they have increased their

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* Harmful effects of the rules on the level of TOFC rates to the forwarders and the public are discussed in Point II below.

annual revenues by three billion dollars in the last decade. And they would now acquire the additional right to operate in the only method that is permitted to freight forwarders. The only inherent, distinctive advantage of the forwarder mode would be given to motor carriers with no reciprocal competitive benefits to the forwarders.

The legislative history of several proposals in the 1960's for amendments to the Interstate Commerce Act evidences the conflict between Rules 2 and 3 and the Act. The Commission has repeatedly asked Congress to amend Section 216(c) to grant power to the Commission to order through routes and joint rates into effect between motor carriers and railroads. Such power would include authority to order both railroads and truckers to establish through routes and joint rates for movement of a motor carrier's loaded trailers. Congress, however, has declined and continues to decline to grant the sought power to the Commission.

When President Kennedy in 1962 asked for an amendment to the Act under which all carriers would have a right to ship trailers on other carriers, and bills were introduced for that purpose, no witness at the Committee hearings, as far as we can ascertain, took the position that rail, motor or water carriers already have that right under the Act. A representative of the freight-forwarding industry detailed the many sections which would have to be amended if such a right were to be created. A representative of the motor carriers urged that motor carriers should be treated as carriers rather than being forced into a behavior pattern that is shipper oriented. The Commission, among other things, informed the Committee that the proposed amendment had far-reaching ramifications and could have drastic effects upon the basic relationships between carriers.

Congress, over many years, has established and carried into effect its own policies balancing the relationships among the several modes of operation in the transportation industry. The new rules are squarely in conflict with those policies and with the provisions of the Act.

ARGUMENT

I. RULES 2 AND 3 WOULD PERMIT MOTOR CARRIERS AND WATER CARRIERS TO ENGAGE IN FREIGHT FORWARDING IN VIOLATION OF PART IV OF THE INTERSTATE COMMERCE ACT

A. The Policy and Mandate of Congress Against Permitting a Motor Carrier to Engage in Freight Forwarding

Congress deliberately adopted a "policy . . . of *not* permitting" common carriers by motor, water or rail "to engage directly in the freight-forwarding business." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15). To carry out that policy, and to guard against its possible violation by the I.C.C., Congress enacted a mandate in Part IV of the Interstate Commerce Act. The mandate expressly directs the Commission not to issue a freight-forwarding permit to any common carrier by motor, water or rail (49 U.S.C. 1010(c)). Rules 2 and 3, however, would give blanket permission to all motor or water carriers to engage in freight forwarding.

The essential characteristic of freight forwarding that distinguishes it from the other modes of transportation is that a freight forwarder *ships* the goods of its customers over other carriers for line-haul transportation. This right to utilize other carriers "for the whole or any part of the transportation of" shipments (49 U.S.C. 1002(a)(5)(C))

is explicitly and uniquely the right of forwarders, not motor, water or rail carriers. Yet Rules 2 and 3 would give the same permission to motor and water carriers to *ship* their customers' goods by rail, using the rail TOFC rates and service, in lieu of performing "all or any portion of their authorized service" (Rule 3(a)). Motor and water carriers would thus clearly be permitted to engage directly in the freight-forwarding business.

As the District Court found (R. 35-36), the new rules are counter to the provisions of Part IV of the Interstate Commerce Act regulating freight-forwarding activities. The rules would flout the policy and the statutory mandate of Congress, but the Commission report wholly ignored both that policy and the mandate.

Part, but only part, of the authorized functions of freight forwarders and motor carriers are similar. Both perform the function of assembling and consolidating shipments of their customers into consolidated lots for movement to the destination area.* At the destination, both forwarders and motor carriers separate individual shipments (*i.e.*, "break bulk") and distribute the individual shipments to consignees. Railroads and water carriers also perform these same functions with respect to their handling of the smaller shipments of their customers.

For the line-haul transportation of the consolidated lot, however, the forwarders do what their name implies. They forward the consolidated shipment, shipping it over one of the physical carriers, usually a railroad. This is the essence of the freight-forwarding business. The critical difference between the functions of freight forwarders and of the car-

* In addition to consolidated shipments, motor carriers transport other traffic without consolidation, hauling only one shipment with one motor vehicle.

riers by motor vehicle, water or rail is that the forwarders are not permitted to perform the line-haul movement or to make through route or joint rate arrangements with the physical carriers, and the latter are not authorized to act as forwarders.

Under Rules 2 and 3, however, motor and water carriers would be permitted to ship a consolidated lot of individual shipments by rail. The rules would thus permit them to become freight forwarders, at their option, "in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (Rule 3(a)). The statutory mandate from Congress prohibiting the Commission from permitting motor and water carriers to engage in the freight-forwarding business would be violated.

The mandate is in Section 410 of the Act, this being the section which prohibits interstate freight forwarding without a permit from the Commission (subsection (a)) and provides for the issuance by the Commission of permits to engage in freight-forwarding activities (subsections (b) and (c)). Congress has directed that:

> "No such permit shall be issued to any common carrier subject to part I, II, or III of this Act. . . ." (Sec. 410(c); 49 U.S.C. 1010(c))

Railroads, of course, are subject to Part I, motor carriers to Part II and water carriers to Part III. The purposes of Congress are clear. The mandate is unqualified; it provides no exception as to freight-forwarding activities between any particular points. A motor carrier company, for example, that has operating rights to transport shipments between New York and San Francisco by motor vehicle over public highways cannot lawfully be granted permission by the Commission to consolidate shipments in New York and then ship the consolidated lot by rail from New York to

itself at San Francisco for distribution to the consignees of the individual shipments.* Yet this permission to engage directly in freight forwarding is exactly what the Commission would grant to motor carriers, under Rules 2 and 3.

After denying to motor, water and rail carriers the right to obtain permission to engage in the freight-forwarding business, Section 410 permits them, by subsections (c) and (d), to have stock control of a freight-forwarder corporation. This careful separation of activities between forwarders, on the one hand, and motor, water and rail carriers, on the other, was done deliberately in carrying out the definite policy of Congress. The Report of the House Committee on Interstate and Foreign Commerce regarding the bill to regulate freight forwarders (now Part IV of the Act) includes the following:

> "The provisions of this subsection, as well as those of section 410(c), are intended to carry out the policy of permitting such carriers to engage in freight forwarding indirectly, through control of subsidiary corporations, but of *not permitting them to engage directly in the freight-forwarding business. It is believed that this policy will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted.*" (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15)

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* An example of a single-line, coast-to-coast motor carrier is described in *Pacific Intermountain Express Co. — Control and Merger—All States Freight, Inc.*, 101 M.C.C. 137 (1966). In approving the merger of these motor carriers that had combined revenues of more than $100 million for 1965, the Commission noted that "an improved through single-line, coast-to-coast, transcontinental service would replace the joint-line service heretofore provided" (*Id.* at 146).

At the outset of that Report, the Committee noted that:

> "Forwarders perform a *unique* type of transportation service by means of coordinated use of the facilities of rail, motor, and water carriers in the transportation of freight.
>
> ". . . They utilize the services of rail, motor, and water carriers, and ship by whatever means will afford the shortest and most expeditious medium, and, as a general rule, do not themselves operate physical transportation facilities." (*Id.* at 1)

This mode of operation, properly characterized by the House Committee as "unique," is the mode that the Commission would now throw wide open to the motor carriers and the water carriers. By Rules 2 and 3 the Commission would destroy the Congressional plan for separation of the activities of the various kinds of carriers in the transportation industry.

If motor carriers were permitted to operate under the authority that Rules 2 and 3 would grant to them, the New York-San Francisco motor carrier could accept shipments from its customers at its dock in New York; call up the railroad and tell it (under a rail TOFC Plan II tariff) to send trucks and trailers to that dock to pick up the consolidated shipment; tell the railroad to transport the consolidated shipment to San Francisco to the motor carrier's dock there; and then distribute the goods to the motor carrier's consignees at that dock in San Francisco. No part of the actual movement of such a shipment would be performed by the motor carrier.

Or (if it chose to utilize a rail TOFC Plan III tariff) the motor carrier could place the goods in its own trailers, either at the shippers' docks or at its own dock, and take them through the streets to the railroad's yard in the origin terminal area for a rail haul to the rail-

road's yard at the destination as a shipment by the motor carrier, in the capacity of a shipper under the railroad's tariff, with subsequent distribution of the individual shipments by the motor carrier to the respective consignees. No part of the line-haul movement of such a shipment would be performed by the motor carrier. The so-called "motor carrier," acting as a shipper by rail, would be doing exactly what forwarders do—and doing exactly what Congress in Section 410(c) has forbidden the Commission to permit motor carriers to do.

Moreover, the scope of the projected invasion into the field of the freight forwarders would apparently go even further. Motor carriers are permitted under Section 216 (c) (49 U.S.C. 316(c)) to establish through routes and joint rates between themselves. Many such through routes and joint rates have been agreed to and published in the tariffs. For example, a New York-Chicago motor carrier may join with a Chicago-Seattle motor carrier to publish a joint rate between New York and Seattle, under the authorization of Section 216(c). Instead of performing the motor carrier service that is authorized in Part II of the Act, these carriers, under Rules 2 and 3, could engage in freight forwarding, shipping by rail between New York and Seattle under the rail TOFC rates. Any two points in the United States that have rail TOFC service could thus be served by motor carriers through a freight-forwarding operation, without the use of motor vehicles or public highways between the two points for shipments so handled in the freight-forwarding manner.*

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* The Government states that, under the rules, a motor carrier could offer the rail service "only with respect to routes covered by its certificate" (Govt. Br. 66). The Government may thus be saying that it would be unlawful under the Act for motor carriers to forward shipments by rail TOFC in situations where motor carriers

Under Rule 3(b), the Commission would give the motor carrier's customer the privilege of directing the motor carrier to transport his particular shipment rather than to forward it. On other shipments, however, the rules would permit the motor carrier, at its own option, either to exercise its authority under Part II to furnish the transportation or to leave that authority unexercised and, instead, to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (Rule 3(a)). Nothing in the Act or in the policy of Congress indicates that the authority or lack of authority of a carrier to engage in freight forwarding is to be determined by whether particular customers of that carrier do not forbid the forwarding of their shipments. Neither is there any indication that a company holding authority under Part II to transport by motor vehicle has any right to leave that Part II authority unexercised on part or all of its shipments and to engage in freight forwarding on those shipments.

Rules 2 and 3, granting permission to motor carriers to forward shipments by rail unless the customer forbids that forwarding, would make a mockery out of the policy and mandate of Congress that no common carrier by motor vehicle should be permitted by the Commission to engage in the freight-forwarding business. In the words of the District Court in this case:

> "No reason is suggested why we should suppose that Congress meant to allow a motor carrier to perform only the services of a freight forwarder, not as an inci-

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have formed a through route and published a joint rate. We submit that freight forwarding by motor carriers is unlawful regardless of whether the authorized motor route between the two terminals is a single-line route of one motor carrier or a through route made by joining the routes of two or more motor carriers.

dent to furnishing transportation, merely because the carrier holds a bare unexercised authority to furnish transportation, while at the same time Congress prohibited the licensing of motor carriers as freight forwarders." (R. 36)

B. The Commission Report

The Commission did not even mention Section 410(c) in its report promulgating Rules 2 and 3 and did not refer to the policy of Congress against permitting motor, water or rail common carriers to engage in the freight-forwarding business. The Commission's *sole* reference to freight-forwarding aspects of Rules 2 and 3 consists of two sentences:

> "Of course, should the first carrier hold out to perform what may amount only to assembly and distribution services at points, and should it use the underlying transportation of the second carrier between points, which it cannot itself serve in a practicable manner, it would no doubt be found to be operating not as a carrier but as a freight forwarder as defined in section 402(a) of the act. Where it does have the requisite authority, it may perform such service not as a forwarder but as a carrier because section 402(a)(5) defines a freight forwarder as any person performing forwarding services *other than as a carrier subject to parts I, II, or III of the act.*" (322 I.C.C. at 335; italics by the Commission)

The Commission thus would disregard the nature of the actual forwarder business which it would permit motor carriers to conduct under Rules 2 and 3. The activity to be permitted to those motor carriers would be precisely the activity of freight forwarders. Under the terms of Rule 3, the motor carriers would be permitted to perform "all or any portion of their authorized service" by the freight-forwarding mode, shipping by TOFC on all ship-

ments except the ones, if any, from customers who direct that their shipments not be forwarded.*

Section 402(a)(5), to which the Commission refers in its report, does not permit a motor carrier to act as a shipper or forwarder. That provision of Part IV reads as follows:

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." (49 U.S.C. 1002(a)(5))

With respect to a motor carrier, the parenthetical phrase

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* The Government apparently does not defend the comprehensive terms of Rule 3. It states that a motor carrier that abandoned the highways on all shipments, instead of transporting some by motor vehicle, could have its motor carrier certificate "revoked for dormancy"; it also says that the Commission would prevent "overenthusiastic embracing of TOFC service" (Govt. Br. 58). But if the authority to act as a motor carrier under Part II actually did include the right to act as a shipper or forwarder using rail TOFC service, such a motor carrier would be entirely within his statutory rights by using that forwarder mode on all shipments. (See pp. 29-30, 35-36, *post*.) The fact is that the Act does not permit the motor carrier to engage in *any* freight forwarding.

"otherwise than as a carrier subject to part .. II .. of this Act" plainly refers to the motor carrier's authorized activity to assemble and consolidate shipments and then to transport "by motor vehicle" and "over public highways" (or pursuant to a through route established under Section 216(c)) for separation and distribution at destination to the respective consignees. These functions it does as a carrier subject to Part II. But if a motor carrier were to ship the goods it would, instead, be acting "as a shipper," thereby engaging directly in the freight-forwarding mode of operation, rather than serving "as a carrier subject to" Part II of the Act, and the exemption would not apply.*

If the intent of Congress had been that any motor carrier was to be permitted to act as a freight forwarder, utilizing the services of a railroad for the actual transportation, the parenthetical exception would have been phrased differently. It would have directly excepted carriers that are subject to the other parts, rather than saying "as" a carrier subject to those parts. Indeed, the original freight forwarder bills, H.R. 9089 and S. 3665, did directly exempt "a common carrier by railroad, a water carrier, a motor carrier," etc.** In the bills that superseded them in the 77th Congress,*** however, that comprehensive language

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* At page 31 of its brief, where it is *not* discussing the freight-forwarding questions, the Government openly refers to the motor carriers as "one class of shippers" and urges that "when a carrier tenders goods *as a shipper*, it is entitled to the same treatment as any other shipper."

** See Hearings before a Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 76th Cong., 3d Sess., on S. Res. 146, June 5, 1940, p. 2.

*** The 77th Congress was the one in which the policy was adopted of not permitting common carriers by rail, motor or water to engage in freight forwarding.

was changed to restrict it to the language that was adopted. Instead of looking to the carrier status of the company, the language adopted looks to the nature of the particular activity of the company.

The purpose of the actual parenthetical phrase was explained in the Report of the House Committee mentioned above, as follows:

> "The definition, it will be noted, does not include a person by reason of a holding out to transport or provide transportation 'as a carrier subject to part I, II, or III' of the Interstate Commerce Act. The purpose of this provision is primarily to avoid regulation, under part IV, of the operations of *express companies,* which might otherwise have been considered to be included within the definition. It was deemed desirable to refer to the other carriers in order to clearly carry out the policy of not having part IV apply with respect to transportation performed by railroad, motor and water carriers in accordance with the applicable provisions of the Interstate Commerce Act." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 6)

Thus, where "transportation" is "performed by" a motor carrier in accordance with the applicable provisions of Part II of the Act, no freight forwarding is involved. The motor carrier is transporting the consolidated lot of the several individual shipments all the way in its motor vehicle over the public highways or is interchanging with another carrier under a voluntary through route arrangement pursuant to Section 216(c). What the Commission here proposes to do, however, is to permit the motor carrier merely to ship the consolidated lot by rail, rather than perform the transportation. That permission would be contrary to the deliberate Congressional policy, expressed at page 15 of the very same Report of the House Committee, against "permitting them [motor carriers, etc.] to engage directly in the freight-

forwarding business."* The Commission's action would nullify the direction from Congress to the Commission in Section 410(c) that no permit to engage in freight forwarding should be granted to a rail, motor or water common carrier.

C. The Government's Arguments in Support of Permitting Motor Carriers to Engage in Freight Forwarding by Rail TOFC Service

The Government properly states in its brief (p. 64) that "The background of Part IV is instructive" but it very seriously misreads and misinterprets that background. The legislative history firmly supports the decision of the court below.

For one thing, the Government completely ignores the portion of the legislative history of Part IV in which Congress expressed its adoption of a policy against permitting motor, water or rail carriers to engage in the freight-forwarding business except through the ownership of stock in a freight forwarder. That express policy would be directly violated by Rules 2 and 3, yet the Government does not even mention the policy.

Moreover, the Government incorrectly indicates at pages 64 and 65 (without precisely so stating) that in the years of legislative consideration of Part IV it was deemed lawful for motor carriers to ship their customers' goods by rail. The facts are quite to the contrary, as the following brief review of the decisions of that period will show.

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* The Government brief omits mention of this express statement of the policy of Congress even though the brief, at page 64, quotes one phrase from page 6 of the same Committee Report. The phrase it quotes is an excerpt from the full statement set forth above.

Part IV was adopted in 1942. Part II, regulating motor carriers, had been adopted in 1935 and became fully effective in 1936. In 1938 the Commission instituted a general investigation of the lawfulness of practices of rail, motor and water carriers in regard to the substitution by one carrier of the services of another carrier.* The Commission found both that some eastern railroads had been shipping freight by certain motor carriers and that one western motor carrier had been shipping its customers' goods by rail between certain points on the motor carrier's authorized routes. The Commission held that both of these practices were unlawful under the Act, and it condemned them in no uncertain terms. Regarding the railroads, the Commission held that "they cannot act as common carriers by rail and shippers by motor vehicles as to identically the same service." *Substituted Freight Service*, 232 I.C.C. 683, 688 (1939). Regarding the motor carrier which was found to have been acting "as a forwarder or shipper," the ruling was the same. The Commission held that ". . . for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it appears that it actually has common-carrier rights between Minneapolis and Terry [*i.e.*, the points be-

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* In a case involving the validity of TOFC tariffs published before Part II became effective, the Commission had said that a motor carrier using that service had the status of a common carrier as to the entire haul and the status of a shipper as to a part thereof (*Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435 (June 20, 1936)), but when Part II became effective a joint arrangement was promptly made by the carriers involved and was held to be lawful under Section 216(c) of Part II (*Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245 (Nov. 17, 1936)).

tween which the motor carrier was shipping by rail]."* (*Id.* at 690)

A year later, and two years before the adoption of Part IV of the Act, the Commission again condemned as unlawful a motor carrier's practice of shipping over another carrier. *Greer Broker Application,* 23 M.C.C. 417 (1940). This time the second carrier was itself a motor carrier. After referring to the *Substituted Freight Service,* case, the Commission said:

> "This practice was stated by the Commission to be repugnant to the act, more particularly to sections 202(a), 206, 207, 208, 216, 217, and 219 thereof. . . . In our opinion, the practice of applicant as disclosed in this proceeding cannot be approved, for reasons similar to those set forth by the Commission." (23 M.C.C. at 420)

In 1942, the year in which Part IV was enacted, the Commission reiterated its ruling:

> "Thus applicant, in effect, is acting as a common carrier by motor vehicle and a shipper by rail as to the same traffic, a situation which is repugnant to the provisions of the act." *Stone's Express, Inc., Common Carrier Application,* 32 M.C.C. 525, 527 (1942)

Thus the ruling that it is unlawful under the Act for a motor carrier to ship its customers' freight over another carrier, paying the tariff rates of the other carrier, had

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* This *Substituted Freight Service* decision is discussed in more detail at pages 50-58 of this brief. The Commission further stated that if "appropriate concurrences" of the participating carriers were published, a lawful arrangement would result. Without published concurrences (and Rules 2 and 3 do not provide for concurrences) the Commission held that there was a shipment by one carrier over another, unlawful under the Act.

been explicitly declared both prior to and during the period when enactment of Part IV was under consideration by Congress. Contrary to the inference in the Government's brief at pages 64-65, there was no occasion for the forwarders to request enactment of further statutory prohibitions against that shipping practice; the practice already had been repeatedly recognized to be unlawful. And Congress, in enacting Part IV, made doubly sure on this point, by adopting Section 410(c) to prohibit the Commission from granting any freight forwarding permit to a common carrier by rail, motor or water.

The Government makes a totally irrelevant argument that "in part IV of the Act, Congress did not intend to preclude motor carriers from performing their traditional pickup and delivery function, albeit it is physically similar to the service performed by freight forwarders" (Govt. Br. 64). No one argues that Part IV precludes motor carriers from performing pickup and delivery. All carriers perform those functions. The distinguishing characteristic of the various carriers' functions, however, concerns the line-haul transportation after pickup and before delivery. Forwarders ship the consolidated lot of the freight they have picked up, whereas the motor carriers (and the rail and water carriers) are not permitted to engage in that forwarding practice. For motor carriers, the authorized practice is either to transport the freight all the way by themselves or to enter into through routes with motor, rail or water carriers under Section 216(c) of the Act (49 U.S.C. 316(c)).

Significantly, the Government in different portions of its brief refers in quite different and contradictory ways to what the motor carriers' activity would be under Rules 2 and 3. When it is discussing freight forwarding, it refers to the exemption for services performed "*as a carrier* subject to one of the other parts of the Act," and makes no mention

of the fact that here the motor carrier would be shipping goods and would be acting as a shipper (Govt. Br. 64). Elsewhere, however, when it is not discussing freight forwarding, the Government relies on the proposition that "when a carrier tenders goods *as a shipper,* it is entitled to the same treatment as any other *shipper*" (p. 31). Under Rules 2 and 3, if they were to go into effect, the motor carrier would indeed be a shipper; it would be acting "as a shipper," not as a carrier subject to Part II. The exemption in Section 402(a)(5) would be totally inapplicable; the motor carrier would be engaging directly in freight forwarding.

Rules 2 and 3 cannot be justified, as the Government attempts, on the ground that motor carriers should be permitted to use rail piggyback service under the railroads' tariffs because freight forwarders have the right to do so (Govt. Br. 65-66): It was Congress that expressly authorized freight forwarders to make shipments by rail (Section 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)). And, at the very same time, it was Congress that directed the Commission not to issue a freight-forwarding permit to any common carriers by motor, rail or water (49 U.S.C. 1010(c)). The "policy . . . of not permitting them to engage directly in the freight-forwarding business" is a policy of Congress. Motor carriers, acting as carriers under Part II, are authorized to engage in activities that are denied to freight forwarders, such as performing line-haul transportation by motor vehicle or entering into through route and joint rate arrangements, but one distinct function is assigned to freight forwarders by Congress and denied to motor carriers. That one function is the function of shipping the consolidated lot by rail, using the rail tariffs, or by other common carrier. If that one function were added to the authorized functions of a motor carrier—and Rules 2 and 3

would do so—the motor carrier would be engaging directly in freight forwarding.

It is no answer to say, as the Government does on page 66, that the motor carrier still would have to be prepared to perform highway service for anyone who demanded it. There is no indication in the legislative history that Congress thought that a motor carrier would go completely out of the motor carrier service if it were also permitted to engage in freight forwarding. To expand the motor carriers' activities to include freight forwarding does not necessarily mean that in other respects motor carriers would completely or even largely leave the highways. In all probability the motor carriers, becoming multi-service transportation agencies, would still continue to perform extensive motor carrier operations on many shipments even if Rules 2 and 3 became effective and they thereby received the additional right to engage in the freight-forwarding mode of operation. But it was that very mixture of modes of operation that Congress had in mind when it decided not to permit motor, rail and water carriers to engage in freight forwarding; "this policy will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, part II, or III were permitted" (see H. of R. Report, quoted p. 16, *ante*).

It is similarly no answer to say, as the Government does in its last sentence on page 66, that any "excessive embracing of piggyback service by a motor carrier would . . . expose it to severe sanctions that the Commission is fully prepared to apply." If a motor carrier actually does have a statutory right to operate by shipping goods by rail, by what authority can the Commission direct the motor carrier not to exercise that right beyond some undefined degree?

And if, on the contrary, the motor carrier mode of operation as authorized by Congress does not give it authority to operate by shipping the goods by rail, by what authority can the Commission undertake to permit a supposedly non-excessive use of that forbidden mode of operation? Nothing in the statute grants such authority to the Commission. Congress has not said motor carriers may be permitted to do some freight forwarding up to the point where it would somehow be deemed "excessive." On the contrary, the policy and the mandate from Congress are that motor carriers shall not be permitted to engage in freight forwarding, without exception for any limited amount of freight forwarding.

Rules 2 and 3, and the discussion in the Government brief, are concerned only with those rail tariffs and services that involve trailers on flatcars, rather than boxcars or other rail cars. No line of distinction, however, can be drawn under the Act between use of rail TOFC service and use of boxcar or other rail car service. In the words of the court below: "The trucker would be entitled to compel the railroads to carry not only the freight-laden trailer but bulk cargo and boxcar freight as well" (R. 28). Forwarders frequently utilize boxcar services of the railroads in conducting their forwarding operations. Section 402(a)(5)(C) authorizes forwarders to utilize "for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act" without regard to the nature of the particular services utilized (49 U.S.C. 1002(a)(5)(C)). No such provision appears in Part II of the Act, and Section 410(c), in forbidding the issuance of a freight-forwarder permit to a motor carrier, contains no exception that would allow such a permit to be issued if the motor carrier were restricted to the use of any one particular type of rail service.

Wholly apart from the terms of the Act or its legislative history, the Government urges approval of the rules on the ground that "the Commission's rules restore a competitive balance between them [the freight forwarders] and the motor carriers that had been disturbed by the preclusion of motor carriers from free access to piggyback service" (Govt. Br. 65). The Government states that issuance of the rules "merely restores motor carriers to a position of competitive equality with respect to *their* traditional business" (Govt. Br. 66; emphasis by Government). But to allow the motor carriers to act as freight forwarders would give them an entirely new authority that they have never had in the entire period since Parts II and IV of the Act became effective. The motor carriers would fully retain their own statutory and certificate authority to transport the goods all the way by public highways or to enter into through route and joint rate arrangements under Section 216(c) of Part II. Both of those rights would continue to be denied to freight forwarders. In addition to their own retained rights, however, the motor carriers would acquire the right to use the freight-forwarder mode of operation, shipping the goods by rail.

Far from producing equality, Rules 2 and 3 would place the motor carriers in an overwhelmingly dominant role in competition against the freight forwarders. The forwarders can offer competition by only one mode of operation, *i.e.*, shipping the goods rather than transporting them. If forwarders were to lose the protection that Congress has determined to be in the best interests of the public, *i.e.*, the protection that does not permit motor, rail or water carriers to act as freight forwarders, there could be little hope that forwarders could continue to offer competition against the motor carriers. The motor carriers already attract to themselves a huge quantity of the nation's freight shipments. In 1965 the gross revenues of the Class I intercity

motor carriers of property, as compared to those of the forwarders, were as follows:

1965 REVENUES*

Class I Intercity Motor Carriers	$7,097,213,149
Class A Freight Forwarders	$ 459,338,760

For every dollar of forwarder revenues, the motor carriers attracted more than fifteen dollars. If the motor carriers, by Rules 2 and 3, can get the right to operate in the only mode that forwarders have, while still retaining the full rights of operation under Part II that are forbidden to the forwarders, the handwriting is on the wall for the forwarders.

The probable consequences of the rules to the freight-forwarding industry were pointed out in the dissenting opinion of Commissioner Webb, who was then Vice Chairman of the Commission:

> "Since Rule 2 encompasses both Plan III and Plan IV TOFC service, it may very well destroy the freight forwarding industry.
>
> • • •
>
> "In short, Rule 2 would confer upon motor carriers all of the advantages flowing from the forwarder's status as a shipper but would impose none of the correlative disadvantages set forth in Part IV of the act.
>
> "No doubt the motor carrier industry would be pleased to capture the traffic presently being moved by freight forwarders. To the credit of the industry, however, it does not desire to capture that traffic in the manner proposed by the Commission." (322 I.C.C. at 394-395)

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* 80th Annual Report of I.C.C., 1966, pp. 170 (Table 34) and 180 (Table 56). Motor carrier revenues in 1965 were $3 *billion* more than in 1956 while the forwarders' increase was only $42 *million*.

Commissioner Webb's last sentence quoted above had reference to the frank statement in the oral argument of counsel for American Trucking Associations, Inc.:

> "I feel it incumbent upon me to state that the Regular Common Carrier Conference which I speak for also is of the view that *the motor carrier cannot use an open tariff*." (322 I.C.C. at 388, n. 7)

The representative of American Trucking Associations, Inc., testifying in 1963 regarding the proposal to amend the Act to enable motor carriers to make TOFC shipments, had endorsed the "objective" but criticized the proposal itself as "seriously defective," saying:

> "Among other things to be considered is the maintenance of carriers *as carriers* and not to dilute their position by forcing them into a behavior pattern which is basically shipper oriented. We earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers *as carriers*." Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 88th Cong., 1st Sess., on H. R. 4700 and 4701, May 2, 1963, p. 213.

Despite these recognitions that a "motor carrier cannot use an open tariff" and that carriers should be treated "as carriers," the reaction of the motor carriers to the bonanza tendered them by the Commission under Rules 2 and 3 has been exactly what Commissioner Webb indicated it would be. They here argue in favor of those rules to allow a motor carrier to act as a shipper under TOFC tariffs. The motor carrier industry would indeed "be pleased to capture the traffic being presently moved by freight forwarders," but this would be done at the price to the public of loss of competition from the forwarders.

In its argument on this point, the Government errs in its statement of the facts and ruling in *Eastern Express*,

Inc. v. *United States,* 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37 (Govt. Br. 65-66). Contrary to what the Government indicates, traditional traffic of forwarders has included volume ("trailerload") shipments, and in handling shipments by TOFC service (which was involved in that case) forwarders perform all of the functions that the Government brief here states are not performed. The Motion to Affirm, filed by the United States and the Commission in that case, is quite clear on this point. The Government *there* stated that both the Commission and the court below had found that volume rates were no "novelty in the forwarder industry"; "that forwarders have included numerous volume rates in their tariffs since shortly after the beginning of forwarder regulation in 1942 (J.S. 13a); that Congress was aware that forwarders were even then handling volume traffic when it enacted Part IV of the Act (J.S. 16a); and that in operating under these rates, forwarders would 'in the ordinary and usual course of their undertaking' perform all the assembly, consolidation, break-bulk and distribution services required of them by Section 402(a)(5) of the Act (J.S. 16a)." (Motion to Affirm, p. 7) The facts were detailed in the lower court's opinion in that case. Motor carriers and forwarders have long competed for shipments of various sizes, and still do although the motor carriers have been successful in obtaining the great proportion of the traffic. To add another competitive weapon to the arsenal of the motor carriers, by allowing them to operate in the freight-forwarder mode, would further accentuate the present inequality between truckers and forwarders, to the harm both of the forwarders and the public.

D. Arguments of ATA and NATA

American Trucking Associations, Inc. and National Automobile Transporters Association join in their brief to this

Court. Evidencing recognition that one who ships on a railroad tariff is indeed doing so as a "shipper," they say that the railroad's tariff "should be available to the traffic of all *shippers* whether originated by one carrier mode or another" (ATA-NATA Br. 16).

Like the Government, these motor carriers completely fail to mention the policy of Congress (expressed in the House Committee Report on the bill enacted as Part IV of the Act) against permitting common carriers by motor, water or rail to engage directly in the freight-forwarder business. They similarly fail to mention the statutory prohibition in Section 410(c) of Part IV against giving any freight-forwarding permit to such carriers.

Closing their eyes to that policy and mandate, the motor carriers urge that "there is nothing in part IV which carves out an exclusive manner of operation for freight forwarders . . . " (ATA-NATA Br. 34). On this concept that the freight-forwarding mode of operation was intended by Congress to be permitted to motor carriers, the Congressional policy and mandate would be rendered meaningless.

Most of the motor carriers' arguments are similar to ones advanced by the Government, but mention should be made of one point. The motor carriers apparently concede that if they confine their own service to assembly and consolidation, at the origin, and to separating the individual shipments ("break-bulk") and distributing those shipments to the consignees, at destination, they would not be operating as carriers subject to Part II and, instead, would be operating as freight forwarders (ATA-NATA Br. 33). We entirely agree.

But the motor carriers then argue that Rules 2 and 3 should nevertheless be approved because the motor carrier would be giving "proper notice to the public through its

tariffs" and because it would still have to be engaged in "continuous and adequate service" under its *motor carrier* certificate, with the Commission standing ready to prevent "a particular motor carrier's 'over-enthusiastic embracing of TOFC service' . . ." (ATA-NATA Br. 33-34).

There simply is no rational basis for this contention that a motor carrier, acting in the manner described above and shipping by rail TOFC for the line-haul transportation, would not be acting as a freight forwarder simply because, at the same time, it acts as a motor carrier to provide enough motor service to prevent revocation of its motor carrier certificate. The policy and mandate of Congress are that a motor carrier should not be permitted to engage in freight forwarding; and this necessarily assumes that the motor carrier so forbidden is and continues to be the holder of a valid motor carrier certificate. Preservation of motor carrier rights by, on some shipments, giving service of the motor vehicle type that is subject to Part II in no way qualifies or permits that motor carrier to engage in freight forwarding for other shipments.

A word about the status of *contract* carriers by motor vehicle may be appropriate at this point. The prohibition in Section 410(c) against issuance of a freight-forwarding permit to a common carrier by motor, rail or water does not apply to contract carriers. A contract carrier serves a limited number of patrons; it does not hold itself out to serve the public (49 U.S.C. 303(a)(15)). Congress has not permitted contract carriers by motor vehicle to make through routes or joint rates with railroads (322 I.C.C. at 350) or to act as shippers of their customers' goods. Although there is no prohibition against granting a freight-forwarding permit to such a carrier, any such grant could be made by the Commission only after the contract

carrier had made the application required in Section 410(b) and after the Commission had made the findings thereon that are required in Section 410(c). A total change of status would be required since all freight forwarders must hold out their services to the public (Section 402(a)(5)).

II. RULES 2 AND 3 WOULD PERMIT VIOLATIONS BY MOTOR CARRIERS OF THE TERMS AND PURPOSES OF PART II OF THE ACT

In the foregoing section we have shown that the new rules would permit motor carriers to engage in freight forwarding in violation of Part IV. As we shall demonstrate below, the activities that the rules would permit to motor carriers would also constitute violations of the terms and purposes of Part II of the Act.

The forwarders' concern with this latter issue has a two-fold derivation. One is that part of the shipments for which forwarders compete, and which they lose to motor carrier competition, are now transported over the highways as single shipments by the motor carriers, without consolidation with other shipments. Since freight forwarding involves consolidation by definition (Sec. 402(a)(5)(A)), no freight forwarding would be involved if the motor carrier, without consolidation, were to ship that individual shipment by rail, but such action of shipping by rail would be a violation of Part II of the Act. It also would be an injury to the freight forwarders to have the motor carriers provide competitive service of an unlawful kind. The second reason for the forwarders' concern with Part II is that on the shipments where freight forwarding by motor carriers would be involved, violating Part IV, the motor carriers would also be violating Part II.

As previously noted, Rules 2 and 3 would have a very severe competitive impact upon the forwarders from the

addition of a new mode of operation—freight forwarding—to the authorized mode of operation that is permitted by Congress to the giant motor carrier industry.

Furthermore, the rules would substantially harm both the freight forwarders and the shipping public in another way. Railroad publication of tariffs providing for Plans III and IV TOFC service is by no means universal on all railroads in this country or even on all parts of the particular railroads which have started such service. In considering whether to publish Plan III or Plan IV tariffs between points where the service has not yet been provided, a railroad executive (if Rules 2 and 3 were to go into effect) would have to take into consideration the fact that his road would be required to handle whatever traffic the competing motor carriers chose to ship. Considering both the strongly-felt competitive posture of railroads and motor carriers, and the fact that motor carriers would have an open invitation to balance their loaded highway movement in both directions by burdening the railroads with imbalances of traffic, such a railroad could be expected to be loath to publish new Plan III or Plan IV tariffs. In the words of the Government brief: "A railroad may, if it wishes, *forego piggyback open tariffs altogether*—in which event it will not be in violation of the Commission's rules" (Govt. Br. 23, 60). Moreover, the rates, if published, probably would have to be set at a higher level to cover the added expense of handling the more burdensome traffic that the motor carriers would shift to the railroads under those tariffs. The freight forwarders and their patrons in the shipping public, as well as the many private shippers who use TOFC, would be harmed by any railroad decision not to expand Plan III and Plan IV service to new areas. They would also be harmed by having to pay higher rates, under Plans in effect now or in the future, where the increase in

rates is due either to the added expense of handling shipments made by the motor carriers or to the reluctance of a railroad to provide low rates for use by its motor carrier competitors.

For all of these reasons, the forwarders have a definite interest in the question of whether Rules 2 and 3 would permit motor carriers to violate the provisions of Part II of the Act. We submit that the lower court was correct in its unanimous decision that the rules are unlawful under Part II as well as under Part IV.

A. The Interstate Commerce Act Does Not Permit a "Carrier by Motor Vehicle" to Perform Its Authorized Transportation Service by Shipping by Railroad

1. Transportation Service Authorized for Motor Carriers by Part II

The Commission held in this case, as it had previously and consistently, "that 'trailer-on-flatcar transportation is in fact transportation *by railroad,*'" regardless of who owns or ships the trailers (322 I.C.C. at 343).* The ATA-NATA contention to the contrary is made without mention of this explicit and clearly correct finding by the Commission in this case (ATA-NATA Br. 21-22).

Rules 2 and 3 purport to authorize carriers by motor vehicle to provide railroad transportation from origin to destination and to do so for the performance of "all or any portion of their authorized service." The terms of Part II

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* "In the *New Haven* case [*Movement of Highway Trailers by Rail,* 293 I.C.C. 93], it was found, *properly we think,* that 'trailer-on-flatcar transportation is in fact transportation by railroad,' and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers' " (322 I.C.C. at 343).

of the Act, under which motor carriers are protected and regulated, make it abundantly clear, however, that the operations of those carriers are to be by motor vehicle and over public highways. Such carriers are not authorized to transport or provide transportation by rail or by any mode other than as carriers by motor vehicle over public highways.

The statutory definitions in Part II reveal the type of transportation agency and service that Congress authorized and contemplated. They evidence the intent of Congress that the operations of carriers under Part II are to be operations *by motor vehicle* and not by rail or as shippers by rail. Section 203(a)(14) reads as follows:

> "The term *'common carrier by motor vehicle'* means any person which holds itself out to the general public to engage in the transportation *by motor vehicle* in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes . . ." (49 U.S.C. 303 (a)(14))

Item 15 reads:

> "The term *'contract carrier by motor vehicle'* means any person which engages in transportation *by motor vehicle* of passengers or property in interstate or foreign commerce . . . under continuing contracts with one person or a limited number of persons . . ." (49 U.S.C. 303(a)(15))

Section 203(c) shows the restricted and protected scope of the activities regulated and authorized by Part II. The section provides that, with three specified exceptions which are not pertinent here, "no person shall engage in any for-hire transportation business *by motor vehicle*, in interstate or foreign commerce, *on any public highway* or within any reservation under the exclusive jurisdiction of

the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing *such* transportation . . . " (49 U.S.C. 303(c)).

The statutory provisions for application to the I.C.C. for certificates of public convenience and necessity similarly emphasize that the operations with which Part II is concerned are those operations which are by motor vehicle over public highways. Section 206(a)(1) provides that "no common carrier *by motor vehicle* subject to the provisions of this part shall engage in any interstate or foreign operation *on any public highway* . . ." without a certificate "authorizing *such* operations" (49 U.S.C. 306(a)(1)).

Nowhere does Congress provide for or permit an operation by a motor carrier as a shipper by rail. Nowhere does it provide for or permit an operation other than "by motor vehicle" and "over public highways." Nowhere does it provide for or permit the transformation of a licensed motor carrier into a multi-service transportation agency unilaterally providing shipment by rail in addition to the services specified in Part II.

Even when the operation is by motor vehicle and over public highways, Congress does not permit the Commission to authorize regular or general or frequent deviations from the particular highway routes specified in the motor carrier certificates; permission to "occasionally deviate" from the specified route is the most that Congress has permitted the Commission to grant (49 U.S.C. 308(b)). Rules 2 and 3, however, would permit regular deviations to rail routes from the specified highways.

Congress clearly intended to provide a comprehensive framework establishing carefully balanced relationships among the several modes of transportation. This is shown

both by the certificate or permit requirements mentioned above and also by the statutory sections providing for intermodal service coordinations and for tariffs.

Congress made its own provisions for common carriers by motor vehicle and common carriers by rail to act in conjunction or coordination with each other in providing transportation service to the public. Those provisions do not include any rail-motor service other than through the establishment of through routes and joint rates. And Congress has deliberately provided that the making of through routes involving a railroad and a motor carrier is voluntary on the part of both carriers concerned. The permission for the voluntary through routes is set out in Section 216(c) (49 U.S.C 316(c)). The Commission here recognized that "we are without statutory power directly to require the establishment of through motor or motor-rail routes" (322 I.C.C. at 334). Neither has Congress granted any permission or made any provision for the type of service that Rules 2 and 3 would order into effect.

Appellants do not and cannot suggest that Rules 2 and 3 have a basis in or are made lawful by Section 216(c). Instead the effort is to show that motor carriers may somehow be authorized to ship by rail and that this newly conceived authority is not inconsistent with the terms and purposes of Section 216(c) and the other provisions of Part II. However, the terms of Part II show that no service as a shipper by rail was intended for motor carriers. Moreover, the general policy arguments advanced by the Government to support the type of service that the new rules would create directly conflict with the basis of Section 216(c), which is the only statutory authority for motor-rail coordinations.

For example, the Government argues that it is anti-competitive, unlawfully discriminatory, etc., for railroads

to enter into a coordinated route arrangement on varying terms with different motor carriers or to make such arrangements with fewer than all motor carriers (Govt. Br. 43-45). Focusing on only one type of party to the voluntary arrangements, the Government complains of "discrimination *among* motor carriers" by railroads (Govt. Br. 45; emphasis by Government). Mutual selection, however, is the essence of the voluntary arrangements provided for by Congress in Section 216 (c). Moreover, Section 3(4) of the Act, which prohibits discrimination between certain connecting carriers, does not include rail-motor interchanges. Thus the Government's general policy arguments ignore the fact that Section 216(c) is the only source of authority for motor-rail arrangements and also attack as anti-competitively discriminatory the Congressional policy in Section 216(c)—a policy also reflected in Section 3(4)—authorizing the specified coordinations on a voluntary ("may") basis.

The tariff provisions of Part II of the Act establish the tariffs that a motor carrier is authorized and required to file. Those tariffs are either for transportation by the motor carrier (and TOFC is held in the Commission report to be transportation by railroad rather than by motor carrier)* or for transportation by both a motor carrier and a rail or other form of carrier "when a through route and joint rate shall have been established" (49 U.S.C. 317(c)). Section 217(d) provides that "No common carrier by motor vehicle, unless otherwise provided by this part [under exceptions not here pertinent], shall engage in the transportation of passengers or property unless the rates, fares and charges upon which the same are *transported by said carrier* have been filed and published . . ." (49 U.S.C. 317(c)). Section 217(a) provides that "Every common carrier by

* See p. 39 and accompanying note, *ante*.

motor vehicle shall file . . . tariffs showing all the rates, fares, and charges for transportation . . . between points on its own route . . . or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established" (49 U.S.C. 317(a)). The provision for tariffs covering rates "for transportation" in that part of the section refers to the same thing that is described in the prohibition above quoted from subsection (d), namely, rates upon which the passengers or property "are transported *by said carrier.*" A carrier of passengers by motor vehicle is not to perform its service by buying tickets for the passengers in a train running between points that the motor carrier is authorized to serve by motor vehicle. Neither is a carrier by motor vehicle to provide rail transportation by piggyback or otherwise between such points.

The plain statutory provisions and intent are that carriers "by motor vehicle" are to provide their service by motor vehicle and over public highways. These provisions constitute, as the three-judge District Court unanimously held, "the fundamental limit . . . prohibiting the carrier from performing its transportation services through a mode not within its authorization . . ." (R. 34-35). Congress did not authorize motor carriers to accept freight from the public and then send it to the destination by whatever means and by whatever routes they see fit to use—whether by rail, by water or by private highway. Their authority, as carriers under Part II, is to transport by motor vehicle over public highways and, even then, with only occasional deviation from authorized highway routes specified in their certificates or permits. Their only other authority is to participate in through routes and joint rates pursuant to Section 216(c).

The authority of the "common carrier *by water*" and of the "contract carrier *by water*" is similarly circumscribed in Part III of the Act. This, again, reflects the statutory scheme of maintaining separate classes of carriers grouped according to the physical means by which the line-haul transportation service is provided. The terms quoted above are defined in Section 302(d) and (e) (49 U.S.C. 902(d) and (e)). The other provisions of Part III also stress that the transportation authorized thereunder is transportation "by water," except with respect to through routes and joint rates. Unlike the situation regarding motor carriers, the water common carriers and railroads have a statutory duty to establish reasonable through routes with each other (49 U.S.C. 1(4) and 905(b)). The duty may be enforced by the Commission but only after a "full hearing" and subject to certain specified standards (49 U.S.C. 15(3) and (4) and 907(d)). (See opinion of the District Court, R. 34, n. 21.) Nothing in Part III provides for the substitution by a water carrier of service by a railroad, whether piggyback or otherwise, and nothing in that Part or in Part II permits either a carrier by water or a carrier by motor vehicle to provide rail transportation through a method of shipping the freight by rail.

2. Interpretations of the Act Here Found by the Commission to Have Been "Sound Conclusions" When Made

The three-judge District Court first reviewed the issues of statutory interpretation raised by the promulgation of Rules 2 and 3 and concluded that the rules violated the Act when viewed "as a matter of first impression" even without consideration of the previous decisions (R. 37). That holding, as the court stated, is "supported and confirmed by the consistent and repeated decisions of the Commission

and the courts." (R. 37). Contrary to the appellants' suggestion, the court below certainly did not conclude and no appellee has implied that it is generally or presumably "beyond the power of the Commission to disturb" its prior decisions (Govt. Br. 56; ATA-NATA Br. 36).* The court did hold—and properly so—that the previous decisions were correct and that the Commission erred in the present case.

Before issuing the rules involved in this case, the Commission had long recognized that the Act prohibited rail shipments by common or contract motor carriers and obligated railroads not to participate in a violation of the Act by accepting shipments from such motor carriers. The previous decisions which the Commission here approves as having *"represented sound conclusions" "when made"* (322 I.C.C. at 334)—but which the Commission would now overrule for the future—were based squarely upon the Interstate Commerce Act itself. They were not based upon any theory of administrative policy or discretion. And operations which the Commission in previous decisions declared to be in violation of the Act were the same kind of operations which the Commission would now permit to the motor carriers and require of the railroads.

One of the most notable of those decisions was entitled *Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954), in which the Commission, after full consideration, made a declaratory order under Section 5(d) of the Administrative Procedure Act (5 U.S.C. 1004(d)). The case

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* Considering both relevant agency and judicial interpretations, the District Court ruled that: "In the face of [the] settled interpretation of the Act by the Commission itself as well as by the courts, the *deference* ordinarily due to the construction of the Act by the administrative agency responsible for its enforcement is not called for" (R. 40).

is known more generally as the *New Haven* case since it was initiated by certain inquiries from that railroad. The Commission, after preliminary steps, "issued a notice setting forth 12 basic and fundamental questions involved in the movement of trailers on flatcars, invited interested parties to submit briefs thereon, and assigned the proceeding for oral argument, which was held on June 28 and 29, 1954" (293 I.C.C. at 94).

Early in that report the Commission summarized certain statutory provisions of Part II of the Act which we have described above and which confine motor carriers to "operations by motor vehicle" and "over public highways."*

Two questions in the *New Haven* proceeding were directly concerned with the issues here:

> "*Question 3.*—May a railroad, under provisions of tariffs duly published and filed by it, but without holding any authority under part II, transport freight-laden trailers on flatcars, the trailers having a prior and/or subsequent highway movement: (a) by private carrier by motor vehicle; (b) by contract carrier by motor vehicle?" (*Id.* at 103)
>
> "*Question 4.*—Under the conditions stated in question 3, may a railroad transport such trailers if the prior and/or subsequent highway movement is by a common carrier by motor vehicle? If so, to what extent must the railroad ascertain and be subject to the limitations in the motor common carrier's certificate as to (a) territory and (b) commodities?" (*Id.* at 104)

Regarding question 4, involving common carriers by motor vehicle, the Commission, in accordance with numerous previous decisions, held that the Interstate Commerce Act

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* These provisions, in the order of the Commission's reference, were Sections 206(a)(1), 203(a)(14), 203(a)(13), and 203(a)(12) (293 I.C.C. at 98-99).

prohibits a motor carrier from acting as a common carrier by motor vehicle and as a shipper by rail in regard to the same service and that therefore a railroad which knowingly accepts such a shipment from a common carrier by motor vehicle would be joining the motor carrier in a violation of the law. The Commission, referring to a case involving a tariff filed before the effective date of Part II of the Act and then to cases after the effective date of Part II,* stated:

> "This question, like number 3, is to be answered against the background of an open tariff published by the railroad naming rates open to the general public and applicable on freight-laden highway trailers to be transported by the railroad on flatcars. In *Trucks on Flat Cars between Chicago and Twin Cities* [216 I.C.C. 435], we found such an arrangement to be lawful. The motor carrier was said to have the status of a common carrier as to the entire haul and the status of a shipper as to that portion of it performed by the railroad.
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> "Three years later, in *Substituted Freight Service,* 232 I.C.C. 683, 690, we again adverted to this principle and rejected it, observing that *for the motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act.* See also *Motor-Rail-Motor Traffic in East and Midwest,* [219 I.C.C. 245], page 247. *The view so stated is obviously sound.* It follows, therefore, that if the railroad is on notice that trailers tendered it in this manner are being operated in common-carrier

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* In *Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245, 247 (November 17, 1936), the Commission had pointed out that: "The tariff there approved [in *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435 (June 20, 1936)], which became effective July 7, 1936, was filed prior to the date on which the provisions of the Motor Carrier Act relating to the filing of tariffs became effective."

> service subject to part II of the act, *it should not thus knowingly join with the motor common carrier in a violation of the law.* It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers." (293 I.C.C. at 104-105)

Regarding the part of question 3 involving contract carriers by motor vehicle, the Commission similarly held that a contract carrier may not utilize TOFC service within the scope of its permit from the I.C.C. The report stated:

> "*. . . a contract carrier may not utilize trailer-on-flatcar service to obtain transportation within the scope of its (the contract carrier's) permit.* For example, a contract carrier of specified commodities, authorized to perform such transportation from Portsmouth, N.H., to New York over a route through Boston, could not lawfully divert his vehicle at Boston to trailer-on-flatcar service between that point and New York." *(Id.* at 104)

The Commission went on to state that although a railroad is not required to police the actions of motor carriers, the railroad should not "knowingly join with the contract carrier in perpetrating a violation of the law" (*Ibid.*). The railroad's duty would be to decline to accept such a shipment made by a contract carrier as consignor.

After answering the other questions before it, the Commission concluded, in part, as follows:

> "The conclusions reached and stated herein will enable carriers and shippers interested in undertaking or using this type of service to proceed with a degree of assurance as to the fundamental legal principles pertaining thereto." *(Id.* at 111)

The subsequent expansion of the already large piggyback operations has been based on those principles (322 I.C.C. at

310), principles that were derived directly from the requirements of the Interstate Commerce Act rather than from any idea of discretion in the Commission.

In 1938, two years after Part II of the Interstate Commerce Act became effective, the Commission instituted an investigation into the lawfulness of the practices of rail, motor and water carriers in regard to the substitution by one carrier of the services of another carrier. This case is referred to in the quotation above and generally as *Substituted Freight Service,* 232 I.C.C. 683 (1939); its full title, indicative of its scope, was *In the Matter of Substitution of Motor Vehicle Service for Rail or Water Service and of Rail or Water Service for Motor Vehicle Service.* All common carriers by rail or water and all common or contract carriers by motor vehicle were made parties.

The report in that proceeding indicated that: (1) certain railroads were utilizing to some extent contract carriers by motor vehicle in the movement of railroad freight and, (2) at least one common motor carrier was utilizing rail service between its authorized motor carrier service points. After discussing "the certificate and tariff provisions" of the recently enacted Part II (*id.* at 684-686), the Commission said:

> *"The principal issue in the instant proceeding is one of law, namely, whether the present operations can as a permanent proposition be made to square with part II, particularly the certificate and tariff provisions thereof."** (*Id.* at 686)

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* Similarly the report stated that "questions 2 to 6 raise questions of law whether and how the service can be squared with part II" (232 I.C.C. at 685). Earlier after outlining the specific provisions of that Part, it was said: "These provisions of part II, so far as they apply to common carriers, are hereinafter referred to as the certificate and tariff provisions" (*Id.* at 684).

Despite that report's discussion of specific sections and purposes of Part II, capped with the statement of the basic legal issue under the new statute, the Commission report in the present case and the appellants' arguments here misleadingly and erroneously assert that the relevant holdings were dicta uttered with "no statutory . . . basis suggested" (Govt. Br. 55) and "without explanation or supporting precedent" (322 I.C.C. at 332; Govt. Br. 55; ATA-NATA Br. 35).

As noted above, one aspect of this 1939 *Substituted Freight Service* case involved certain railroads utilizing contract carriers by motor vehicle in the movement of railroad freight. Those railroads urged that they could do so in the capacity of being shippers as between themselves and the contract motor carriers. The Commission rejected the alleged right. It stated:

> "The situation of the eastern rail carriers and of the St. Louis Southwestern Railway Company is different in that they utilize to some extent so-called contract carriers by motor vehicle in this service. They are *the rail carriers who urge that they are shippers* in relation to such contract motor carriers and that neither they nor such contract carriers are or should be required to act as common carriers by motor vehicle in their relation to the public. *But they cannot act as common carriers by rail and shippers by motor vehicle as to identically the same service.*" (232 I.C.C. at 688)

The Commission in *Substituted Freight Service* then turned to "the reverse situation," *i.e.*, the substitution of rail for motor carrier service. With the same statutory principles, it stated:

> "The only specific instance referred to at the oral argument of substitution of rail service for motor-carrier service is in connection with Consolidated, which

on transcontinental traffic substitutes for its service between Minneapolis, Minn., and Terry, Mont., the service of the Chicago, Milwaukee, St. Paul and Pacific Railway Company, on account of load restrictions within the State of North Dakota. *It appears that between these points it acts as a forwarder or shipper* and assembles the traffic tendered by the individual shippers into carload lots, paying the railroad the carload rate between Minneapolis and Terry and assessing the individual shipper or consignee its less-than-truckload rate between primary origin and destination. *But for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it appears that it actually has common-carrier rights between Minneapolis and Terry** .... If Consolidated or other motor and water carriers desire to continue this service, they should bring the service into conformity with the tariff provisions of the act in accordance with the views expressed herein." (*Id.* at 690)

The "tariff provisions in the act," referred to in the foregoing quotation, are Sections 6(1), 217(a) and 306(a) (49 U.S.C 6(1), 317(a) and 906(a)), which require railroads, motor carriers and water carriers to file and publish tariffs showing all of their rates, fares, and charges. As previously noted in our discussion of Section 217(a), tariff provisions in the Act require that in the case of a through route and

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* Footnote by I.C.C.: "In *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435, we found proposed schedules justified wherein the motor carrier was said to have the status of a common carrier as to the entire haul and the status of a shipper as to part thereof. However, schedules providing for joint motor-rail-motor rates were subsequently proposed and found justified for this service in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245." See opinion of the District Court in the present case, R. 37.

joint rate each carrier publishing the rate must show in its tariff the rate between points on its own route and points on the route of any other carrier. In deciding the *Substituted Freight Service* case, the Commission expressed certain views as to how the carriers might bring the service into conformity with these tariff provisions. Regardless of the publication form that carriers might choose in complying with such tariff provisions, the Commission expressly found that the applicable rate tariff should show "appropriate concurrences" of each carrier participating in the service *(Id.* at 689, last paragraph).

Thus the Commission held that if a rail carrier originated a shipment, and wished to turn the traffic over to a motor carrier for a part of the haul, it would have to publish a tariff showing the through route and obtain a "concurrence" from the motor carrier involved, which the motor carrier could issue or refuse to issue. Similarly, it held that if a motor carrier wished to turn his shipments over to a railroad for a portion of a haul, the motor carrier would have to obtain the voluntary concurrence of the railroad in its tariff. Neither the railroad nor the motor carrier could simply publish in its tariff its intent to turn the traffic over to another carrier and act as a shipper over such other carrier.*

The Commission's report in the present case questions whether the Commission in the *Substituted Freight Service* case of 1939 intended to proscribe what its language had so forcefully condemned as being in violation of Part II of the

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* As stated by the court below in the present case:
"Although the [*Substituted Freight Service*] decision emphasizes the necessity for publication of tariffs disclosing the manner of carriage, it also requires that such tariffs be published with the concurrence of the railroad." (R. 38)

Act, with regard to a carrier which acts both as a carrier and as a shipper in respect to the same service. The Commission admitted, however, that in decisions made by it in the 1940's and 1950's it had so understood the principles and holdings of that 1939 case (322 I.C.C. at 334).

The points urged to distinguish the *Substituted Freight Service* case do not comport with the facts of that case. The present Commission report suggests that the controlling principles might apply "were a carrier to tender a shipment to another carrier for transportation to a point it [the first carrier] cannot serve" (322 I.C.C. at 333), thus leaving open the situation where the transportation by the second carrier is between points that the first carrier would be authorized to serve. That comment, however, fails to note that the particular motor carrier operation of shipping by rail that was condemned in the 1939 case was one where the motor carrier doing the shipping "actually has common-carrier rights between Minneapolis and Terry," which were the points involved (232 I.C.C. at 690).

Also inconsistent with the 1939 rulings are the Commission's other "distinguishing" comments suggesting that the action of the motor carrier in shipping by rail might not violate the Act if notice of that intention were first given to the original shipper (322 I.C.C. at 332-334). Those comments overlook the fact, discussed above, that the 1939 decision required not only a notice but also the filing of voluntary "appropriate concurrences" by any carrier whose service was to be substituted for the service of the initial carrier (232 I.C.C. at 689 (last paragraph), 690). Appellants obscure this by describing the 1939 case as "merely" holding the tariffs in question "legally insufficient" and requiring "lawfully filed tariffs" (322 I.C.C. at 332; Govt. Br. 55, n. 33; ATA-NATA Br. 36). But the Commission in 1939 clearly held that to be sufficient and lawful under

the statute any such tariffs must at least include concurrences. No concurrences are involved in the proposed Rules 2 and 3; indeed, at one point the ATA and NATA acknowledge, as they must, that "motor carrier use of the open-tariff rules would be the *unilateral* substitution by the motor carrier of trailer-on-flatcar transportation for all or a portion of the highway movement" (ATA-NATA Br. 32).

The statutory principles described in the *Substituted Freight Service* case were admittedly and repeatedly reaffirmed and applied by the Commission.* Its present report correctly recognizes (322 I.C.C. at 334) that this is true of its decisions "including": *Ringsby Truck Lines,*

* The same statutory analysis has consistently guided the courts. As the District Court noted, one facet of the analysis includes the rule that: "a person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the 'grandfather' provisions of the Act. *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (D.C. N.Y. 1940), aff'd p.c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. *The relevant premise of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad."* (R. 38-39). See also *United States* v. *Maher,* 307 U.S. 148, 155-156 (1939); *Andrews Van Lines, Inc.* v. *United States,* 240 F. Supp. 763 (D. Neb. 1965), affirmed per curiam 382 U.S. 67 (in which the Government's Motion to Affirm (pp. 4-5) also recognized that *"Plainly the statute did not intend to treat carriage by ship, plane, or train as carriage by motor vehicle"); Consolidated Freightways, Inc.* v. *United States,* 136 F.2d 921 (C.A. 8, 1943), certiorari denied, 320 U.S. 781; *Moore* v. *United States,* 41 F. Supp. 786 (D. Minn. 1941), affirmed per curiam 316 U.S. 642; *Kline v. United States,* 41 F. Supp. 577 (D. Neb. 1941).

Inc. v. *Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 139, 141-142 (1945); *Savage Application*, 265 I.C.C. 157, 167 (1947); *Movement of Highway Trailers by Rail* [*New Haven* case], 293 I.C.C. 93 (1954).

As if to dilute the unbroken and long line of cases based on the Act, the Commission added that it nonetheless believed two of its cases "are consistent with our present interpretation of *Substituted Freight Service*. . . ." (322 I.C.C. at 334). The Commission offered no explanation of the supposed consistency of either case with its present interpretation and neither citation is referred to or discussed in this Court in the supporting briefs of the Government and the ATA-NATA. Both of the two cases were in fact direct decisions that it is a violation of the Act for a motor carrier to act as a shipper of its customers' freight.

In the first of those two cases cited in the report, *Greer Broker Application*, 23 M.C.C. 417 (1940), a motor common carrier stated that he was shipping some of his customers' freight over other common carriers. He sought a broker's license from the Commission for that activity. The Commission not only denied the license but also condemned the motor carrier's practice of shipping over other carriers. Moreover, the Commission there demonstrated the patent invalidity of the present assertion that the 1939 *Substituted Freight Service* decision was rendered without explanation or explicit statutory basis.* Thus the 1940 Commission report observed that:

> "In *Substituted Freight Service*, 232 I.C.C. 683, the Commission had under consideration, among other matters, a situation where a motor carrier accepted

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* See pp. 50-51, *ante*.

traffic for transportation from origin to destination as a common carrier at its own rates and, as to a portion of the route of the shipment, substituted the service of a rail carrier for its own service, paying for such substituted service the tariff rates assessed by the rail carrier. *This practice was stated by the Commission to be repugnant to the act, more particularly to sections 202(a), 206, 207, 208, 216, 217, and 219 thereof.* In the situation here presented, the substituted carrier is another motor carrier and the substitution is as to the entire transportation rather than a portion of it. *In our opinion, the practice of applicant as disclosed in this proceeding cannot be approved, for reasons similar to those set forth by the Commission."* (23 M.C.C. at 420)

In the second case, *Stone's Express, Inc., Common Carrier Application,* 32 M.C.C. 525 (1942), the evidence showed that an applicant for motor carrier rights under the "grandfather" clause of Part II had been shipping part of its freight by rail between New York and Boston. Although the report conditionally approved the application,* it admonished the applicant concerning that rail service activity, saying:

"Thus applicant, in effect, is acting as a common carrier by motor vehicle and a shipper by rail as to the same traffic, a situation which is repugnant to the provisions of the act. If applicant desires to continue

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* Significantly in this regard, in addition to the rail transportation the report also found that "continuously since" 1935 the applicant had been engaged in "regular-route operations" "as a common carrier by motor vehicle" between New York and Boston over highways specified in the report's appendix (32 M.C.C. at 526-529). The fact that the motor carrier had been continuously performing actual highway service on part of the shipments did not save it from condemnation for violating the Act by shipping other shipments by rail.

> to substitute rail service in lieu of its own motor-vehicle operation between New York and Boston, or between any points served by it as a motor carrier, it should bring such service into conformity with the tariff provisions of the act in accordance with the views expressed in *Substituted Freight Service*, 232 I.C.C. 683." (32 M.C.C. at 527)

Although the present report cited this as the other case allegedly "consistent with" its new interpretation, earlier the Commission had properly and expressly acknowledged that *Stone's Express* case had "adhered to" the principle that for a motor carrier to act as a common carrier by motor vehicle and a shipper by rail as to the same traffic is "repugnant to the provisions of the act." *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 139, 141-142 (1945). In short, that understanding of the Act had been in full effect for at least twenty-five years prior to the Commission's report in this case and had been expressly followed even in the only two cases that the Commission report here suggested might not directly contradict its new comments on the 1939 interpretation.

The Interstate Commerce Act itself remains unchanged in any pertinent respect since the Commission's original and repeated decisions were made. Those decisions were expressly based on the Act and not on a notion implicit or otherwise of discretion in the Commission. The report in the present case expressly states that those decisions "represented sound conclusions" when they were made (322 I.C.C at 334). Yet Rules 2 and 3 would now permit the carriers by motor vehicle and the carriers by water to ship the goods of their customers by rail—precisely the action and type of activity that those previous decisions recognized as being prohibited by the statute.

B. Sections 2 and 3 of Part I and the So-called "Rule of Equality"

Appellants devote much of their briefs to arguing in various ways that Rules 2 and 3 are justified and lawful on the basis of a so-called "rule of equality." Despite the professed objective, however, Rules 2 and 3 clearly would not produce equality between motor carriers and shippers or freight forwarders, and the rules cannot be justified on that basis. The gross inequalities under Rules 2 and 3 show the basic irrelevance of the so-called "rule of equality" to the issues of this case.

One reason why the rules would not produce equality is plain on the face of the Government's brief. The Government assures the Court that "the antidiscrimination provisions of the Act . . . can be fully complied with by discontinuing open-tariff piggyback services" (Govt. Br. 60). This would completely deprive private shippers and freight forwarders of any TOFC service. TOFC Plans II, III and IV, the only plans they can use, would be dead. But discontinuance of all or any open-tariff TOFC service would have no effect whatsoever on Plans I and V, and these are the Plans in which the motor carriers now participate. Plan V tariffs are clearly lawful under the terms of Section 216(c) of Part II of the Act, which provides for voluntary motor-rail through routes and joint rates. Plan I was held lawful by the Commission in this proceeding as also coming within the terms of Section 216(c) (322 I.C.C. at 349) and the Government is defending that ruling in another case.* In a decision made in 1962, the Commission said that "the physical rail transportation service provided by the railroads in Plans I, III, and V, is identical." *National Automobile Transporters Association Petition for Declar-*

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* *Lone Star Package Car Co.* v. *United States*, Civil Action No. 4-355 (N.D. Tex.).

atory Order, 91 M.C.C. 395, 412. In "fully" complying with the new Rules 2 and 3, as the Government suggests, by discontinuing open-tariff piggyback service, the railroads could exclude all private shippers and freight forwarders from TOFC service and such compliance would leave the motor carriers entirely free to participate in the motor-rail service that is authorized by Section 216(c). The result certainly would not be equality in TOFC between motor carriers and private shippers or freight forwarders. The only equality, in those circumstances, would be between the private shippers and the freight forwarders; none of them would be able to ship by piggyback.

Compliance with Rules 2 and 3 by total abandonment of the Plan II, III and IV tariffs might not be expected, but there might well be selected abandonments and also a serious deterrence to establishing new open-tariff TOFC service between points where it does not now exist (see pp. 38-39, *ante*).

Even if there were no abandonments there still would be no "rule of equality" to provide equal treatment for private shippers and forwarders as compared to motor carriers. Under a through route and joint rate arrangement made between a railroad and a motor carrier pursuant to Section 216(c), the total amounts paid by the shippers are divided and each carrier receives a "division." These divisions are privately negotiated between the railroad and the motor carrier. The Commission here did not even initially propose a rule to provide equality between the amount received by a railroad from a motor carrier as a division and the amount the railroad would receive from a private shipper or freight forwarder as a tariff rate. The Commission did initially propose a rule to require "that the divisions received by a rail carrier providing joint intermodal

service could not *exceed* any all-rail TOFC rate maintained by the rail carrier for like services" (322 I.C.C. at 328). It finally concluded, however, that:

> "We do not believe that it would be practical to attempt to control by a rule of general applicability the level of compensation to be received under division agreements which are, by nature, private contracts negotiated by individual carriers." (*Ibid.*)

Thus, if Rules 2 and 3 were in effect, a motor carrier could ship its customers' goods under a rail TOFC tariff, paying the tariff rates, *or*, if the motor carrier had made a Section 216(c) arrangement with the railroad providing for a "division" to the railroad in an amount lower than the tariff rate, the motor carrier would be free to obtain that more favorable treatment.* No freight forwarder or private shipper, however, is permitted by the Act to make such an arrangement; they must pay tariff rates, regardless of lack of equality with the motor carriers. If a railroad, by a private contract negotiated with a freight forwarder or private shipper, were to agree to accept a lower amount than the tariff rate, both parties would be criminally liable under the rebate provisions of the Act.

In short, justification for rules that would permit motor carriers to act as shippers cannot be found in any rule of equality. Contrary to appellants' arguments, no equality would result among motor carriers, private shippers and freight forwarders with respect to TOFC service. There will be instances where motor carriers can participate in

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* For example, the amounts received by the Pennsylvania Railroad on Plan I TOFC (an arrangement held by the Commission to be a through route under Section 216(c) despite the forwarders' arguments to the contrary) "are in every instance materially lower than" that railroad's tariff rates to the public under Plan III tariffs (R. 382-3).

TOFC service while no TOFC service at all will be available to forwarders and private shippers. And, where the TOFC service is provided by tariff (Plans II, III and IV), motor carriers still would have the right to enter into more favorable arrangements with any willing railroad as an alternative to using the tariff TOFC service and paying the tariff rates that forwarders must pay. As Vice Chairman Webb observed, "Although Rule 2 is apparently designed to place motor carriers in a position of equality with forwarders in the use of all-rail TOFC service, a greater regulatory inequality would be hard to imagine" (*Id.* at 395).

The Commission report, in discussing Rules 2 and 3, referred to only one antidiscrimination section, namely, Section 2 (322 I.C.C. at 335). That section is concerned solely with rates (49 U.S.C. 2). It is wholly irrelevant here, where there is no claim that the railroads charge a higher rate to one shipper than to another. If the Commission had in mind that rail charges or "divisions" under Section 216(c) are at levels different from the tariff rates, that situation is still irrelevant with regard to Rules 2 and 3 since it is produced by the terms and purposes of Section 216(c) and would continue unaffected by the rules.

The reference in the Commission's report to Section 2 is accompanied by the citation of two cases (322 I.C.C. at 336). Neither case is in any way relevant to Rules 2 and 3. One case held that a railroad could not transport another railroad's private passenger cars at a lower rate than the rate charged for hauling private cars owned by individuals. *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740 (1931).* The case in no way concerned the performance

* The companion case involving the same orders was *Kansas City S. Ry.* v. *United States,* 282 U.S. 760. A similar case is *I.C.C.* v *Baltimore & O. R.R.,* 225 U.S. 326 (railroad fuel).

by one carrier of its transportation obligations by shipping over the lines of another carrier. A carrier asking other carriers to transport its own goods or supplies and not those of its customers has offered no transportation services to the public and receives no payment for actual or purported carrier services with respect to the movement. It is lawfully acting as a shipper.

The other case cited in the report held that a railroad, because of the rebate provisions of the Act, could not make unlawfully large and discriminatory allowances to certain shippers. *Warehouse Co.* v. *United States,* 283 U.S. 501 (1931). Appellants do not refer to that case; it is patently unrelated to the issue.

Neither Section 2, cited in the Commission report, nor Section 3(1), cited by appellants, purports to regulate the manner by which carriers by motor vehicle or by water are authorized to perform their services to the public. Section 3(1) concerns discrimination in service, but its remoteness from the issue here is evident from the fact that, as discussed above, Rules 2 and 3 could be fully complied with by cancelling the present TOFC tariffs, or not publishing new tariffs for TOFC service, thereby excluding private shippers and forwarders from TOFC, while maintaining TOFC arrangements with the motor carriers under Section 216(c).

ATA and NATA assert that "The Commission, however, did not rest its promulgation of the open-tariff rules on specific affirmative provisions of any one section of the Act" (ATA-NATA Br. 26). When the Act is viewed as a whole, however, it is plain that Congress has provided for each of the respective transportation agencies to operate in its own mode of operation, with coordinations and interchange arrangements between motor carriers and rail-

roads to be made in the manner provided for in Section 216(c), covering through routes and joint rates, rather than by transforming a motor carrier into a shipper by rail.

The antidiscrimination decision now alleged by appellants to be "most nearly in point here"* is *I.C.C.* v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911). This Court, upholding the Commission, held unlawful under Section 2 certain tariffs by which on carload shipments some railroads charged forwarders and shipper associations the higher less-than-carload rates rather than the carload rates charged individual shippers. This case affords no support for appellants' claim that motor carriers, as regulated under Part II, are entitled to ship rather than carry their customers' freight. Before regulation, a person operating a motor carrier service could engage in innumerable operations and practices that are not permitted to him under regulation. For example, he could operate over either private or public highways and could change his highway routes at will. Under regulation, he receives the benefits of protection against unlicensed competitors but must conform to Part II, including the stricture against using any route for the performance of his service other than the public highway route specified in his certificate or permit, and the Commission can allow no more than "occasional" deviation therefrom. Deviation to a railroad route is not permitted. The motor carrier cannot be permitted (without change in his certificate) even to deviate by operating his trucks on a highway alongside a railroad, despite the fact that such a route might be the most direct and economical one for him. *A fortiori* he cannot take his carrier freight off the highways and ship it by rail. For motor-rail service, Section 216(c) provides the statutory way.

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*Govt. Br. 39; see also ATA-NATA Br. 26, 28.

The appellants' attempt to assimiliate the forwarders of *Delaware, L. & W. R.R.* to motor or water carriers aptly illustrates the fashion in which Rules 2 and 3 would unlawfully put those carriers in the freight-forwarding business. Thus the Government contends:

> "If a railroad must treat a freight forwarder tendering goods for shipment no differently from an ordinary shipper—the teaching of that case—so it must offer a motor carrier the same trailer-on-flatcar service it offers conventional shippers (including freight forwarders)." (Govt. Br. 33)

No statute or case, however, supports or suggests such an assimilation of motor and water carriers with freight forwarders. To the contrary, the right of forwarders to ship over line-haul common carriers, recognized in the *Delaware, L. & W. R.R.* case, was carefully established by Congress in specifically authorizing freight forwarders to utilize "for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act" (Section 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)). No such right is conferred on motor, water or rail carriers and, indeed, the Act specifically prohibits them from obtaining freight forwarding permits (*ante*, pp. 13-20). Part IV of the Act reflects and protects the unique status of forwarders by, on the one hand, not permitting them to perform line-haul transportation between terminals or to enter into through routes and joint rates but by, on the other hand, specifically granting them the right to utilize the services of the authorized line-haul carriers.

Moreover, if the antidiscrimination provisions in Sections 2 and 3(1) were to be given the effect as to TOFC service that the Government urges, the ramifications would produce chaos throughout the transportation industry on all kinds

of service. Rules 2 and 3 apply only to the railroads' TOFC service and appellants' briefs are directed to that service. If the theory, however, is that a carrier has a right to act as a shipper and to ship via another carrier, the principle would similarly apply to all kinds of freight in all kinds of rail cars.* And railroads, too, would be permitted to act as shippers via motor carriers and water carriers in lieu of performing their authorized rail service, since similar anti-discrimination sections are in Parts II and III (49 U.S.C. 316(d), 905(c)). Appellants' theory cannot be passed off as a one-way intermodal principle permitting one type of carrier to ship its customers' goods over another type of carrier but not similarly permitting the latter to ship over the former. Appropriate regulation of the various transportation agencies would be made most difficult. Indeed, in explaining the policy of not permitting common carriers by rail, motor or water to engage in the freight-forwarding business, shipping their traffic over other carriers, the House Committee Report emphasized that the policy adopted and followed "will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15.)

Appellants completely ignore these considerations. Ironically, however, the Government refers to and relies upon a physical carrier's "duty of carriage" (Govt. Br. 58, n. 35). It would apply that duty only to railroads, arguing

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* As the District Court noted, if the antidiscrimination sections were construed to authorize Rules 2 and 3, then "The Rules announced, limited as they are to TOFC shipment, would fall far short of the need for guidance were the novel interpretation of the Act to be sustained; the greater need would be for rules to govern the problem of handling freight in other forms" (R. 28).

that the railroad could not ship the freight over the same motor carrier that had initially tendered the freight to the railroad in lieu of performing the motor carrier's own "duty of carriage." No such distinction has been made by Congress in the Act; neither motor carriers nor carriers by rail or water are permitted to ship their traffic over another carrier in lieu of performing their own authorized service for that traffic.

III. THE LEGISLATIVE HISTORY OF THE RECENT BILLS TO AMEND THE ACT CONFIRMS THE UNLAWFULNESS OF RULES 2 AND 3

The Government's complaint against the refusal of certain railroads to enter into through route arrangements with all motor carriers, and to do so on non-discriminatory terms, is a complaint against a policy that Congress has established and firmly maintained. For several years the Commission has sought from Congress the power to increase the coordination of rail and motor carrier service by the establishment of compulsory through routes. Congress has regularly and consistently declined to grant that power to the Commission. Under the authority sought, the Commission would have been empowered, among other things, to order railroads to transport trailers or containers of a motor carrier containing the shippers' goods.

Congress has refused to approve such a change in the Act, even though the Commission assured Congress that it would exercise the sought compulsory power only "in proper cases," after investigation and hearing, and that it would "protect the carriers from unfair or unreasonable demands to provide through service." (75th Annual Report of the I.C.C., 1961, p. 186).* The farthest that Congress

* Similar recommendations were made by the Commission in 1962 (76th Ann. Rep., p. 201) and in 1963 (77th Ann. Rep., p. 19).

has been willing to go in the coordination of railroad and motor service has been to provide for voluntary through routes and joint rates, with no compulsion on any carrier.

In 1962 and 1963 Congress considered another proposal for increased coordination. The proposal would have made an exception, for piggyback shipments, from the general rule regarding the inability of a carrier to ship its customers' goods via another carrier. Under that proposal a motor carrier would be given the right to ship by rail piggyback, and the railroad would be compelled to handle the motor carrier shipments. The President's Transportation Message of 1962 said that certain "changes in the Interstate Commerce Act . . . are needed . . ." and stated:

> "I recommend that legislation be enacted to:
>
> "(4) assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers. This change will put the various carriers in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques." (H. of R. Doc. No. 384, 87th Cong., 2d Sess., p. 5)

Identical bills to implement this recommended change in the scheme of the Act were introduced in both houses of Congress in 1962 before the 87th Congress and again in 1963 before the 88th Congress. Hearings were held before the committees of both houses. The hearings developed that the bills were deficient to accomplish the intended purpose. They also developed that the intended result would seriously disrupt the transportation industry.

The bills would have amended Section 2 of the Act (relating to railroads), Section 216(d) (motor carriers), and Section 305(c) (water carriers) by adding to each section the following new provision:

"Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated."*

The attention of Congress was called by several witnesses to the fact that the Act, as it stands, has been interpreted for a generation to mean that carriers by motor vehicle cannot ship the goods of their customers by rail. For example, the statement of the Comptroller General of the United States, addressed to the Honorable Oren Harris, of the House Committee on Interstate and Foreign Commerce, included the following:

"If enacted, this section apparently would have a bearing on decisions of the Interstate Commerce Commission concerning so-called piggyback services. See, for example, *Substituted Freight Service,* 232 I.C.C. 683 (1939), in which the Commission stated that *one could not act as a common carrier by motor vehicle and as a shipper by rail as to the same shipment;* and *Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954), in which the Commission found that *motor contract carriers could not lawfully make use of any piggyback services."* (Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 88th Cong., 1st Sess., on H.R. 4700 and H.R. 4701, April 30, 1963, pp. 20-21)

The witness who appeared on behalf of the freight forwarders in opposition to the proposed change in the Interstate Commerce Act stated, in part, as follows:

"I will show that the method proposed by the bill for carrying out the recommendation is legally inadequate,

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* In Secs. 216(d) and 305(c) this language would have been preceded by the words "Provided further, however, that . . ." (S. 3242, 87th Cong., 2d Sess.)

and that even if the recommendation itself were sound, which it is not, many additional changes in law would be necessary to accomplish the stated purpose of equality.

"The bill proposes to authorize a carrier of one kind to ship its empty or loaded trailers by a carrier of another kind on the basis of rates published for use by shippers. It purports to do this by the expedient of amending the antidiscrimination sections of parts I, II, and III of the act.

"This ignores the fact that the basic scheme of the law, and numerous specific provisions thereof, make it unlawful for a motor, rail, or water carrier to use the services of other carriers as shippers.

"In Substituted Freight Service, 232 ICC 683, decided in 1939, the Commission said that for a motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act.

"In a comprehensive proceeding involving piggybacking decided in 1954, Movement of Highway Trailers by Rail, 293 ICC 93, the Commission reached the same conclusion.

"It has consistently adhered to this finding for 24 years. The repugnancy to the act cannot be cured by a simple amendment to the antidiscrimination sections.

"In pointing out other changes in the law that would necessarily have to be considered as an integral part of the proposal made by the bill, I wish to make clear that we do not recommend such changes.

"We are strongly opposed to this provision of the bill, but we think the committee ought to know what the recommendation entails. (*Id.* at 516-517)

"• • •

"Sections 203(a)(13) and (14), which define the terms 'motor vehicle' and 'common carrier by motor

vehicle,' respectively, clearly confine motor common carriers to the use of the public highways of the United States.

"These definitions contain no authority for a motor carrier to operate by railroad or by water, or to use rail or water routes.

"Simply to change the antidiscrimination provisions of the act, as the bill proposes to do, will not remove these statutory prohibitions.

"Unless the definitions are amended, section 3 of H.R. 4701 could have no effect whatsoever.

"To change these basic definitions poses a crucial question of fundamental transportation policy. It involves changing the course and concept of highway transportation with consequent serious effects on the transportation system as a whole." (*Id.* at 518)

After suggesting the form of change in the statutory definitions which would be necessary if Congress were to decide to approve the proposal, the witness said:

"It would be necessary also to amend section 203(a)(14). That section defines 'common carrier by motor vehicle' as a person who engages in transportation by motor vehicle 'over regular or irregular routes.' To this it would be necessary to add the phrase 'whether upon a highway or by rail or water.'

"Comparable amendments also would need to be made in parts I and III of the act, so that no carrier, in the future, would be confined to any particular type of transportation or kind of route, but could employ the services and routes of other modes in the provision of its service.

"If Congress is to consider authorizing motor carriers to ship their vehicles or containers via rail or water, in lieu of hauling them over the highways, it should concurrently consider changing the basic law which now confines them to the highways. The law gov-

erning the granting of motor carrier certificates, permits, and alternate routes is involved in section 3 of the bill.

"Sections 203(c) and 206(a)(1) of the act make it unlawful to engage in for-hire or common carrier transportation on any 'public highway' without a certificate.

"Before section 3 of the bill could have any effect these sections would have to be amended to make them apply not only to transportation on any 'public highway' but to transportation 'over any line of railroad or any water route.'

"Section 208(a) of the act specifies the terms and conditions which the Commission may or must include in motor carrier certificates.

"It provides that the certificates must specify either the precise highways over which, the fixed termini between which, or the territory within which, the holder may operate. Clearly this section would not permit the granting of a route via rail or water.

"The force and effect of this section would be destroyed if, as proposed by the bill, motor carriers could depart at will from the operations specified in their certificates." (*Id.* at 518-519)

He then outlined possible statutory changes which, if the proposal were approved, would be needed to establish appropriate "standards for granting rail or water routes" to motor carriers, and added:

"If such safeguards as these are not written into the law the entire pattern of motor carrier operations, carefully established over a period of more than 30 years, would be destroyed overnight.

"The routes specified in certificates would become meaningless—indeed the certificates themselves would become of little value.

> "And every motor carrier in the United States would be given a wide-open invitation to enter the freight forwarding business without a permit." (*Id.* at 519)

He also commented on that portion of the recommendation to Congress which referred to an intention to put other carriers in a "position of equality with freight forwarders." He noted that:

> "Equality is a two-way street, but the bill does not propose to put freight forwarders in a position of equality with other carriers.
>
> "From the very beginning of regulation the motor carriers have had the right to make joint rates with railroads, express companies, and water carriers—a right which is denied to freight forwarders.
>
> "That is the characteristic which distinguishes the two types of carriage. Motor carriers have the right to negotiate joint rates on a 'divisional' basis, whereas forwarders are limited to the payment of whatever rates or charges the railroads publish for the use of the general public.
>
> "Now it is elementary that if motor carriers are given access to the forwarder method but forwarders are still denied the motor carrier method, equality is not achieved but inequality is compounded." (*Id.* at 520-521)

At the end of his statement about the proposal, in which he had described the several amendments to various parts of the Act that would be necessary if Congress were to approve the idea of changing the Act to allow motor and water carriers to ship by rail, the witness said:

> "In concluding my remarks about this section of the bill, I repeat that the freight forwarding industry does not sponsor the amendments I have outlined.

> "We point out simply that they are integral parts of the question raised by section 3 of the bill, and consideration of that section necessarily involves consideration of the issues raised by the further amendments I have described. I have tried to place the full picture before you." (*Id.* at 521)

After hearing this presentation by the representative of the freight forwarders, and the statements of various persons on the subject, the Committee did not approve the proposal to give the carriers "the right to ship vehicles or containers on the carriers of other branches of the transportation industry." The House Report No. 1144, 88th Cong., 2d Sess., stated that: "Following the hearings, the committee last fall gave extensive consideration to the type of legislation it should recommend to be enacted. . . . The committee did not include in its consideration the proposed . . . extension to all shippers and carriers of the right to ship vehicles and containers by any mode. . . ." (*Id.* at 7-8).

We do not know of even a single witness who told Congress that the proposed legislative change was unnecessary on the ground that the Act already gave carriers that right.

The Commission informed the Committee that "we lack sufficient information upon which to take an informed position on [the proposed amendment], *the ramifications of which are far-reaching and could drastically affect basic and long-estabished relationships between carriers*" (Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 88th Cong., 1st Sess., on H.R. 4700 and H.R. 4701, p. 32). Referring to this proceeding which was then pending, the Commission said that "we intend to review thoroughly and to evaluate and resolve (or, where necessary, formulate appropriate legislative recommendations concerning) the issues presented by the rapid acceleration in the growth of coordinated motor-rail activities under the

various piggyback plans" *(Ibid.)*. The Commission then asked Congress "to encourage greater coordination of services by enacting legislation" to give the Commission power to order through motor-rail routes and joint rates into effect (*Ibid.*). Congress, however, again declined to do so.

The representative of ATA criticized the proposed piggyback amendment as being "seriously defective" and urged that motor carriers should be treated "as carriers" rather than being forced "into a behavior pattern which is basically shipper oriented" (*Id.* at 212). This is the very pattern that Rules 2 and 3 would now create, without benefit of legislation. He also stated that "the ICC proceeding is one that should be permitted to be concluded before any final action would be taken on this particular recommendation" (*Id.* at 213). As mentioned above, there was no contention that the Act, unamended, gave all carriers the right to ship over all other carriers, or that the Act already treated motor carriers as shippers and permitted them to ship on the rail TOFC tariff service.

The far-reaching ramifications of Rules 2 and 3, and their drastic effect upon the basic and long-established relationships among the carriers—relationships that have been created by careful and deliberate Congressional action over many years—afford strong reasons for upholding the unanimous decision of the lower court in this case. The Act as created by Congress does not provide for or contemplate that motor, rail or water carriers can act as shippers and forward their traffic rather than performing their duty of carriage or joining with other carriers to do so under the permitted through routes and joint rates. Congress itself has declined the Commission's repeated requests for power to order motor-rail coordinations into effect by means of compulsory through routes and joint rates. Congress established and has never changed its policy against permitting

common carriers by rail, motor or water to engage in freight-forwarding operations. If the policies of Congress are to be changed, it is a matter for Congress to consider and decide, not one for the Commission. By the terms and purposes of the Act as it now stands, and as it has stood unchanged in any pertinent respect for more than a generation, Rules 2 and 3 are unlawful.

CONCLUSION

The National Transportation Policy states: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, *so administered as to recognize and preserve the inherent advantages of each.* . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (49 U.S.C., preceding Sec. 1)

By Rules 2 and 3, permitting carriers by motor vehicle and carriers by water to engage in a forwarding business of shipping their freight by railroad TOFC service instead of transporting it by motor vehicle or by water, the Commission would destroy the plan of Congress for separation of the several modes of transportation according to the type of activites that each mode is authorized to conduct. The essential, distinctive inherent advantage of freight forwarders—the right to utilize the tariffs of line-haul carriers—would be added to the advantages of a competing mode enabling it to become a multi-service transportation agency with no correlative mitigation of the forwarders' statutory disadvantages. The impact of the rules on the freight forwarders "may very well destroy the freight forwarding industry" (Vice Chairman Webb, dissenting, 332 I.C.C. at

394). The rules conflict both with the particular sections of the Act which we have mentioned and also with the policy directive to the Commission to "recognize and preserve the inherent advantages of each" mode of transportation. For this reason, and for the other reasons set forth above, the unanimous judgment of the court below should be affirmed.

Respectfully submitted,

D. Robert Thomas
Lee B. McTurnan
Sidley & Austin
11 South LaSalle Street
Chicago, Illinois 60603
George H. Leonard
2 Lafayette Street
New York, New York 10007
Theo. R. Schneider
1123 Hadley Street
St. Louis, Missouri 63101
Giles Morrow
711 Third Avenue
New York, New York 10017

Attorneys for Appellees
Acme Fast Freight, Inc., et al.

April, 1967

APPENDIX

Section 410(c) of the Interstate Commerce Act, 49 U.S.C. 1010(c), provides:

> "The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. No such permit shall be issued to any common carrier subject to part I, II, or III of this Act; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to part I, II, or III of this Act, shall be denied because of the relationship between such corporation and such common carrier."

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APPELLEE'S BRIEF

SUPREME COURT, U. S.
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;* and

---

No. 60

UNITED STATES, ET AL., *Appellants,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEES SOUTHERN RAILWAY COMPANY, ET AL.

FRANCIS M. SHEA,
WILLIAM H. DANGRAF, JR.,
734 Fifteenth Street, N.W.,
Washington, D.C.

WALTER J. MYSKOWSKI,
712 Ring Building,
1200 18th Street, N.W.,
Washington 6, D.C.

W. GRAHAM CLAYTOR, JR.,
WILLIAM D. MCLEAN,
JAMES A. BEVERLEY,
Southern Railway Building,
Box 1808,
Washington 13, D.C.,
Attorneys for Intervenors.

Of Counsel:
SHEA & GARDNER,
734 Fifteenth Street, N.W.,
Washington, D.C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;* and

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No. 60

UNITED STATES, ET AL., *Appellants,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEES SOUTHERN RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY; NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY; GEORGIA, SOUTHERN AND FLORIDA RAILWAY COMPANY; AND CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

Questions Presented

In addition to the question framed in the brief for the United States and the Interstate Commerce Commission,

the following question is raised by the character of that brief:

Whether the action of the Interstate Commerce Commission here in issue should be sustained on the basis of statutory authority not relied upon by the Commission and alleged facts neither relied upon by the Commission nor supported by the record before it.

Statutes and Rules Involved

The National Transportation Policy, 49 U.S.C. preceding § 1, and sections 1(4), 2, 3(1), 3(4), 15(3), 216(c), 216(d), 217(a), 306(a), 402(a)(5), 410(a)(1), and 410(c) of the Interstate Commerce Act, 49 U.S.C. 1(4), 2, 3(1), 3(4), 15(3), 316(c), 316(d), 317(a), 906(a), 1002(a)(5), 1010(a)(1), and 1010(c), and Commission Rules 500.2-500.3, 49 C.F.R. 500.2-500.3 (Supp. 1966), are printed in the Appendix, *infra*.

Statement

The Government's statement of the case includes—indeed, in the main concentrates upon—a number of assertions of fact that have no basis whatever in the report of the Interstate Commerce Commission and that, moreover, are not supported by the record.[1] Accordingly, we are obliged to discuss the facts in some detail.

The appeals in this case are from that aspect of a judgment of a three-judge United States District Court holding invalid certain rules promulgated by the Interstate Commerce Commission to regulate trailer-on-flatcar ("TOFC") service. The rules were issued in a decision entitled *Ex Parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, which we refer to hereinafter as "*Ex Parte 230*."[2] In brief, those rules, which

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[1] For convenience we use "the Government" to refer collectively to the attorneys for both the United States and the Commission.

[2] In No. 58, *The New York Central Railroad Company* v. *United States*, the New York Central, which is also an appellee in the case at bar, has

are often referred to as "open tariff" rules, and which are set forth in the Appendix hereto at pages 8-9, require the railroads to offer to motor carriers the same TOFC service that is offered to shippers.[3] Before discussing the rules and the procedural history of this litigation in detail, we describe the nature of existing TOFC services so that the impact of the rules may be fully appreciated.

1. *The nature and development of TOFC service.* TOFC is an important transportation development based on a simple technique. By the use of TOFC, the long-haul cost advantage of rail transportation is made available to shippers and consignees who are not located on railroad sidings. Without TOFC, when such a shipper wishes to transport freight by rail, the freight must be loaded onto trucks, hauled to the railroad, unloaded from the trucks, and reloaded onto rail freight cars. At the other end of the rail movement, if the consignee also is not located on a railroad siding, the freight must be unloaded from the rail freight cars, loaded onto trucks, hauled to the point of destination, and unloaded again. With TOFC, the costly intermediate loadings and unloadings are eliminated simply by placing the truck trailer itself, or a container designed for transportation by both truck and rail, on a rail flatcar.

TOFC is a "bimodal" form of transportation in a physical sense, like any other type of rail-motor movement, in that the rail transportation must be supplemented at one or both ends by motor transportation. However, it is not a "hybrid" service in the sense that it combines in a single mode of transportation the features of both rail and motor service. Trucks and railroads are used in their

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appealed from that aspect of the judgment of the three-judge court that *upheld* a rule issued by the Commission in *Ex Parte 230*. That rule is not related to the rules here in issue. No other party to the District Court litigation has appealed from the aspect of the judgment involved in No. 58.

[3] Technically, water carriers would also be beneficiaries of the rules, but this litigation has from its start focused exclusively upon motor carriers.

distinct, familiar roles—trucks on the highways, railroad cars on the rails. Thus, in *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 97-101 (1954), where the motor carriers attempted to block the development of TOFC, the Commission rejected the motor carriers' fanciful argument that railroads become motor carriers when they transport trailers or containers on flatcars.[4] And the commission reaffirmed that ruling in the case at bar (Rep. 343).[5]

While TOFC service has been available for a long time, the Commission pointed out in *Ex Parte 230* that "[t]he experience . . . of most railroads . . . was very limited until 1954, the year in which [the] Commission gave approval to a number of practices that were then slowly developing. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, the so-called *New Haven case*" (Rep. 305-307). "Almost immediately" after the *New Haven* decision, "a number of railroads inaugurated or expanded their . . . TOFC operations," and from 1959 to 1964 the growth of TOFC was "explosive" (Rep. 305, 307). In order to promote TOFC service, "substantial investments have been made by the railroads and others in TOFC equipment." Thus, for example, a single carrier, the New York Central, by the time of the *Ex Parte 230* hearings, had invested almost 30 million dollars (Rep. 309).

The growth of motor carriage over the past few decades has, of course, resulted in an enormous diversion of traffic

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[4] "We cannot say that a freight-laden trailer secured to a flatcar, which in turn is coupled in a train being drawn by a locomotive over steel rails laid on the railroad's right-of-way, is transportation over such a 'highway.' Nor can we agree that the transporting vehicle is a motor vehicle; rather, it is a flatcar which is an integral component of a train 'operated exclusively on . . . rails' . . . ." *Id.*, at 100-101.

[5] The Commission's *Ex Parte 230* report has not been reprinted in the record, but has been included in its original slip opinion form in the record in Volume 2 at page 795. Accordingly, we cite the report herein as "Rep." and use the original pagination.

from the railroads to both motor common carriers and, particularly recently, to private carriage by companies that have established their own fleets of trucks. The precise degree to which TOFC service has enabled the railroads to recapture some of this traffic is not clear. As the Commission stated, "At the present time the available statistical data . . . is not sufficiently refined or reliable to demonstrate authoritatively the precise extent to which railroad successes with piggybacking have meant actual diversions of traffic from competitive modes of transport" (Rep. 308). However, TOFC service has certainly had some impact, particularly in deterring the growth of private carriage. Thus, the Commission stated, "There can be no doubt of the benefit which TOFC service has already rendered the railroads in allowing them to recapture traffic lost to competing modes of transportation, and especially to private motor carriage" (Rep. 322).[6] In short, on the basis of the record the Commission concluded that, while the degree of TOFC's success was not measurable, TOFC service had certainly returned to the railroads some part of the traffic it had lost to common and private motor carriage, and also that TOFC had had more impact in reducing the amount of private carriage than in recapturing traffic from motor common carriers.

These statements by the Commission bear only upon the impact of the rail TOFC movement upon comparable long

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[6] The Commission gave three examples it thought were "typical" (Rep. 307-308). One of them involved Monsanto Chemical Company, which had initially shipped by rail, then shifted to motor carriage, and was "on the verge of going heavily into private motor carrier operations" when the advent of TOFC encouraged it to continue to use common carriers. There are a great many similar situations disclosed by the record. See R. 198-199, 210-211, 220, 258-260, 261, 265, 267, 269, 273, 274, 275, 276, 278, 279, 280, 281, 286, 288, 293, 294, 297, 299, 301, 304, 383, 389, 390, 392, 394, 395, 396, 398, 447, 450, 453, 466, 470, 482, 489, 491, 492, 493, 501, 506, 514, 516-519.

haul motor carrier movement. They have nothing to do with the question of motor carrier participation in the trucking portion of a TOFC movement where the shipper or consignee is not located at a rail siding. The Government's attack on present TOFC practices, however, relates exclusively to this aspect of TOFC service. That is, the Government does not suggest that there is anything wrong with the railroads' securing long-haul railroad traffic—as to which the Government concedes the railroads are generally the low-cost transporter (Br. p. 3)—at the expense of long-haul motor carrier traffic, common carrier or private. What the Government does suggest is that the motor carriers are being unfairly dealt with respecting the transportation of freight from the shipper's dock to the rail siding in connection with TOFC service. In order to evaluate the Government's contentions, it is necessary as a preliminary matter to describe with some specificity the various forms of TOFC service.

2. *The five TOFC "plans."* TOFC service has been employed under what are commonly known as five "plans" that are described in detail in the Commission's Report (pp. 309-312). For present purposes, the most important feature of the various plans is that certain of them have been made available by the railroads to shippers without joint participation by motor carriers; while others have been designed for use by shippers only through joint service offered by railroads and motor carriers. In more detail, the principal types of TOFC service are as follows:

The three all-rail plans available to shippers—generally referred to as Plans II, III, and IV—differ with respect to the extent of service the railroads offer to perform. Thus, under Plan II the railroad provides a complete door-to-door service, including pickup and delivery. Under Plan III

the railroad performs only a ramp-to-ramp service, with pickup and delivery being the obligation of the shipper. Plan IV is also a ramp-to-ramp service, but it differs from Plan III in that the shipper furnishes a flatcar in addition to the trailer, the railroad supplying only the power and rails.

The two plans offered to shippers by railroads in cooperation with motor carriers are called Plans I and V. The critical common characteristic of these Plans is that they are entirely voluntary arrangements between the carriers in which all aspects of the service, including the compensation to be received by each carrier, are decided upon by mutual agreement. It may be useful, however, to point out the principal respects in which these Plans differ.

Plan I is fundamentally an arrangement under which the motor carrier substitutes rail TOFC service for its authorized highway service. Thus, the traffic is solicited by the motor carrier; it moves under motor carrier rates and the motor carrier's bill of lading; the service is available only between points that the motor carrier is authorized to serve over the highway; and the shipper has the right to forbid use of the TOFC service so as to require transportation by highway, but not the right to demand TOFC service. The applicable rates are published in regular motor carrier tariffs that contain a provision referring to so-called "substituted service directories," which set forth the service covered, the points of interchange, and the names of the participating carriers.

In contrast, Plan V is a typical joint rate-through route arrangement under which service may be offered to points that the motor carrier is not authorized to serve, as well as to points it is authorized to serve. Thus, the traffic may be solicited by either the motor carrier or the railroad; the traffic moves under motor-rail, rail-motor, or motor-rail-

motor joint rates and over through routes published in joint tariffs; and the traffic must move over the designated motor-rail TOFC route. That is, the motor carrier does not have the option to use highway service for the TOFC segment.

3. *Motor carrier participation in TOFC service.* By definition, every TOFC movement requires the transportation of a trailer or container by truck at one or both ends of the rail movement. The Government's brief is designed to establish that, as to this trucking portion of a TOFC movement, the motor carriers have been unfairly treated by the railroads. This effort is insupportable. In this portion of our statement of facts, we set forth the relevant facts that can be deduced from the character of the various TOFC plans or that appear in the Commission's or the Examiners' reports. We defer to later discussion a particularized examination of the Government's version of the facts.

In the two plans offered to shippers by railroads in conjunction with motor carriers—Plans I and V—the motor carriage portion of the movement, of course, is provided by the motor carrier that has entered into the plan in question with the railroad. Thus, the Government's complaint relates to the plans (II, III, and IV) offered directly by railroads to the shipper.

As to these three plans, it is important to note that only under Plan II (door-to-door) does the railroad undertake to perform the trucking service incident to the TOFC movement, and that the railroad can do this only where specifically authorized to perform motor carriage under the Interstate Commerce Act. In this connection, section 202(c)(2), 49 U.S.C. 302(c)(2), permits railroads to perform trucking pickup and delivery services within terminal areas—a type of service they have traditionally performed and that is

regulated as railroad service. Thus, for example, on a TOFC movement from New York to Chicago, the railroad could pick up the freight by truck in New York, ship it by rail to Chicago, and deliver there by truck. However, as the Examiners' recommended report, supported by other data of record, makes clear, even under Plan II railroads often—and probably more often than not—hire trucking concerns to perform the terminal trucking services rather than performing those services themselves or through a trucking subsidiary (R. 772, 264-265, 773, 268, 776, 233, 786, 138). For example, these appellees, The Southern Railway System, *always* employ short-haul carriers or local cartage companies (R. 773, 268).

Under the other two "all-rail" plans—Plans III and IV—it is the shipper's obligation to provide for the motor carriage to the railroad ramp. The shipper may hire a motor carrier to perform that service, or the shipper may perform the service himself. If the shipper performs the trucking himself, he may employ his own equipment or lease it from a leasing company or a railroad.

The Commission did not make any determination respecting the relative degree to which shippers perform the trucking services incident to Plans III and IV TOFC service or hire motor carriers to perform that service. The Commission did state that "[t]rip leasing of trailers from the railroads or their subsidiary leasing companies has become commonplace with many shippers and freight forwarders" (p. 312). Even in such a case, however, the shipper may hire a motor carrier to operate the leased equipment. Still, it is certain that in some undetermined number of instances the shipper does not hire a motor carrier.

There is no basis, however, for any suggestion that the railroads' leasing practices have had an unfair impact upon either shippers or motor carriers. Much of the Report

was devoted to the matter of leasing, for the motor carriers urged that the practice be proscribed while shippers vigorously opposed that suggestion.[7] The Commission concluded that there was no warrant for curtailing leasing in any fashion, and that any potential problems could be handled simply through tariff-filing requirements to insure that there would be no discrimination between shippers. As the Commission put it:

> "While we recognize that there are opportunities for discrimination in present rate publication and equipment leasing practices, we cannot agree with the A.T.A. that the only available cures are a straitjacket for TOFC tariffs and major surgery to excise trailer leasing. . . .
>
> "... The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused. . . . We agree with the examiners that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse. Should this approach prove ineffective, additional steps can be taken at some future time. At present, we conclude that they are not needed, and that regulations substantially similar to those recommended will suffice" (Rep. 370-371).

This is all that can fairly be said about motor carrier participation in the trucking service incident to TOFC service on the basis of the Commission's report and the examiners' report. It obviously is far removed from what the Government says. As we have indicated, we will deal in detail with this discrepancy later.

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[7] See, *e.g.*, R. 270, 271, 272, 273, 274, 275, 283, 284, 287-288, 289, 290, 291, 293, 294, 296-297, 299, 301, 722, 723, 725, 433, 435, 439, 441, 450, 452, 455, 460, 464, 483, 487, 489, 496, 503, 509, 513.

4. *Commission regulation of TOFC prior to Ex Parte 230.* The pattern of TOFC service described above, under which certain plans are made available by railroads to shippers while others are made available to shippers jointly by railroads and motor carriers, developed under the explicit direction of the Commission. In 1954, the Commission established guidelines for the development of TOFC service in order to "enable carriers and shippers interested in undertaking or using this type of service to proceed with a degree of assurance as to the fundamental principles pertaining thereto." *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 111. Two major aspects of the Commission's rulings in *New Haven* were of critical importance: First, the Commission, reaffirming a principle long established, held that the anti-discrimination provisions of the Interstate Commerce Act did not require railroads to deal with shippers and competing carriers on the same basis. *Id.*, at 105. Second, the Commission, again reaffirming prior decisions, ruled that railroads could not make available to motor carriers their "open tariff" TOFC service offered to shippers even if the railroads wanted to. As the Commission put it, it would be "repugnant to the Act" for motor carriers to ship under the "open tariffs" even with railroad consent "in the absence of a through-route arrangement between the connecting carriers." *Id.*, at 105. In sum, motor carrier participation in TOFC service had to be by way of establishment of through route-joint rate plans; but this did not foreclose the railroads from offering TOFC service directly to shippers where either the railroad was authorized to perform the incidental trucking service or where the shipper was willing to arrange for the performance of that service.

The *New Haven* decision accomplished its purpose: It provided "assurance as to the fundamental principles" governing TOFC service, and—as the Commission in *Ex Parte 230* recognized (*supra* p. 4)—the railroads consequently invested heavily in the establishment of that service. It is the reversal of *New Haven* and its antecedents by *Ex Parte 230* that has given rise to this litigation.

5. *The Ex Parte 230 proceeding.* To the extent the Government's brief implies that the focus of the *Ex Parte 230* proceeding was upon the desirability of "open tariff" rules —and the implication seems clear enough—the Government is in error. As the Commission's report shows on its face—it consists of 104 pages only 10 of which are devoted to "open tariffs"—*Ex Parte 230* was a broad inquiry into virtually every aspect of TOFC service, an inquiry that resulted in a large body of rules relating to a number of different subjects. Not only was the question of "open tariff" rules one of many subjects considered by the Commission, but it was a subject that was given virtually no attention by either the Commission or any of the parties until the very end. What happened was this:

The rule-making proceeding was instituted by an order of the Commission dated June 29, 1962 (R. 55). The purpose of the proceeding was stated to be an inquiry "into the practices of, and the manner and methods of the performance and use of," TOFC service. Among the various issues that were specifically described in the order was one relating to "open tariffs"—"the extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV TOFC rail rates and service in their operations" (R. 56). However, in the written "representations" that the parties—who included all carriers and freight forwarders subject to regula-

tion (R. 57)—were invited to file, the inclusion of such an issue, which had been long settled by decisions such as *New Haven*, was opposed by some (*e.g.*, R. 102-104) and received relatively little support from others.[8] Then, at a prehearing conference held on October 9, 1962, the Commission distributed proposed Rules and Regulations based on the information secured by the representations and by responses to questionnaires sent to certain carriers (R. 129). Those proposed rules, which the Commission described as "a framework upon which can be developed the rules ultimately to be adopted" (R. 129) and as to which the parties were requested to state their positions (R. 126), did *not* contain any "open tariff" rules. Next, in an order of October 11, 1962, the Commission directed that each party file a special pleading "(1) setting forth whether it agrees in whole or in part with the proposed Rules and Regulations . . . and (2) suggesting changes and modifications of such Rules and Regulations as well as such additional rules as may be deemed appropriate" (R. 154). In these special pleadings that were then filed, the only mention of "open tariff" rules was by one carrier that wanted such rules, but restricted to households goods (R. 176). Accordingly, there was hardly any mention of this issue in the verified statements and reply verified statements filed by the parties, of which the evidentiary record consists. (No oral testimony was taken.)

In these circumstances, it was hardly surprising when the Examiners' proposed rules did not contain any "open

[8] While the Regular Common Carrier Conference supported "open-tariff" rules, as did Consolidated Freightways, Delta Motor Lines did not, and Pacific Intermountain Express thought the Commission should seek legislation (R. 69-70, 87, 113, 124). This is all there was in the 73 representations that were filed, of which some 35 came from motor carriers or their associations (R. 130-135).

tariff" provision. But it *was* surprising when the Commission, in its notice of oral argument (R. 792), resurrected this issue that had been dropped after the initial notice of hearing.[9]

Having raised, then abandoned, and then reraised the "open tariff" issue at the eleventh hour, the Commission finally in its *Ex Parte 230* report overruled *New Haven* and a host of related decisions and promulgated the "open tariff" rules. Under those rules—Rules 2 and 3 set forth in the Appendix at pp. 8-9, *infra*—railroads are required to permit motor carriers to use TOFC Plans II, III, and IV on the same basis as shippers. The shipper whose freight is being transported, however, pays the motor carrier's rate for all-highway transportation and has no right to require that TOFC be employed. He may only veto its use. Thus the option whether to use TOFC is solely that of the motor carrier. Moreover, he may use it for "all or any portion" of his authorized service (Rule 3(a)); so that under the Plan II "door-to-door" service he need perform no transportation at all; he can merely secure the order from the shipper and place it with the railroad, never touching the freight. And, finally, there can be no dispute that, under the Rules, the motor carrier may act precisely as a freight forwarder. That is, the motor carrier may collect a number of individual shipments, charging his own rate as to each; combine those shipments into a trailer-load; ship that trailer by rail under a TOFC plan; break-bulk at destination; and make his profit by virtue of the difference between the

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[9] It was also perhaps surprising that, at the oral argument, the "open tariff" rules did not command the unanimous support even of the motor carrier industry. Thus, counsel for appellant American Trucking Associations, Inc., stated: "I feel it incumbent upon me to state that the regular common carrier conference which I speak for also is of the view that the motor carrier cannot use an open tariff" (R. 794).

aggregate charges paid him by the shippers and the volume trailer TOFC charge he pays the railroad.

6. *Deficiencies in the Government's version of the relevant facts.* The foregoing discussion includes all the relevant facts that, in our view, can be relied upon by any party. The Government, however, goes far beyond these facts. The Government's version of the relevant facts is insupportable. Some of its statements reflect a fundamental misunderstanding of the character of existing TOFC service. Others have no foundation in the Commission's Report for the very good reason that they have no foundation in the record. In this portion of our brief, we catalogue some of the major factual errors in the Government's brief:

a. The central policy contention of the Government is based upon its assertion that "railroads seek to dominate the entire piggyback service, its motor as well as its rail portions," and that this is not merely a "theoretical" danger because "[r]ailroads have in fact widely, and increasingly, exploited the advantages of their position by the techniques outlined" in the Government's brief (Br. p. 19). The Commission made no finding remotely resembling this assertion by the Government. The reason it did not is clear from an examination of the "techniques" described by the Government.

(1) The first "technique" seems to be that some railroads have "declined to offer any Plan I substituted service, under which most motor carrier piggyback traffic moves" (Govt. Br. p. 11). But, as the record citations provided by the Government demonstrate, of the six major carriers named by the Government, *only one* does not offer *Plan V* service—the typical through route-joint rate rail-motor type of service.[10] It is true that Plan I appears to be more

[10] As to the Baltimore & Ohio, see R. 230-231, 233.

popular with some motor carriers than Plan V, but there is nothing whatever in the record to indicate that the National Transportation Policy or any other policy favors Plan I over Plan V. Indeed, this appellee, the Southern Railway System, is persuaded that Plan I is not lawful under the Act, primarily because it does not give the shipper the right to require that his freight be transported by motor-rail TOFC service. Accordingly, the Southern is one of the plaintiffs in the litigation that we describe in more detail later (pp. 64-65 *infra*) involving the legality of Plan I. But, as the record shows (p. 61), the Southern at the same time *does* engage in joint motor-rail TOFC arrangements of a Plan V type. Thus for the Government to assert—as the Commission did not—that the refusal of six railroads to enter into Plan I arrangements evidences a "technique" by which the railroads are "seek[ing] to dominate the entire piggyback service, its motor as well as rail portions," is wholly baseless.

(2) For the same reasons, no weight can be given the Government's statement that there is no transcontinental Plan I service—a statement which is followed by a footnote acknowledging that there now *is* such service (Br. p. 11). The portion of the record cited by the Government discloses a likely reason for any relative scarcity of transcontinental joint motor-rail TOFC service: There, one of the two—and only two—motor carriers on whose complaints the Government relies noted that a "basic way" in which TOFC can be used beneficially by motor carriers is "to minimize the problems resulting from the inevitable imbalance in traffic" between different points (R. 63). Imbalance of transcontinental traffic is well recognized as a major transportation problem. Railroads might quite reasonably be cautious lest this problem be thrust upon them alone by Plan I TOFC arrangements in which the motor

carrier decides whether to employ TOFC or all-motor transportation. Finally, once again the Commission did not so much as mention the alleged unavailability of transcontinental TOFC joint service.

(3) The next "technique" listed by the Government is that "Those railroads that did offer Plan I service generally asserted the right to pick and choose among the motor carriers. The factors considered included the interest in preventing motor-carrier piggyback rate competition with the railroads' own Plan II door-to-door service" (Br. pp. 11-12). For the last assertion, only a single railroad is referred to; and whether because of this paucity of data or because that railroad's explanation of its policy seemed perfectly reasonable to the Commission, the Commission nowhere mentioned this matter in its report.

As to the broad assertion that railroads "generally" claim the right to "pick and choose," no citation to even the record, much less to the report, is provided at all. The statement is flatly inconsistent with the Commission Bureau of Transport Economics and Statistics' summary of the information secured through the Commission's questionnaires ("Most of the railroads offering plan I to regulated motor carriers, other than to subsidiaries, generally make the plan available to any motor carrier regarded as qualified economically to handle the traffic and to do so within its rights" (R. 136-137, 607)), and with the Examiners' Recommended Report ("[s]o long as the motor carrier meets the financial responsibility and route authority requirements the railroads are generally willing to share Plan I arrangements with any such motor carrier" (R. 618)). See also R. 225, 91, 240-241, 769, 722, 778, 215, 781, 245-252. Therefore, it is difficult to know how to deal with the Government's statement. If all that the Government means to say is that railroads assert that they have the right

under the statute to enter into joint arrangements with some motor carriers and not with others, then the Government is surely correct, since the statute, under which motor-rail through route arrangements must be voluntary, 49 U.S.C. 316(c), does give railroads that right. But if the Government means to say that the railroads "pick and choose" among motor carriers as another "technique" for "dominat[ing] the entire piggyback service," then, once again, the assertion is supported neither by any Commission finding nor by the record.

(4) Another "technique" described by the Government appears to rest upon the fact that the TOFC plans offered by railroads directly to shippers (Plans II, III, and IV) have grown more rapidly than the joint motor-rail plans (Plans I and V). Because of this, the Government alleges that "piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads" (Br. p. 12). As we have pointed out and as the Government surely must concede, the railroads do *not* undertake to perform the motor carrier service in connection with two of the three plans offered directly to shippers (Plans III and IV). In no sense could the motor carrier portion of the movement under those plans be called "a railroad service." To be sure, the motor common carriers must compete with private carriage under those plans; but that is always true and the Commission found nothing amiss with it. Thus, the Government can hardly demonstrate railroad "domination" of the motor carrier phase of piggyback by showing that plans under which the railroads do *not* undertake to perform motor carrier service are growing rapidly.

It may be noted, in this connection, that the Government's failure to take into account that only in one of the

TOFC plans—Plan II—does the railroad provide door-to-door service is reflected also in the Government's interpretation of data from secondary sources (Br. 12, n. 9). Thus, the Government's assertion that "motor carriers participated in only 28 percent" of piggyback shipments rests upon the plainly false premise that motor carriers "participate" in the movements only under joint service plans and not under Plans III and IV.

In short, the fact that the Commission did not find that the growth of the TOFC plans offered directly to shippers evidences the railroads' "domination" of the trucking service incidental to TOFC movement is readily understandable: such a finding would have been untrue.

(5) Another "technique" referred to by the Government is the leasing of trailers by railroads to shippers for use in the plans (III and IV) where the shipper must provide for the motor carriage (Br. 19). The railroads are certainly free to do this and have done it, as the Commission indicated. But, as we have already pointed out, the Commission also concluded that there was no reason whatever to eliminate this option for the shipper (see *supra*, pp. 9-10). And nowhere in the Commission's report can be found any finding that this is a method through which the railroads are "seek[ing] to dominate the entire piggyback service."

The reason is clear enough. The shippers—including the Departments of Defense and Agriculture—strongly favor the continuation of leasing, presumably because the motor carriers have not always been able to afford satisfactory service.[11] Indeed, one may speculate about how fast TOFC service would have grown if the railroads had been dependent on motor carriers to provide the necessary service.

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[11] See citations provided in note 7, *supra*.

(6) Next, the Government observes that if the shipper is located in a terminal area the railroad can provide a door-to-door TOFC service directly, and if he is located outside a terminal area the railroad can do the same thing indirectly "through a trucking subsidiary or a contract trucker" (Br. 19). Here the Government is simply unhappy with the statutory provisions that permit a railroad to provide trucking terminal area services, 49 U.S.C. 302(c)(1), and under limited circumstances to own a trucking subsidiary that performs services "auxiliary to or supplemental of" train service. See *American Trucking Assns.* v. *United States*, 364 U.S. 1. Moreover while it is clear enough that Plan II terminal trucking is performed by the railroads to a substantial extent, the Commission's report does not establish anything at all about the extent to which railroad subsidiaries perform motor carriage in connection with TOFC. Presumably the Commission was of the view that any abuses of "auxiliary and supplemental" motor carrier service could be dealt with directly—as surely they can—and that the performance by railroads of motor carrier terminal services under Plan II in full conformity with the statute could hardly be inconsistent with the National Transportation Policy.

b. While the foregoing discussion covers all of the specific practices that the Government appears to regard as "techniques" for railroad "domination" of motor carrier service, the Government's brief contains a number of factual generalizations that it evidently believes are supported by the more specific factual assertions discussed above. We note below some of the more startling conclusions drawn by the Government.

The Government states that "the railroads may now refuse, at their option, to offer any piggyback service to motor carriers"; that they "are also free to charge them

rates that exceed open tariffs''; and, most importantly, that the ''railroads have frequently exercised these options, and candidly admit that a consideration in doing so is the desire to eliminate motor-carrier rate competition'' (Br. 43). As we have already demonstrated (*supra* p. 15), quite apart from the fact that nothing in the Commission's report supports this charge, the Government's list of ''largest and most strategically situated rail carriers'' (Br. p. 11) included only *one* that did not offer either Plan I or Plan V rail-motor joint service. How it can possibly be said that this establishes that the railroads ''frequently'' refuse ''to offer any piggyback service to motor carriers'' is difficult to understand.

As to the charge respecting predatory pricing practices, the Government's cross reference to pages 10-12 of its brief indicates that it has in mind the single carrier that said it did not enter into Plan I arrangements with motor carriers whose own rates between the points in question were lower than the railroads' Plan II door-to-door rates, since the result would be diversion of traffic from Plan II to Plan I (R. 79-80). If it were an issue in this case, we would urge that this is a perfectly reasonable practice of the sort that carriers engage in all the time in deciding whether to enter into through route-joint rate arrangements. But clearly it is not an issue. First, the fact that one carrier does something is obviously no basis for saying that carriers in general ''frequently'' do it. Second, what that single carrier says it does has nothing to do with the Government's assertion about the railroads' ''charg[ing] [motor carriers] rates that exceed open tariffs.'' The only meaning the Government's statement can have is in relation to the sharing of revenue between railroads and motor carriers under Plan I or Plan V arrangements. What the Government apparently means to say is that, in such cases, the railroad's share is ''frequently'' larger than it would receive for per-

forming the same service directly to a shipper under a Plan III or IV service. The Government cites nothing to show that this is "frequently" true. The Examiners' Recommended Report suggests it is not (R. 668-670). See also R. 382-383. But assuming that divisions in some cases are fixed at such a level, as may be the case, that would hardly demonstrate "domination" of the motor carriers by the railroads. As the Government must know, a great number of factors enter into the reasonableness of a sharing of revenue in a joint service arrangement. For example, if the traffic is primarily solicited by the railroad, it is reasonable for the railroad to receive a larger share. Moreover, if the traffic is long-haul traffic of the type as to which motor carriers are not competitive because of their costs, the same result may be true (see R. 331-332). But this is no place to untangle all of the snarls in the Government's argument. The fundamental point here, as in connection with so much of the Government's version of the "facts" respecting TOFC, is that its version has no basis at all in the Commission's report.

c. Since our discussion of the Government's reliance upon facts which are not supported by the report or the record is already extended, we simply list in the margin a representative sampling of additional statements by the Government that we challenge for substantially the same reasons given above.[12]

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[12] (1) "[It is] the railroads' present policy of either refusing motor carriers any access to piggyback or making it selectively available to them on terms dictated by the railroad . . ." (Br. 42).

(2) "By refusing to deal with the regulated motor carriers . . . the railroads are in a position to dominate the motor as well as the rail segments of piggyback service, or to favor some motor carriers at the expense of others and thereby create unfairness and, perhaps, debilitate competition generally between the railroad and motor-carrier industries" (Br. 22). (The last clause escalates the speculation in a fashion that, presumably because of the introductory "perhaps," is not backed by any attempt at documentation.)

d. In sum, we submit that the Government is attempting to shore up its legal contentions by relying upon facts that, while certainly colorful, cannot be derived from either the Commission's report or the record. As we have indicated, we do not believe that the Government's assertions could be supported by *any* record. But it suffices for present purposes to observe that it is hardly surprising that they are not supported by *this* record, since not until the record was closed did the Commission suggest that it was seriously considering "open tariff" rules.

7. *The District Court proceeding.* The railroad and freight forwarder appellees brought suit in a three-judge federal court in Chicago to set aside the "open tariff" rules. In granting the relief requested, the court's analysis was in outline as follows (R. 17-43): First, the Commission had relied upon section 2 of the Interstate Commerce Act, 49 U.S.C. 2, but that provision was not relevant because it applies only to rate discrimination, not to refusal to afford service, and because it does not regulate relations between carriers, but only between carriers and shippers. Second, under the Act motor carriers and railroads are confined to performance of transportation services by highway and

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(3) "[T]he discrimination that the Commission questioned in this case has many of the same injurious consequences as the traditional forms encompassed by the prohibitions of the Act" (Br. 40).

(4) "[T]he railroads' present policy of either refusing motor carriers any access to piggyback or making it selectively available to them on terms dictated by the railroad constitutes so insidious a form of discrimination" (Br. 42).

(5) "[T]he elimination of motor-carrier competition from the truck segment of piggyback would appear to reflect, not efficiency, but only the railroads' economic power. This is a classic instance of unfair competition" (Br. 44).

(6) "The consequences are not markedly less injurious where the railroad permits motor-carrier participation in piggyback service but at rates so much higher than those charged ordinary shippers as to assure that the competition of the motor carriers will be marginal and that the railroads will skim off the bulk of the profits to be made in the truck segment of the service" (Br. 44-45 n. 28).

rail, respectively, and the exclusive authority for coordination of their services is the through route-joint rate provisions of the statute. 49 U.S.C. 15(3), 316(c). But under those statutory provisions any motor-rail joint service must be offered pursuant to voluntary arrangements between the carriers, whereas the "open tariff" rules involve compulsion. Third, the "open tariff" rules are also incompatible with the provisions of Part IV of the Act that prohibit motor carriers from engaging in freight forwarding. And, finally, the invalidity of the rules was confirmed by the fact that the Commission had departed from a construction of the statute that it had consistently adhered to since 1939. The court did not discuss any of the policy arguments now advanced by the Government, because it evidently had not occurred to anyone that such arguments could be made on the basis of the Commission's report and the record.

Argument

INTRODUCTION AND SUMMARY

Although, as the Government says, "[i]t is generally (albeit not invariably) cheaper, faster and more efficient to move large quantities of freight long distances by rail than by truck" (Br. 18), for the last three decades motor carriers have secured a progressively larger portion of freight revenue. There is no sign that this trend has stopped. Thus, from 1939 to 1959 the motor carriers' revenue increased from 22.81% to 80.27% of the railroads' revenue (R. 316); and despite what the Commission termed the "explosive" growth of TOFC service between 1959 and 1964, the motor carriers nevertheless succeeded in the latter year in passing the railroads in revenue.[13] Moreover,

[13] For the figures for these latter years, see "Statistics of Railways in the United States," published annually by the Commission, and "Transport Economics," October, 1966.

in recent years more and more shippers have turned wholly or partly away from common carrier service of any sort in favor of private carriage.

In order to maintain a reasonably stable competitive position, the railroads have invested large amounts of capital in new forms of equipment and service. One of the technological innovations that the railroads have regarded as promising is TOFC service. By the simple process of transporting upon a rail flatcar an entire truck trailer (or a container that can be mounted upon, and demounted from, a truck chassis), the costly step of loading and unloading freight between truck and train can be eliminated. This cost reduction permits the railroads to compete more effectively with motor carriers for the business of shippers who are not located on rail sidings.

After the Commission in the 1954 *New Haven* decision (*supra* pp. 11-12) laid down the guidelines that were to govern TOFC development—and since it was clear under *New Haven* that railroad investment in TOFC equipment could not, at the motor carriers' option, be turned to the advantage of the motor carriers rather than the railroads—the railroads embarked upon an accelerated program of establishing and promoting TOFC service. While, as we have indicated, that service has not reversed the trend that still runs in favor of the motor carriers, it has at least prevented an even more serious deterioration of the railroads' relative position; and it has in addition stemmed diversion of traffic by private carriage.

The Government does not question the desirability of further expansion of TOFC service. Nor does it suggest that there is anything wrong with the railroads' securing long-haul traffic as to which rail transportation is the most efficient mode. The Government, however, urges that the motor carriers are not getting their fair share of the short-haul and pickup and delivery trucking service that is in-

cident to TOFC service. The Government says that the "open tariff" rules, under which railroads would have to furnish motor carriers with the same TOFC service that they offer to shippers, would cure this evil; and the Government says that the rules are required by the anti-discrimination provisions of the Interstate Commerce Act.

The Government is wrong on all counts:

1. A threshold obstacle to judicial review is the fact that the Commission did not adequately explain the basis for the "open tariff" rules. Most of the Commission's discussion (Rep. 327-337) was devoted to rebutting contentions that the rules would be antagonistic to the National Transportation Policy, and to distinguishing some, and overruling other, of the Commission's prior decisions holding that motor carriers could not employ a railroad's "open tariff" even with railroad consent. As to the authority of the Commission to *require* the railroads to treat motor carriers as if they were customers, however, the Commission adverted only to section 2 of the Act, 49 U.S.C. 2. But in its brief discussion of section 2, the Commission did not explain why—or even explicity state *that*—section 2 obliges the railroads to offer motor carriers the same service as it offers shippers. Indeed, the principal thrust of the Commission's discussion of section 2 appears to be that the fact that a motor carrier is a competitor of a railroad would not "compel" the conclusion in every case that section 2 would be inapplicable (Rep. 335-356). This is hardly the same as saying that the difference between a shipper and a motor carrier is *always irrelevant* under section 2—the determination that must be made to support the "open tariff" rules. This ambiguity in the Commission's report requires that the rules be set aside under the principle established in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94. Moreover, the applicability of *Chenery* is under-

scored by the fact that the Government, in its brief in this Court, relies upon statutory provisions—sections 3(1) and 1(4) of the Act, 49 U.S.C. 3(1), 1(4)—and allegations of fact that were nowhere mentioned by the Commission.

2. The statutory provision adverted to by the Commission, section 2, is not applicable for two reasons. First, on its face it proscribes discrimination only in terms of compensation received by the railroads, not in terms of service provided by railroads. It is section 3(1) that relates to discrimination in service, not section 2, as the Commission and the courts have consistently stated. But the "open tariff" rules are designed, according to the Government, to remedy an alleged discrimination in service, not in rates. Second, section 2 has long and often been held not to govern relations between competing carriers, but only relations between carriers and their shippers. Moreover, the infirmity of the Government's view—that section 2 requires that motor carriers be accorded the same treatment as shippers—is exposed by the inequality that would be produced by the "open tariff" rules. While motor carriers would always secure all benefits made available to shippers, they could receive greater benefits than shippers by virtue of entering into through route-joint rate arrangements with railroads. Moreover, they could secure a like advantage over freight forwarders, who, by virtue of their special status as carrier-shippers, may employ the TOFC plans made available to shippers but may not enter into through route-joint rate arrangements with the railroads.

3. Section 3(1) cannot be relied upon by the Government to support the rules, since the Commission did not rely upon it. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169. In any event, the provision is inapplicable because by its terms it "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." That this

proviso means exactly what it says is confirmed by its legislative history, which indicates that the proviso was designed to reflect the long line of decisions holding that section 3(1), just as section 2, is limited to governing relations between carriers and shippers, not between carriers and carriers. And if neither section 2 nor section 3(1) is relevant, then neither is the portion of section 1(4) relating to the railroads' obligation to provide reasonable service. Sections 2 and 3(1) are the anti-discrimination provisions, not section 1(4); and the Commission's sole justification for the rules, to the extent it gave any, relates to alleged discrimination.

4. The invalidity of the rules is further confirmed by their incompatibility with the through route and freight forwarder provisions of the Act.

a. Under section 216(c), 49 U.S.C. 316(c), the Commission cannot compel the establishment of through routes between motor carriers and railroads. The Commission's conclusion that no compulsion is involved under the rules because the railroads could abandon their multi-million dollar investment in TOFC service is wholly unrealistic. This was the Commission's only asserted basis for escaping the impact of the through route provision, and since it is meritless the rules should be deemed inconsistent with that provision. Moreover, the Government's assertion in this Court that no through routes would be involved under the "open tariff" rules is immaterial, since the through route statutory provision is the exclusive method provided by the statute for the coordination of rail-motor service. Finally, the Government's contention could not in any event be accepted, since the Government does not, and cannot, explain why the service provided under the "open tariff" rules would *not* involve through routes, whereas the service provided under Plan I, as held by the Commission, *does* involve through

routes. The two types of service are identical, but for the fact that one is required by the Commission and the other is voluntary.

b. Under Part IV of the Act, motor carriers cannot be given freight forwarder permits. However, under the "open tariff" rules motor carriers could operate exactly as do freight forwarders. That is, they could consolidate less-than-truckload shipments into truckload shipments, employ the railroad to perform the line-haul transportation (and under Plan II even the terminal pickup and delivery service), and make their profit on the spread between the charges paid by their shippers and the volume rate charged by the railroad. Accordingly, the "open tariff" rules are in conflict with Part IV.

5. Finally, the rules do not further the National Transportation Policy. The Government's contention in this respect is, as we have demonstrated, based upon a recital of facts that cannot be supported on the basis of the Commission's Report or the record. For our part, we suggest that the rules would have a debilitating effect on railroad service because they would permit motor carriers to shift part of their legitimate costs to the railroads. Motor carriers would not employ the "open tariffs," of course, unless it would advantage them to do so. A typical instance in which this would be the case would be where the motor carrier did not have a return load for a shipment. Thus, motor carriers could thrust upon railroads their return load problems. Motor carriers could also use TOFC to meet their peak load requirements, thereby requiring the railroads to have more standby equipment and motor carriers less. The predictable result would be a rise in TOFC costs, and hence in TOFC rates. While motor carriers would, of course, benefit competitively, this result hardly seems consonant with the National Transportation Policy's

mandate for administration of the Act so "as to recognize and preserve the inherent advantages of each" mode of transportation.

I

THE "OPEN TARIFF" RULES ARE INVALID BECAUSE THE COMMISSION'S REPORT DOES NOT DISCLOSE THE GROUNDS UPON WHICH THEY ARE BASED AND BECAUSE THE GOVERNMENT CANNOT NOW SUPPORT THE RULES ON GROUNDS THAT DO NOT APPEAR IN THE REPORT.

Before analyzing the statutory provision on which the Commission may have based the "open tariff" rules, we discuss whether such an analysis need be made at all in order to dispose of this case. We say it need not, for the Commission at no point explained the statutory rationale of its decision adequately. This failure is fatal, for "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 94. See also, *e.g.*, *Phelps Dodge Corp.* v. *Labor Board*, 318 U.S. 177, 197; *Automatic Canteen Company* v. *FTC*, 346 U.S. 61, 81; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168; *United States* v. *Chicago M. St. P. & P.R. Co.*, 294 U.S. 499, 510-511; *Northeast Airlines, Inc.* v. *C.A.B.*, 331 F.2d 579, 586 (1st Cir. 1964); Administrative Procedure Act, 5 U.S.C. §§1003(b), 1007(b).

The ten relevant pages of the Commission's Report (327-337) can be searched in vain for the statutory provision that is said to require the railroads to treat competing carriers as if they were shippers. The first few pages (327-330) are devoted to a general—and in our view, erroneous—evaluation of the merits of the "open tariff" rules. Nowhere in

the discussion does the Commission suggest that the desirability of the rules would be a statutory justification for their promulgation. The next portion of the Report (pp. 330-334) consists of an effort to distinguish—later acknowledged as a determination to overrule (p. 336)—prior decisions. Inasmuch as those decisions stood for the proposition that the arrangements contemplated by the "open tariff" rules are *prohibited* even *with* railroad consent, it is hardly surprising to find that the Commission's discussion suggests no basis for concluding that these arrangements are *mandatory without* railroad consent. Next (pp. 334-335), the Commission attempts to refute the contention that the rules are invalid because they will result in the compulsory establishment of through routes. Obviously, if the Commission is wrong in this respect (about which we say more later) the rules are invalid. But even if the Commission is correct, all that is established is that the through route provisions of the Act do not *bar* the rules, not that they support them. Finally, in two short and cryptic paragraphs (pp. 335-336), the Commission adverts to the only statutory provision that might be thought to be a basis for the Commission's action—section 2 of the Act, 49 U.S.C. §2. We discuss later the patent inapplicability of section 2. At this point we note simply that nowhere in its discussion does the Commission indicate why section 2 justifies—or indeed explicitly *that* section 2 justifies—a rule requiring the railroads to treat truckers as if they were shippers.

There appear to be three different—and partly inconsistent—notions expressed in the Commission's discussion of section 2. The first is that its applicability should be determined on a case by case basis. Thus:

> "... It might be argued, however, that service provided for a competitor could not be said to be performed

'under substantially similar circumstances and conditions' as that provided for private shippers.

"Whether two or more transportation services were performed 'under substantially similar circumstances and conditions' would be a matter of fact to be determined in each individual case as it arose, but we see no reason why the fact that the user of a service was another carrier rather than a private shipper would *compel* the conclusion that dissimilar circumstances and conditions were present." (Rep. 335-336) (emphasis supplied).

This appears to mean only that in each case where a motor carrier seeks to require a railroad to offer it TOFC service because the railroad offers such service to a shipper, the difference between a shipper and a motor carrier *will not "compel"* a decision in favor of the railroad. In other words, a decision in favor of the motor carrier may be *permissible.* This is hardly the same thing as saying that the difference between a shipper and a motor carrier *is always irrelevant* under section 2 and that section 2 therefore *will "compel"* a decision in favor of the motor carrier, which is the holding that must be made to support the "open tariff" rules.

Again, in describing its conclusions, the Commission stated that "when TOFC service is offered by a rail carrier to the public generally, *there is nothing to preclude* its use by motor or water common or contract carriers . . ," and that to the extent this holding departed from *New Haven,* the latter case was overruled (Rep. 336). But this appears to bear only upon that portion of the *New Haven* decision which held that motor carriers could not utilize open tariff TOFC service *even with the consent of the railroads.* See *supra,* p. 11. But to say that "there is nothing to preclude" motor cariers from utilizing such service does not

show how section 2 *requires* a railroad to offer such service to its competitors against its will.

It is only the rules themselves, together with a brief discussion of *Louisville & Nashville R.R. Co.* v. *United States*, 282 U.S. 740, that suggest a conclusion by the Commission that section 2 *requires* a railroad to treat motor carriers as if they were shippers. Where this is combined with a contradictory suggestion that the problem should be dealt with on a case by case basis, and another suggestion that all that is at stake is whether motor carriers may be *permitted* by the railroads to use "open tariff" TOFC service, we submit that the Commission has failed to measure up to the requirement that the grounds for its decision be set forth with clarity so that the courts may effectively perform their task of review—a requirement that applies with special force in a case of this importance where the Commission has overridden a long line of its prior decisions. See *e.g.*, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-654.

Finally, the pertinence of the *Chenery* rule in the case at bar is underscored by the character of the Government's brief, which ranges far beyond anything contained in the Commission's report both by way of facts and by way of law. We have already discussed the Government's departure from the report in terms of findings of fact; in the next portion of our brief we deal with the Government's effort to defend the rules on the basis of statutory authority that was not even mentioned by the Commission.

II

THERE IS NO STATUTORY AUTHORITY FOR THE "OPEN TARIFF" RULES.

As we have indicated, the only statutory basis for the "open tariff" rules that was even adverted to by the Commission was section 2 of the Act. The Government here, however, says that it "need not stop" with section 2, but may in addition rely on section 3(1) and section 1(4), 49 U.S.C. 3(1), 1(4). But in the lower court the Government *did* stop at section 2, where it agreed with appellees that "[a] reading of the Commission's report makes clear that it was this Section [section 2] upon which it relied" (Govt. Br. p. 15). The Government does not explain why it now feels free to advance statutory authority which it did not urge in the lower court and which the Commission did not even cite. There is no acceptable explanation. The Commission's failure to mention sections 3(1) and 1(4) cannot be regarded as an oversight, since as we show later there are obvious impediments to their use in this case (see *infra*, pp. 48-54). Accordingly, as this Court has held, "The courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169.

But even were this not true, the Government's position would not be advanced. As we show in this portion of our brief, there is *no* statutory provision that supports the "open tariff" rules.

A. *Section 2 Is Inapplicable.*

The only statutory provision relied upon by the Commission—section 2—is inapplicable (1) because it deals only with discrimination in rates, whereas the "open tariff"

rules deal with alleged discrimination in service, and (2) because it does not govern relations between railroads and motor carriers, but only relations between railroads and their shippers.

1. *Section 2 deals only with discrimination in terms of ompensation.* Assuming *arguendo* that there is discrimination in the railroads' not offering Plans II, III, and IV to competing carriers, it is a discrimination in the form of refusing to offer service, not a discrimination in the form of collecting a greater amount of compensation from one person than from another for performing the same service. But section 2 on its face deals only with discrimination of the latter type—rate discrimination.[14] Where the former type of discrimination is involved, it is the more encompassing section 3(1) of the Act that is relevant,[15] not section 2.

Not only is this the plain meaning of the statutory

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[14] "*If any common carrier* subject to the provisions of this part *shall,* directly or indirectly, by any special rate, rebate, drawback, or other device, *charge, demand, collect, or receive from any person* or persons *a greater or less compensation* for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, *than it charges, demands, collects, or receives from any other person* or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful" (emphasis supplied).

[15] " (1) *It shall be unlawful for any common carrier* subject to the provisions of this part *to make, give, or cause any undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, *in any respect whatsoever;* or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (emphasis supplied).

language, but the courts and the Commission have consistently so read these dual anti-discrimination provisions of the Act. As the Commission said in one of its early decisions dealing with these provisions, *Rail & River Co.* v. *B. & O. R.R. Co.*, 14 I.C.C. 86, 88-89 (1908):

> " . . . The former [section 2] assures to shippers an equality of rates for the transportation of property under substantially similar circumstances and conditions; and the latter [section 3(1)] assures to them an equality in the opportunity to use the rates, facilities, and services of carriers. One right supplements the other. An equality in rates without an equal opportunity to use the facilities of carriers would fall far short of the general objects sought to be accomplished by the Congress. On the other hand, the right to impartial treatment by carriers in the transportation of their merchandise would mean little to shippers if not accompanied by an assurance of an equality also in rates. . . ."

Thirty years later the Commision continued to adhere to the same position. *Joseph A. Goddard Realty Co.* v. *New York C. & St. L. R. Co.*, 229 I.C.C. 497 (1938), is directly in point. There the complainants charged a railroad with a violation of section 2 in that, while it performed switching services for other shippers nearby, it refused to perform switching services for complainants. The Commission held that there could be no violation of section 2 because the charge was one of refusal to perform service, not of rate discrimination.[16]

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[16] "Section 2 . . . prohibits a carrier from charging one person a greater or less compensation for any service rendered or to be rendered in the transportation of property than it charges any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and con-

Neither the Commission nor the courts have deviated from this interpretation of section 2. See *Wight* v. *United States*, 167 U.S. 512, 518 (Section 2 prohibits "any rebate or other device by which two shippers . . . are compelled to pay different prices."); *United States* v. *Delaware, L. & W. R. Co.*, 40 Fed. 101, 103 (C.C.N.D.N.Y. 1889) (Section 2 "relates to unjust discrimination in rates. The latter [section 3] is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers. . . ."); *United States* v. *Hanley*, 71 Fed. 672, 673 (N.D. Ill. 1896) ("There can . . . be no conviction under this section [2] until it is alleged and proven that an advantage in rates has been given. . . ."); *United States* v. *Vacuum Oil Co.*, 153 Fed. 598, 605 (W.D.N.Y. 1907) ("The gist of the offense described by section 2 is the payment of a different rate for performing a like service. . . . This section [3] is broader than section 2, and includes . . . any advantages in facilities and conveniences given or received."); *Osborne McMillan Elevator Co.* v. *Mpls., St. P. & S. Ste. M.R.R. Co.*, 306 I.C.C. 155, 160 (1959) ("The discrimination forbidden under section 2 of the act must be caused by charging one person more than another for performing a like and contemporaneous service. . . ."); *Pacific Lumber Co.* v. *N.W.P.R.R. Co.*, 51 I.C.C. 738, 760 (1918); *Board of Trade, City of Chicago* v. *Grand Trunk W. R. Co.*, 255 I.C.C. 141, 148 (1943).

In the face of this settled view that it is section 3(1) which imposes the obligation to render transportation service to all persons similarily situated once it is provided to any person, and that section 2 imposes only the obligation

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ditions. The complaint herein is that defendant, while switching connecting line traffic for other industries at Muncie, declines to switch such traffic for complainants. Therefore the facts present no case of unjust discrimination under section 2." *Id.*, at 500.

to charge equal rates for the same service, the Commission artfully recast section 2 so as to find therein an obligation to render service.[17] The Commission's version of section 2 is that it "requires rail carriers . . . to *make* 'like and contemporaneous *service* in the transportation of a like kind of traffic under substantially similar circumstances and conditions' *available* to any person at a charge no greater and no less than that received from any other person" (Rep. p. 335) (emphasis supplied). Section 2 does not refer to availability of service; but the Commission, so as to make it appear that section 2 does relate to discrimination in making service available, inverted the statutory terms, putting at the forefront the language respecting service that in the statute appears simply as the standard for determining when there is an unjust *rate* discrimination. Such a bald attempt to rewrite the statute cannot, we submit, succeed. Section 2 does not authorize the Commission to compel the railroads to perform the *services* that would be required of them by Rules 2 and 3.

In this Court, the Government tries a different tack. It does not suggest that there is any ambiguity in the language of section 2. It hardly could. Rather, in a curious inversion of the rule that the greater includes the lesser, the Government argues that the "greater discrimination involved in a flat refusal to provide service" should be included in the lesser discrimination of charging different rates (Br. pp. 30-31). With no case law and no statutory history to support it,[18] the Government's contention

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[17] We show later that section 3 would not be applicable in this case either, even had it been relied upon by the Commission.

[18] The Government manages (Br. 30-31) a gingerly citation of one sentence in this Court's opinion in *Interstate Commerce Commission* v. *Delaware, L. & W. R.R. Co.*, 220 U.S. 235, 252. But the case was a *rate* discrimination case and the Commission and the Court accordingly relied upon section 2 of the Act. All that the Court said in the sentence referred to by the Government was that a discrimination in service may achieve

amounts to nothing less than an appeal that the statute be rewritten. Moreover, whatever force there might be to the Government's plea in other circumstances, there is none here, for the Congress has dealt with the problem of discrimination in service in section 3 of the Act. That provision bars "any unreasonable preference or advantage" "in any respect whatsoever." [18] Thus, there is no occasion to stretch the language of section 2 beyond its settled meaning.

That is not to say that the Commission did not have a reason for attempting to extend the scope of section 2 so that it would overlap section 3. It did have such a reason, for, as we show later, the difficulty with section 3 is that it is not applicable to a carrier's treating its customers more favorably than its competitors. But the Commission's effort to escape the limitation of section 3 should not succeed, for two reasons. First, as we show in the next portion of this brief, the same limitation also governs section 2. And, second, an agency simply should not be permitted to rewrite a statute in order to avoid a legislatively imposed barrier to the end the agency wants to achieve.

This, then, is as far as the Court need go: the Commission's rules must be defended on the basis of section 2 because that is the only authority relied upon by the Commission, and section 2 is inapplicable because, in refusing to allow the motor carriers the use of TOFC service made available to shippers, the railroads are not "collect[ing] . . . a greater or less compensation" from the motor carriers than they are collecting from the shippers.

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the same purpose as a discrimination in rates. That is certainly true. But since, as we point out in the text, section 3 of the Act deals with discrimination in service, there is no basis for reading into section 2 a prohibition against such discrimination. And certainly this Court did not in *Delaware, L. & W. R.R.* suggest that there was.

[18] For the text of section 3(1) see Appendix p. 3, *infra*.

2. *Section 2 does not apply where the alleged discrimination is against competing carriers.* Having discussed the *type* of discrimination prohibited by section 2 and shown that section 2 does not prohibit discrimination involved in refusing to provide service, but only the discrimination involved in collecting unequal compensation for equal services, we turn to a discussion of the *persons* who are protected against discrimination by section 2.

The Government's view is that section 2 absolutely bars all "'personal' discrimination—refusal to accord equal service because of the identity or interest of the sender" (Br. 34). Thus, says the Government, "where two senders (one a conventional shipper, the other a motor carrier) tender the same cargo (a truck trailer) for the same flatcar service over the same route for the same distance, the rule of equality requires the railroad to treat both patrons the same" (Br. 35).

The trouble with the Government's view is, first, that it would not serve to uphold the Commission's rules even if it were right and, second, it is wrong.

a. The Government's view of section 2 could not sustain the "open tariff" rules because those rules themselves insure that the railroad will not be required to "treat both patrons the same." Under those rules, while both motor carrier and shipper will be able to use the "open tariff" TOFC service on the same basis, the motor carrier—unlike the "conventional" shipper—will also continue to enjoy the right to enter into joint service arrangements with the railroad (Plans I and V) in which the "cost" to the motor carrier of the rail portion of TOFC service may be less than the "cost" to a shipper for precisely the same physical service. Thus, as the lower court noted (R. 28-29), the railroads will be able to "discriminate" against shippers in favor of motor carriers by offering shippers less ad-

vantageous terms than motor carriers, but not against motor carriers in favor of shippers.[19]

Similarly, the "open tariff" rules would prefer motor carriers to freight forwarders. Freight forwarders have always filled the role of carrier *vis a vis* their customers and of shipper *vis a vis* the carrier employed to perform the line haul transportation. See *Chicago, Milwaukee, St.P. & P.R.R. Co.* v. *Acme Fast Freight Inc.*, 336 U.S. 465; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Forwarder Volume Commodity Rates Between Chicago and New York*, 308 I.C.C. 455, 461 (1959). Accordingly, they must be treated by the railroads the same as any other shipper. *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235. On the other hand, the railroads may not *prefer* freight forwarders to other shippers by entering into through route-joint rate arrangements that might result in divisional arrangements under which freight forwarders would in substance secure railroad transportation at rates lower than those charged other shippers. *Chicago, Milwaukee, St.P. & P.R.R. Co.* v. *Acme Fast Freight, Inc., supra*, at 478. This means, in connection with TOFC, that freight forwarders may employ Plans II, III, and IV, but they may not enter into Plan I or Plan V arrangements with railroads.

Under the "open tariff" rules, the competitive relationship between motor carriers and freight forwarders would be seriously disrupted. The motor carriers would be able to use Plans II, III, and IV, as would the freight forwarders. But the freight forwarders, like other shippers, would *not* be able to enter into Plan I and Plan V arrangements.

Yet another strange result of the rules arises in relation

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[19] The Government admits the facts, but denies that there is anything incongruous about them (Br. 62 n. 39). The Government's argument, however, simply defies analysis.

to a portion of the *New Haven* decision that the Commission did not discard. In *New Haven*, the Commission held that a railroad engaging in Plan I or Plan V service with some motor carriers could refuse to establish comparable arrangements with other motor carriers because section 3(4) of the Act, 49 U.S.C. 3(4), respecting discrimination by railroads among connecting carriers, does not apply to motor carriers. 293 I.C.C., at 105. Thus, under the new rules, railroads may treat one motor carrier differently than another, but, says the Government, they may not treat shippers as a group more favorably than motor carriers as a group. Surely the Congress could not have intended that the railroads be free to "discriminate" among competing motor carriers but not between non-competing truckers and shippers.

None of these results of the "open tariff" rules can be harmonized with the Government's notion that the anti-discrimination provisions of the Act forbid any consideration of the character of the "shipper." If the Government were correct, the railroads could not treat motor carriers better than shippers; yet they would be free to do so under the rules that the Government seeks to sustain. More significantly, the railroads could not treat motor carriers better than their competitors the freight forwarders; yet they would be free to do so under the rules. They could not treat one motor carrier better than another; yet, once again, they would be free to do so under the rules. Since these results of the "open tariff" rules do not square with the Government's simplistic view of section 2 any better than they do with common sense, there is good reason to suppose that the Government's construction of section 2 is unsound as a matter of law. As we now demonstrate, it is.

b. The Government has not cited a single decision that

holds that section 2 requires that carriers treat competing carriers in the same fashion that they treat customers. The Government could not cite any such decision, for an unbroken line of authority is to the contrary. In the *New Haven* case, the Commission was faced with the question whether a railroad having joint TOFC arrangements with some motor common carriers could refuse to offer comparable service to contract carriers, private carriers (shippers), or freight forwarders. The Commission rejected the shippers' contention that sections 2 and 3(1) require equality of treatment as between shippers and motor carriers in the offering of TOFC service. As the Commission phrased it:

> "The shipper interests contend that the provisions of sections 2 and 3(1) . . . preclude the railroads from confining this service to the motor common carriers. In our view, however, those provisions are applicable only to those who stand, as to the railroad, in the relation of shippers." 293 I.C.C., at 110.

This construction of the scope of section 2 was consistent with all other decisions that we have been able to discover. See *Consolidated Mining & S. Co. of Canada* v. *N.Y. Central R.R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Sioux City & N.O. Barge Lines, Inc.*, v. *Chicago & N.W. Ry. Co.*, 303 I.C.C. 537, 562 (1958); *Federal Barge Lines, Inc.* v. *Alton & S.R.*, 303 I.C.C. 669, 679 (1938); *Eastern Central M. Carriers Ass'n* v. *Baltimore & O.R. Co.*, 314 I.C.C. 5, 50 (1961), *aff'd sub nom. Cooper-Jarrett, Inc.* v. *United States*, 226 F. Supp 318, 376 U.S. 6 ("It should be observed, also, that sections 2 and 3(1) are intended to protect shippers, not competing carriers."). *Cf. Texas & Pacific Railway Co.* v. *Interstate Commerce Comm'n*, 162 U.S. 197, 219 (1896).

To these decisions must be added many more that relate to section 3 rather than to section 2. Because, as we have

pointed out, section 3 is broader in its reach, litigation under it has been more frequent than under section 2. As we show later in this brief (*infra* pp. 48-52), all of that litigation has produced a single conclusion: section 3 was not designed to protect competing motor carriers. If this is so, then the same conclusion applies to section 2, because, as this Court has stated and as the Government's brief implicitly concedes, "[T]he provisions of §§ 2, 3 and 4 of the act being in *pari materia* require harmonious construction and therefore they should not be applied so that one section destroy[s] the others. . . ." *United States* v. *Louisville & N.R.R. Co.*, 235 U.S. 314, 325-326. In short, Vice Chairman Webb was quite correct in the case at bar when he said in dissent: "The Commission's interpretation of section 2 leads to this astonishing conclusion: that 'discrimination' as between carriers, which is expressly permitted under section 3(1) and its counterpart section 216(d) [relating to discrimination by motor carriers], is condemned by section 2" (Rep. 393).

It remains to discuss the decisions cited by the Government in support of its reading of section 2. The Government says that the case "most nearly in point" is *Interstate Commerce Commission* v. *Delaware, L. & W.R.R.*, 220 U.S. 235. While that decision is certainly relevant, its real importance is that it discloses the infirmity of the Government's position. That decision, together with others we cited above (*supra*, p. 41), establishes that under existing legislation a freight forwarder is *always* to be treated by railroads as a shipper, although it is a carrier to its patrons. The consequence is that it must always pay the same rates as other shippers and can never enter into joint rate arrangements with the railroads. But, as we have already pointed out (*supra*, p. 41), if that be so then the "open tariff" rules would actually *permit* discrimination between

motor carriers and freight forwarders; for motor carriers could take their choice between "open tariffs" or Plan I or Plan V arrangements where available, whereas the freight forwarders would be confined to "open tariffs." Since the Government's reading of the *Delaware, L. & W.R.R.* decision produces such an inequitable result, it is likely that the Government's reading is wrong. It is.

In *Delaware,* the railroads argued that they could deny carload rates to forwarders proffering consolidated shipments on the ground that, if the shipment be considered in terms of the ownership of its components, it would consist of a number of less-than-carload lots. This effort of the railroads to fix charges on the basis of a wholly conceptual division of a single physical shipment according to the real ownership of its components was rejected by the Commission and the Court. In the case at bar, however, the right of the railroads to deny TOFC service to motor carriers does not turn upon the "mere circumstance"—to use the Court's phrase in *Delaware*—that the motor carrier does not own the freight. Rather, the railroads refuse "open tariff" TOFC service to motor carriers for the quite different—and as we show later quite sound—reason that otherwise the motor carriers would be enabled to better their competitive position *vis a vis* the railroads by capitalizing on the inherent cost advantages of railroad transportation. Moreover, freight forwarders have always been regarded as "conventional shippers," to use the Government's term. See *supra p.* 41. Accordingly, a decision which requires that they be treated the same as other shippers can hardly be taken as authority for the proposition that motor carriers, who have never been regarded as "conventional shippers," should receive like treatment.

What the Government has not cited, and what it cannot cite, is a single decision holding that section 2 requires

motor carriers to be given the same services and rates as shippers or freight forwarders.[20] In point of fact, when the question of equal treatment as between motor carriers and freight forwarders has been put to the Commission, it has held that there is a significant difference between them. Thus, in the *New Haven* case, at the same time that the Commission held that railroads had to permit forwarders to use TOFC service available to other shippers, it also held that railroads did *not* have to offer forwarders the same TOFC service available under joint rate arrangements with motor carriers. See also *Advancing Freight Forwarder Charges*, 281 I.C.C. 1, 5 (1951), where the Commission held that railroads did not have to treat freight forwarders and carriers alike with respect to assessment of a fee for certain services in connection with the collection of charges.

Apart from *Delaware*, the other decisions cited by the Government are of the most distant relevance, since they deal only with discrimination between "conventional shippers" and not with whether motor carrier competitors of railroads are entitled to claim section 2 rights against the railroads. Thus, for example, in *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144, 166, the Court reaffirmed its holding in *Wight* v. *United States*, 167 U.S. 512, that a railroad cannot justify a rate discrimination among shippers on the ground that, in the case of the favored shipper, it was merely matching a low rate of a competing carrier. It was in this sense that the Court stated,

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[20] Of course a carrier may legitimately act as a shipper in tendering its own goods or equipment to another carrier for transportation; and in such a case the anti-discrimination provisions of the Act naturally require that, as to such a movement, the tendering carrier be treated simply as a shipper. This was the situation in the decision cited by the Commission (Rep. 336), *Louisville & Nashville R.R. Co.* v. *United States*, 282 U.S. 740, where the railroads tendered their private cars to other railroads for transportation, not to fulfill any transportation contract with another shipper, but only on the shipper-railroad's own account.

"The phrase 'under substantially similar circumstances and conditions' . . . refers to the matter of carriage, and does not include competition between rival routes." 168 U.S., at 166. The Court's statement respecting the irrelevance of competition between two carriers for a shipper's traffic as a justification for *favoring that shipper over other shippers* can hardly control where the question is the propriety of *favoring all shippers over the competing carrier.* It is one thing to say that *a shipper* should not be discriminated against because of competition between carriers, and it is quite another to say that the *competing carrier* should not be "discriminated" against. In the one case, the victim of the discrimination—the shipper—has nothing to do with the competition between the contending carriers; in the other, the "victim" of the discrimination—the competing carrier—has everything to do with the competition and should not be heard to complain that he does not have the same rights as the shipper.

For the sake of completeness, we add that even the law of discrimination between shippers is not nearly as clear as the Government claims. It simply cannot be said that "[i]t is irrelevant in such cases that the discrimination is required to meet competition" (Br. 32). Thus, in *Texas & Pacific Railway Co.* v. *Interstate Commerce Comm'n,* 162 U.S. 197—a decision receiving a "but cf." citation from the Government (Br. 29 n. 18)—this Court held that under section 2 the competition of water carriers warranted the railroads in maintaining lower rates for the transportation of shipments that originated outside the country than for shipments that originated within the country. Moreover, in a series of recent decisions which are certainly well known and widely discussed in the transportation industry, the Commission has applied the *Texas & Pacific* principle to justify under section 2 rate differentials designed by the carriers to better their competitive position. See *Coal to*

New York Harbor Area, 311 I.C.C. 355 (1960); *Coal from Ill., Ind., and Ky. to Illinois and Indiana*, 308 I.C.C. 673, 678 (1959); *Reduced Rates on Coal from the East to the Northwest*, 292 I.C.C. 119, 137 (1954); *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 394 (1958), *aff'd*, 166 F. Supp. 96.

In sum, the only statutory authority mentioned by the Commission in support of its rules, section 2 of the Act, is inapplicable both because it is restricted to discrimination in terms of compensation and because it does not require equal treatment of shippers and motor carriers. Moreover, as we show next, even if the other section now relied upon by the Government for the first time, section 3, could be considered, it too would not justify the rules.

B. SECTION 3 IS INAPPLICABLE

The Government urges that section 3(1) of the Act, 49 U.S.C. 3(1),[21] sustains the validity of the "open tariff" rules. The Government does not suggest why, if its construction of section 3(1) is correct, the Commission failed to rely upon that section in its Report. As we have pointed out, since rate discrimination is not in issue, it would have been much more appropriate for the Commission to have cited section 3(1) rather than section 2. The explanation is clear enough: The Commission did not mention section 3(1) because it did not share the Government's present

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[21] "(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

view of the reach of that provision, probably because by its own terms section 3(1) "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The Government attempts to avoid the impact of this proviso to section 3(1) by relying upon legislative history which it says establishes that "The sole purpose of the proviso . . . was to make clear that a railroad had no standing to complain that it was unreasonably prejudiced or disadvantaged because a competing motor carrier was charging a lower rate" (Br. 37). We deal in a moment with that legislative history, which supports our position rather than the Government's. At the outset, however, we note that there is no warrant for going behind the language of the proviso, for that language is perfectly clear. When the Congress says that the anti-discrimination provision "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description," there is no basis for adding, "but only where the discrimination, prejudice, or disadvantage consists of one carrier's undercutting another carrier's rates and not where the discrimination takes any other form." As written, the proviso clearly applies here: The complaint is that the refusal of the railroads to permit truckers the use of TOFC service which is available to shippers is discriminatory. That is a claim of "discrimination, prejudice, or disadvantage to the traffic of [another] carrier," and consequently is the type of "discrimination" that the Congress excluded from the scope of section 3(1).

The only item of legislative history cited—but not quoted—by the Government is a statement of Senator Wheeler in explanation of a proviso in section 216(d) of the Motor Carrier Act of 1935, 49 U.S.C. 316(d). The proviso to section 3(1) was added in 1940, and it was, as the Government says, evidently borrowed *verbatim* from section 216(d).

Senator Wheeler's remarks are set out in full in the margin.[22] He did say, as the Government suggests, that the proviso was "added to meet the objection . . . that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage." But, while such "objections" may have been the particular reason that prompted the Congress to add the proviso, the Congress certainly did not draft the proviso so as to deal merely with that single sort of "discrimination."

Moreover, Senator Wheeler immediately added, with respect to the fear of some that section 216(d) could be given a construction that would permit railroads to claim rate discrimination by motor carriers: "This contention is not well founded in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons. However, . . to make assurance double sure, this provision was added."

Thus Senator Wheeler thought that section 3(1) simply

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[22] "Paragraph (b) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The Committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.

"In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.

"This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage. *This contention is not well founded in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since* 1887, *and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons.* However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5856. (Emphasis supplied.)

could not, under well established precedent, be called into service by a carrier, because it protected only a carrier's "patrons." We submit that there could hardly be a clearer expression of intent both that the proviso was designed to do exactly what it says—*i.e.*, to exempt broadly from coverage the relations between carriers—and that this design was based upon the understanding that, so construed, the proviso reflected existing law under section 3(1).

Senator Wheeler's understanding of existing law, furthermore, was quite correct. In a long line of cases prior to the 1935 legislation, the Commission had held that "a situation of prejudice or preference between common carriers is not comprehended by the provisions of section 3(1)." *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, 774 (1932). Moreover, a number of those cases involved facts quite similar to those in the case at bar. Thus, in *Quanah, A. & P. Ry. Co.* v. *A., T. & S.F. Ry. Co.*, 205 I.C.C. 253 (1934), which involved a claim of discrimination by virtue of one carrier's refusal to join with another in providing a service, the Commission found no violation of section 3(1) because the provision "applies only to shippers and receivers of freight." *Id.*, at 261. Similarly, in *Nicholson Universal S.S. Co.* v. *Pennsylvania R.R. Co.*, 203 I.C.C. 637, 647 (1934), the Commission held section 3(1) inapplicable to a complaint by a water carrier that rail carriers had refused to enter into through routes and joint rates with it on the same basis as they had with competing water carriers. In *Hoboken Manfacturers' R.R. Co.* v. *Abilene & S. Ry. Co.*, 248 I.C.C. 109, 119 (1941), the Commission rejected a railroad's contention based on section 3(1) that the respondent railroads had refused to furnish the complainant with certain equipment that it was furnishing to other carriers. And in *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell T. Co.*, *supra*, decided when telephone companies were subject

to regulation by the Interstate Commerce Commission, the Commission held section 3(1) inapplicable to a complaint that the respondent refused to allow the complainant to use its toll lines while permitting another telephone company to use its lines.[22]

These decision, together with others such as *New Haven*, already cited in connection with our discussion of section 2 (*supra*, pp. 42-44), establish that neither section 3(1) nor section 2 would have been applicable in the case at bar prior to the enactment of the section 3(1) proviso. Since the legislative history indisputably discloses that the Congress intended the proviso to be read in the light of those prior decisions, the proviso should be given its literal meaning. Under that meaning it is, as Senator Wheeler put it, "double sure" that section 3(1) does not govern relations between carriers. Moreover, since, as we have also indicated, section 2 must be construed in the light of section 3, the proviso to section 3 reinforces our view respecting the inapplicability of section 2.

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[22] See also *Kansas City S. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I.C.C. 291, 296 (1935); *Oregon Short-Line & U.N. Ry. Co.* v. *No. Pacific R. Co.*, 61 Fed. 158, 159-160 (9th Cir. 1894).

For similar decisions after the addition of the proviso to section 3(1) in 1940, see *Chicago, Milwaukee, St. P. & P. R.R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 456 (1957), *aff'd*, 182 F.Supp. 81 (E.D. Wis.), 366 U.S. 745; *Denver & Rio Grande Western R.R. Co.* v. *Union Pacific R.R. Co.*, 287 I.C.C. 611, 619 (1953), *aff'd* 351 U.S. 321; *Atlantic Coast Line R.R. Co.* v. *Southern Rwy. Co.*, 302 I.C.C. 711, 716 (1958); *Consolidated Mining & S. Co. of Canada* v. *N.Y. Central R.R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557, 560 (1939).

And for similar decisions under the discrimination and prejudice section of the Motor Carrier Act, see *Freight, All Kinds, Chicago & I.H.B. Ind., Mich., Ohio*, 322 I.C.C. 423, 427 (1964); *Proportional Rates Between Harrisburg, Pa., and Points in Penna.*, 315 I.C.C. 499, 503 (1962); *Commodities Between Illinois, Kansas and Missouri*, 31 M.C.C. 323, 325-326 (1941); *Fort Smith & Western Ry. Co.* v. *Atchison T. & S.F. Ry. Co.*, 216 I.C.C. 411, 432 (1936).

C. SECTION 1(4) IS INAPPLICABLE

The Government also attempts to tie the first clause of section 1(4) of the Act, 49 U.S.C. 1(4),[24] into the package of anti-discrimination provisions upon which it relies. Once again, the Commission did not cite that provision, and with good reason. To the extent the Report reveals the Commission's purpose in promulgating the "open tariff" rules, that purpose was related in some way to discrimination, as the Government says. But it is sections 2 and 3 of the Act that regulate discrimination, not section 1(4), and none of the decisions cited by the Government indicate the contrary. The office of section 1(4) is to fix the carrier's more general duty to afford reasonable service. A typical section 1(4) question would be whether railroads are obliged to furnish oil tank cars. See, *e.g., United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208. As to TOFC service, a section 1(4) question might be whether the railroads are obliged to purchase more equipment so that the service could be instituted between additional points. But the only issue in the case at bar is whether the railroads must treat motor carriers precisely the same as shippers. That is a discrimination question, not a section 1(4) question; and if we are correct in our view that neither section 2 nor 3 imposes such an obligation upon railroads, then it is inconceivable that section 1(4) would.

The Commission may well have had an additional reason for not relying upon section 1(4): the only remedy for a violation of that section is in the courts, not in the Commission. Thus, in *Wells & Son* v. *Chicago, B. & Q. R. Co.*, 161 I.C.C. 145 (1930), the Commission concluded that it

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[24] "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor. . . ."

could not provide relief even though it was of the view that the defendant's conduct contravened section 1(4). The Commission stated:

> "Paragraph (4) of section 1 . . . makes it the duty of every carrier to provide and furnish transportation upon reasonable request. In *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, the court held that this commission has no jurisdiction to enforce by order the duty provided in said paragraph, and that the remedy for a failure to perform said duty lies in the courts.
>
> "Upon consideration of the evidence we . . . find that the defendant's tariff herein named requires it to perform the switching service requested by the complainants, and that the refusal of the defendant to perform such service in accordance with the said tariff is a violation of its tariff and of its duty under section 1, paragraph (4) of the act. We conclude, however, that this commission is without jurisdiction to prescribe a remedy for either of said violations." *Id.*, at 148-149.

Accord, *Oliver Manufacturing Supply Co.* v. *Reading Co.*, 297 I.C.C. 654, 658 (1956); *Jacksonville Port Terminal Operators Association* v. *A. T. & N. R. Corp.*, 263 I.C.C. 111, 116-117 (1945); *Joseph A. Goddard Realty Co.* v. *New York, C & St. L.R. Co.*, 229 I.C.C. 497, 502 (1938); *Hines* v. *Henaghan*, 265 Fed. 831 (4th Cir. 1920); *Baird Bros.* v. *Mpls. & St. L.R. Co.*, 181 Ia. 1104, 165 N.W. 412, 418 (1917); cf. *Louisville & Nashville R.R. Co.* v. *Cook Brewing Co.*, 223 U.S. 70.[25]

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[25] This is not a principle the Commission has applied consistently in practice. Thus, in *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139 (1945), one of the cases in which the Commission held that a motor carrier could not utilize as a shipper the "open tariff" TOFC services of a railroad, the section 1(4) claim of the motor carrier was decided on

III. THE COMMISSION'S RULES ARE INCOMPATIBLE WITH VARIOUS PROVISIONS OF THE STATUTE.

Not only is there no affirmative support in the statute for the "open tariff" rules, but a number of provisions of the Act are incompatible with those rules. Fundamentally, the infirmity of the rules, viewed from this aspect, stems from the Commission's erroneous determination that a motor carrier may be treated as both a carrier and a shipper with respect to the same movement. The product of this determination, the "open tariff" rules, conflicts with the statutory provisions delineating the operating authority of motor carriers—particularly when considered together with the through route-joint rate provisions of the statute—as well as the provisions regulating freight forwarding.

A. *The Commission's Rules Undermine The Operating Authority And Through Route-Joint Rate Provisions Of The Act.*

An unexceptionable method of providing coordinated motor-rail TOFC service is the establishment of through routes and joint rates. However, under section 216(c) of

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the merits rather than dismissed. See also *New York Central Railroad Co.* v. *United States*, 201 F.Supp. 958 (S.D.N.Y. 1962), *vacated*, 371 U.S. 805, where the court held that the Commission did have jurisdiction under sections 1(4) and 1(6) to annul an embargo of a carrier. And the Commission, as some of the cases cited in the text indicate, feels free to base an order on section 1(4) where the order is also grounded upon other provisions, normally section 2 or 3. See also in this connection *Trojan Scrap Iron Corp.* v. *Boston & M.R.*, 270 I.C.C. 727, 729-30 (1948), where the Commission appeared to take the position that it could enter an order under section 1(4) in circumstances where the carrier would not be required to add extra equipment. In *Trojan*, however, the order was also based upon section 3, so that, under the general rule expressed in the cases cited in the text, the Commission was free to refer to section 1(4). At any rate, the point is that the rule with respect to the Commission's want of jurisdiction over a section 1(4) claim, unless the claim is also supported by provisions such as section 2 or 3, has been plainly and repeatedly stated by the Commission in decisions that have never been overruled; and especially in such circumstances the Court should not consider in support of the rules this provision that was not cited by the Commission.

the Act, 49 U.S.C. 316(c), through route and joint rate arrangements must be voluntary. The Government maintains that the "open tariff" rules would not result in the establishment of through routes, and that in any event the rules do not involve compulsion. The other railroad appellees disagree with the Government on both counts—they maintain that the rules would establish compulsory through routes.

We take an intermediate position. We do not ask the Court to determine whether in fact the "open tariffs" would result in the establishment of through routes. In our view, if the "open tariff" rules do *not* involve through routes, they are certainly invalid, because the through route provision is the exclusive method under the Act for coordination of rail and motor carrier service. And even if we are wrong about that, it is still not necessary to decide whether the rules would produce through routes, since the Commission did not dispute that through routes would result, but held only that there would be no compulsion; and as to this, the Commission erred. Finally, in any event the Commission's Report is so obscure with respect to the question of through routes that the Government's contention that the "open tariffs" would not produce through routes cannot be accepted.

1. *The through route section is the exclusive provision for coordination of rail-motor services.* The plain implication of the through route provision is, as the District Court held, that "[T]he through route permitted by Section 216 (c) is the exclusive statutory authority for the use of rail transportation by motor carriers . . ." (R. 35). The Congress having committed the establishment of joint motor-rail service to the choice of the parties in through route arrangements, there is no room for the establishment of such service by any other means. As this Court stated in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60,

72: "The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers." See also *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (S.D.N.Y. 1940), *aff'd,* 309 U.S. 638.

This decision of the Congress not to empower the Commission to compel the establishment of through motor-rail routes and joint rates may be thought unwise. The Commission has so concluded. It has frequently urged the Congress to change its mind, but to no avail.[26] Particularly in such circumstances, we suggest, the Court is entitled to view with skepticism the Commission's newly discovered source of authority to accomplish coordination outside the restrictions of the through route-joint rate provisions.

There is another policy consideration involved here quite apart from the Congress' decision to leave motor-rail relations to the negotiation of the parties. Under the through route provisions, 49 U.S.C. 317(a), 906(a), carriers must comply with specific requirements respecting the filing of tariffs. While the Commission's rules purport to supply equivalent protection to shippers where motor carriers use "open tariff" TOFC service, the Congress did not intend that this protection be granted or withheld in the discretion of the Commision. In this case the protection may be adequate; in the next it may not. Under the Commission's approach, there will be no statutory test.

Entirely apart from section 216(c), the fundamental structure of the Act evidences the Congressional intent that, absent some statutory exception, motor carriers are author-

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[26] See the Commission's 80th Annual Report (1966) p. 127; 77th Annual Report (1963) p. 19; 76th Annual Report (1962) p. 201; and 75th Annual Report (1961) p. 186. Bills to amend the Act were introduced but were not passed. S. 3510 and H.R. 12362, 87th Congress, and S. 676 and H.R. 2088, 88th Congress.

ized only to operate by motor vehicle upon the highways and are not free to act as if they were shippers and arrange for the transportation of freight by rail. In the various parts of the Act, Congress has subjected the different modes of transportation to a comprehensive pattern of regulation and has defined the type of service to be performed by each mode. The plain implication is that each mode may act only within the scope of the Congressional grant of authority. Thus, in the case at hand, the motor carriers, in proposing to use rail "open tariffs" to transport freight, must establish that they will be engaged in the service they are authorized to perform as motor carriers. There is no dispute as to this basic principle, nor could there be, since Rule 3 itself indicates that the premise of the rules is that, in hiring the railroads to perform TOFC service, the motor carriers would be engaged "in the performance of all or [a] portion of their authorized service."

But it is clear that, in acting as shippers in tendering freight to railroads, the motor carriers would *not* be performing "their authorized service" but rather would be avoiding such service, since the Congress has empowered motor carriers only to transport freight in motor vehicles and over the public highways. Thus, for example, "common carrier by motor vehicle" is defined as "any person which holds itself out to the general public to engage in . . . transportation by motor vehicle . . ." 49 U.S.C. 303(a)(14). And "motor vehicle" is defined as any "trailer, or semitrailer . . . used upon the highways . . . but does not include any vehicle . . . operated exclusively on a rail or rails." 49 U.S.C. 303(a)(13).

The District Court, relying upon these and cognate provisions in Part II, as well as upon the general statutory scheme, held:

> "The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority con-

> ferred on the carrier. Each mode of transportation is the subject of a separate formal part of the Act: Part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highway.' (R. 30-31).

This holding of the District Court—that in the absence of a through route arrangement the type of "coordination" envisioned by the rules is improper—is, as the court noted, "supported and confirmed by the consistent and repeated decisions of the Commission and the courts" (R. 37). In *Substituted Freight Service*, 232 I.C.C. 683, 690 (1939), the Commission held that a motor carrier could not, acting as a shipper, lawfully substitute rail service for its authorized highway service in the absence of a valid joint rate through route, because to do so would be "repugnant to the Act." We say that this was a holding; the Government says it was *dictum* (Br. 55). But it is bootless to debate the matter, since the principle announced in *Substituted Freight Service* was consistently adhered to in subsequent opinions through the *New Haven* decision in 1954 down to *Ex Parte 230*.[27]

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[27] In addition to *New Haven*, see *Greer Broker Application*, 23 M.C.C. 417 (1940); *Stone's Express, Inc. Common Carrier Application*, 32 M.C.C. 525 (1942); *Ringsby Trucklines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139 (1945); *Savage Application*, 265 I.C.C. 157 (1947); *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157, 164 (1954).

As to judicial decisions, the lower court cited *Acme Fast Freight, Inc.*, v. *United States*, 30 F. Supp. 968 (S.D. N.Y. 1940), *aff'd*, 309 U.S. 638, and *Ready Truck Lines, Inc.* v. *United States*, 42 F. Supp. 970 (N.D. Ill. 1941), *aff'd*, 314 U.S. 580. As the court stated, "The relevant premise of [these] decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad (R. 38-39). See also *Andrews Van Lines, Inc.* v. *United States*, 240 F. Supp. 763 (D. Neb. 1965), *aff'd*, 382 U.S. 67; *Moore* v. *United States*, 41 F. Supp. 786 (D. Minn. 1941), *aff'd*, 316 U.S. 642; and *Kline* v. *United States*, 41 F. Supp. 577 (D. Neb. 1941). In its motion to affirm in *Andrews Van Lines* (pp. 4-5), the Government correctly stated: "Plainly the statute did not intend to treat carriage by ship, plane, or train as carriage by motor vehicle." It follows that a motor carrier which employs rail TOFC service to substitute for motor carriage in the absence of a valid through route arrangement is not performing its authorized service.

2. *Even if the through route provisions are not exclusive, the joint service here involved is illegal because it is involuntary.* Even if the Court were to accept the Government's contention that a joint motor-rail service may be performed without the establishment of through routes, the case should still be decided against the Government without reaching the question whether the rules would actually result in the establishment of through routes. The only point of determining whether through routes are involved would be to determine whether it would be necessary to reach the further question whether the service would be compelled by the rules rather than voluntary, since through routes between motor carriers and railroads must be volun-

tary. But, if the same principle of voluntariness applies to the joint service here involved even assuming that service does *not* involve through routes, then the question is the same as if through routes were involved, namely, whether there is compulsion. Stated otherwise, even assuming that through routes are not the exclusive method for establishing joint motor-rail service and that the service here involved would not result in through routes, the Government cannot prevail unless it can also establish that either (a) this joint service, as opposed to through route service, *may* be compelled by the Commission, or (b) the rules would *not* compel such joint service.

As we now show, (a) this joint service cannot properly be compelled; and (b) the Government's effort to demonstrate that the service is in fact not compelled by the rules is unpersuasive.

a. Whether or not the motor-rail service contemplated by the rules would amount to a through route service, it obviously would afford substantially the same advantages to the motor carriers. That is, just as in the case of a through route, the motor carrier could offer the shipper transportation partly by motor and partly by rail on a single bill of lading without the shipper's being required to intervene to transfer lading at any point between origin and destination. We submit that the Congress, in committing to the discretion of the carriers the question whether through routes should be established between motor carriers and railroads, foreclosed the Commission from compelling the establishment of a joint service of the sort here involved against the will of the railroads.

There is no case law directly in point, since the well established law, as we have indicated, is that joint service requires the establishment of a through route, which, of course, must be voluntary. But in any event the Government cannot maintain that the joint service to be established under the

rules could be compelled by the Commission, since the Commission itself did not adopt such a view. Rather, the Commission stated, in response to the argument that the rules would compel through routes, simply that the rules "would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it" (Rep. 335). And again, later in its decision the Commission conceded that it "is without power to require a rail carrier to provide TOFC service jointly with motor carriers . . ." (Rep. 377).

b. The remaining question, then, is whether the joint service would be compelled by the rules within the meaning of the statutory prohibition. The Commission's disingenuous answer is, as we have noted, that there would be no compulsion because, instead of performing the TOFC service for motor carriers, the railroads could stop performing it for shippers. This argument might be meaningful were the "alternative" meaningful. But it is simply fanciful to say that there is no compulsion here because the railroads may, if they choose, surrender their multimillion dollar investment in TOFC.

The fallacy of the Commission's position is, perhaps, even plainer if the principle of the rules is carried over to other transportation services. The approach adopted by the Commission respecting "open tariffs" can hardly be confined to TOFC service. If the rules are upheld the result will be that every carrier of every description will be entitled to use, as a shipper, every service of every other carrier. In order to prevent this, a carrier would have to cease operations altogether. Such an "alternative" can hardly evidence "voluntariness."

In sum, whether or not the establishment of a through route is the exclusive method of performing the type of joint motor-rail service here involved, and whether or not that service involves through routes, the Commission still

cannot compel the railroads to participate in such service, and the rules would result in such compulsion. In consequence, the rules are beyond the authority of the Commission.

3. *In any event, the Rules cannot be upheld on the ground that they would not involve through routes, because the Commission's report provides no adequate basis for such a determination.* If what we have said up to now is wrong, the Government still should not prevail because its contention that the "open tariff" rules would not result in the establishment of through routes has no decent foundation in the report.

It is clear enough from the briefs of the other parties that the question whether a particular transportation service does or does not involve through routes is often exceedingly complex. However, we suggest that the Court need not pursue the matter. On the basis of the Commission's report only two conclusions are possible: Either it must be assumed *arguendo* that the "open tariffs" would result in through routes, or it must be concluded that the Commission's discussion of the matter is so hopelessly ambiguous that the case should be remanded. The relevant considerations are as follows:

a. While at one point in the Report (p. 355) the Commission indicated that the services to be provided under the Rules would not involve through routes, in the critical portions of the Report in which the Commission dealt with the question of compulsory through routes, the Commission, as the lower court observed, "did not dispute . . . that requiring railroads to offer open-tariff TOFC service to motor carriers would amount to establishing compulsory *de facto* through routes. The Commission avoided the argument . . . by concluding that no compulsion was involved in its Rules" (R. 32; Rep. 334-335). Accordingly, once

again the Government is attempting to defend the rules upon a basis quite different than that relied upon by the Commission.

b. The Commission held that Plan I arrangements were valid through route agreements (Rep. 342-343). But there is no possible basis for distinguishing Plan I arrangements from the service that would be performed under the "open tariff" rules. As the lower court pointed out, "The operative features of that Plan [I] are identical with the TOFC service contemplated by the Commission's newly promulgated Rule 3. In each case the motor carrier has the option, subject to the shipper's veto, to employ substituted rail service or to haul the trailers over the highway. The shipper pays the motor carrier's rates upon motor carrier bills, and the motor carrier is subject to limits on circuity and points of service. The only difference between the two schemes is the railroad's consent under existing Plan I" (R. 34). Accordingly, if Plan I involves through routes, so does "open tariff" service—or at the least the Commission should be required to state why it does not.

c. At this point it seems desirable to describe briefly the litigation pending in a three-judge court in the Northern District of Texas respecting Plan I,[28] since the Government's contention respecting the absence of through routes under "open tariffs" is squarely contrary to the argument it has made in that court respecting Plan I. In Texas, these appellees, the Southern Railway System, have joined the freight forwarders in attacking the validity of Plan I on the ground that it does not involve a genuine through route-joint rate arrangement. The Commission and the United States have been joined by a number of railroads and by the motor carrier appellants in defense of Plan I.

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[28] *Lone Star Package Car Co. v. United States* (Civ. No. 4-355).

While the arguments made on both sides in Dallas are complex, one contention that was advanced by the plaintiffs is particularly pertinent here in view of the Government's brief in this Court. In Dallas, the plaintiffs maintain that one of the principal reasons for the invalidity of Plan I under the through route provisions of the Act is that the shipper under that Plan does not have the right to demand the motor-rail service; he can only veto it. The United States and the Commission, however, urged that that consideration is irrelevant to the through route question. That is the Government's position in Dallas. In this Court, however, the Government states: " '[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service.' . . . In open-tariff service . . . [t]here is no holding out by the railroad of service; [footnote as follows:] The shipper is merely advised that, unless he stipulates to the contrary, the motor carrier may, at its option, substitute open-tariff rail piggyback service for a portion of the freight movement" (Br. 60-61). The contradiction is flat and goes to the heart of the through route issue both in this Court and in Dallas.

We do not suggest that this Court resolve the contradiction. We had hoped that the Dallas case, which was argued on November 5, 1965, would have been ripe for review by this Court together with the case at bar. However, the Dallas court seems to be holding the case there until this Court disposes of the "open tariff" question. Doubtless this Court's decision may have a marked impact on the Dallas case. If this Court reaches the issue and holds that the "open tariff" rules would, or would not, produce through routes, the Plan I litigation may be at an end.

What we do suggest is that the Government should not be permitted to defend the rules on the ground that they would not involve through routes when (1) the Commission

assumed *arguendo* that they would involve through routes; (2) the Commission's determination that Plan I does involve through routes is not compatible with a determination that "open tariffs" would not; and (3) the Government advances in this Court a rationale in defense of "open tariffs" that is incompatible with its argument in Dallas in defense of Plan I. At the least, in such circumstances the case should be remanded to the Commission under the *Chenery* principle.

B. *The Rules Would Permit Motor Carriers To Engage In Freight Forwarding, Contrary To The Provisions Of Part IV Of The Act.*

The Government states that "[t]he railroad appellees do not join in" the argument respecting the freight forwarder provisions of the Act. This prediction cannot have been based upon our briefs in the lower court, where we supported the freight forwarder appellees without reservation.[29] At any rate, we reaffirm our support of the argument made in the separate brief of the freight forwarder appellees.[30]

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[29] Nor did we intend to reverse our position in our Motion to Affirm in this Court, where, for purposes of economy of presentation, we stated: "We do not in this motion discuss another independent ground upon which the District Court rested its judgment—that the rules are invalid because . . . they permit motor carriers to act as freight forwarders. This issue is thoroughly discussed in the motion to affirm filed by the freight forwarders." It is difficult for us to perceive how the Government could have been led by this statement to believe that we had abandoned an argument that we had pressed upon the District Court.

[30] We do so, moreover, without sharing the concern of the Government that if that argument is accepted "it would preclude the railroads from providing piggyback service to motor carriers even on terms dictated by the railroads." Putting aside the pejorative last phrase of this assertion, we do not really understand what the Government is saying. Neither the freight forwarders nor the railroads contend that there is anything illegal about joint rate TOFC arrangements that qualify as genuine through route agreements under the statute. As we have already pointed out

We do not wish, in this brief, to duplicate the brief of the freight forwarders, who explore this issue at length. We merely stress several points that appear to us to be particularly salient:

1. The permit provisions of Part IV, 49 U.S.C. 1010, were obviously enacted with the idea that the Commission would regulate the number of freight forwarders in business so that destructive competition would be avoided and healthy competition encouraged. Unless the Congress contemplated that motor carriers were to be free to perform freight forwarding by virtue of their motor carrier certificates, the "open tariff" rules undercut the freight forwarder regulation provided by the Congress if they permit motor carriers to engage in freight forwarding.

2. On the face of the statute, it seems highly improbable that motor carriers are, by virtue of their motor carrier authorization, entitled to perform freight forwarding, since the Act prohibits motor carriers from securing freight forwarder permits. 10 U.S.C. 1010(c).

3. The Government's argument that "[t]here is inevitably a good deal of overlap between the functions of motor carriers and railroads, on the one hand, and freight forwarders on the other" (Br. 64) does not detract from this conclusion. All the Government says in support of this assertion is that "[s]ince a substantial number of motor carrier shipments are less than truckload, consolidation of small shipments is a very important aspect of a motor carrier's service" (*ibid.*). Of course this is true. But it has to do only with the physical matter of consolidating shipments into trailerloads for operating convenience. It is obviously to the advantage of motor carriers that their trailers be as

(*supra*, p. 41), it is well established that the Act gives motor carriers and railroads the right to enter into such agreements; it does not give freight forwarders the same right.

full as possible, since the several separate less-than-truckload shipments are charged the higher less-than-truckload rates while, with proper consolidation, the carrier's expenses for over-the-road shipment can be based on full truckloads.[31]

Under the "open tariff" rules, however, the motor carrier could do much more than simply consolidate for operating convenience. He could operate in all respects precisely as a freight forwarder. That is, (1) he could confine his activities to consolidating and breaking bulk—indeed, under Plan II he could even require the railroad to perform these services so that he would not even touch the freight—and (2) he could make his profit on the difference between the rate paid him by the shipper and the railroad's transportation charge. This is the heart of freight forwarding. "Freight forwarders consolidate less-than-carload freight into carloads for shipment by rail, truck, or water. Their charges approximate rail less-than-carload rates; their expenses and profits are derived from the spread between the carload and l.c.l. rates." *Chicago, Milwaukee, St. P. & P. R.R. Co.* v. *Acme Fast Freight, Inc.* 336 U.S. 465, 467. When a motor carrier does precisely the same thing, as it would be able to do under the "open tariff" rules, it is acting as a freight forwarder without a permit.

IV

THE "OPEN TARIFF" RULES ARE INCONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY.

The Government puts a good deal of emphasis upon the National Transportation Policy, which of course is an important guide in construing the provisions of the Act.[32]

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[31] When a motor carrier "consolidates" in this fashion, he is acting "as a carrier" within the meaning of Section 402(a)(5), 49 U.S.C. 1002(a)(5).

[32] To the extent the Government implies that this Court, in *United States*

But, as we have already indicated at some length, the factual premises for the Government's contention cannot be found in the Commission's report or in the record.

Because the Commission did not see to it that an adequate record relating to the "open tariff" rules was compiled, it is not possible to measure accurately the probable impact of the "open tariff" rules. However, the character of those rules does permit a reasoned estimate. As we now show, that estimate is that the rules would confer an unfair benefit upon the motor carriers to the ultimate disadvantage of the shipping public. Moreover, as we also show, the rules would not cure the evil practices described by the Government, even if those practices did in fact exist.

The main points in an analysis of the likely effect of the Rules are these: (1) Under the Rules, a motor carrier could not tender its shipper's freight to a railroad under a TOFC "open tariff" unless the shipper could himself tender the freight directly to the railroad for TOFC transportation. (2) Under the Rules, the shipper whose freight the trucker could ship via rail TOFC service would pay the truck rate for the movement, not the railroad TOFC rate. (3) Under the Rules, the shipper could not direct the motor carrier to use TOFC service: that choice would be left to the motor carrier subject only to a veto by the shipper—a veto which, as a practical matter, would probably seldom be exercised.

The first conclusion that seems clear enough on the basis of these considerations is that the Rules would not make available to shippers an additional TOFC service, since by hypothesis that service would already be available to them directly from the railroads.

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v. *Pennsylvania R. Co.*, 323 U.S. 612, held that the Policy can serve as a substitute for specific statutory authority, the Government is wrong. There the Court merely held that, in light of the Policy, specific sections of the Act should be construed to authorize the Commission's action. The Court concluded: "These sections provide sufficient authorization for the Commission's order." *Id.*, at 619.

If the shipping public would not gain a wider choice of service, would the Rules have an impact on rates? Very likely they would, but hardly a salutory one. By enabling the motor carriers to cast part of their legitimate costs upon the railroads, the rules probably would cause railroad rates to rise to a level higher than they would otherwise be. What would likely happen is this:

As we have indicated, once the shipper has tendered his freight to a motor carrier the choice whether to ship via TOFC will be the motor carrier's, not the shipper's. Naturally, the motor carrier will use TOFC service only when it is to its advantage. There are three obvious situations in which this might be the case. First, where the TOFC rate is lower than the motor carrier's cost of transporting the freight, the motor carrier could make money by paying the railroad to perform the transportation by TOFC rather than hauling the freight over the highway itself. In such a case the motor carrier's profit on the motor carrier rate paid to it by the shipper could be increased (or its loss decreased) simply by turning the shipment over to the railroad. Of course, a shipper who tenders freight to a trucker at a rate higher than an available TOFC rate would not be acting strictly on the basis of price; but shippers are not always motivated solely by price considerations. And, while the motor carrier which is able to sell its service in such circumstances is obviously entitled to whatever profit it can make in terms of its costs of *highway* transportation, for that carrier to increase its profit by virtue of the lower costs of *railroad* transportation hardly seems either fair or in accord with the National Transportation Policy goal of a system in which each carrier plays the role for which it is economically best suited.

There are at least two other situations in which a motor carrier might choose to utilize TOFC service rather than perform the transportation itself. Where the motor car-

rier has no return load from the point of destination to the point of origin, it would probably be able to lease a trailer for a one-way TOFC movement at a lower cost than that of its own round-trip movement. And, even absent return load considerations, the motor carrier could probably reduce its overall costs by leasing TOFC equipment for peak load (*e.g.*, weekend) movements. In both cases, the motor carrier would be shifting to the railroad part of the costs of transportation between particular points while retaining to itself its most profitable traffic. The result seems evident: In circumstances where railroad TOFC service is in fact the low cost mode of transportation, the railroads would be disabled in making use of their advantage because their trucking competitors would be artificially increasing TOFC costs. In time, economic necessity would force increases in the TOFC rates. Thus, it is plain enough that the shipping public would be harmed and that the result would hardly be in accord with the National Transportation Policy, which directs that each form of transportation be accorded the benefits and assume the burdens of its inherent advantages and disadvantages.

While these are not the only deleterious effects the railroads anticipate from the Rules, they are illustrative. Moreover, we suggest that their character—although surely not their extent—is demonstrable even without a record. We add that it is significant in this connection that *no shipper interests* supported Rules 2 and 3 before the Commission, and none support them here.

Finally, consider how ill-designed the "open tariff" rules are to deal with the problems the Government says exist—problems that all center upon the assertion that the railroads are using their control of rail TOFC to preclude motor carriers from participation in the motor carriage incidental to TOFC. Assume that to be so. The Government does not indicate how the "open tariff" rules would remedy the

situation. Under those rules, the railroads would still be free to lease equipment to shippers; they would still be free to perform door-to-door service under Plan II; they would still be free to enter into through route-joint rate arrangements with some motor carriers but not with others, and the divisions of revenue under those arrangements would not have to be related to the "open tariff" charges. Indeed, the Government itself concedes that motor carriers would not employ the "open tariff" rules "normally"—"a motor carrier will normally find it more advantageous to use its own trucks, since the out-of-pocket cost of moving freight with its own equipment is likely to be less than the cost of employing another carrier to do so at rates that reflect both the total costs of, and a profit for, the second carrier" (Br. 58).

We have indicated above situations in which this differential might occur—*e.g.*, shipments where the motor carrier does not have a return load. Unquestionably in those situations it would be helpful for motor carriers, and harmful for railroads, to operate under the "open tariff" rules. But the only way in which this can be regarded as somehow relevant to the discriminatory practices dwelt upon by the Government is as some sort of generalized punishment against the railroads.

In short, the proper remedy for the problems perceived by the Government, assuming they exist, is not the "open tariff" rules, but legislation. Both the Commission and the Administration have sought legislation, but unsuccessfully. As we have already noted (*supra*, p. 57), the Commission has frequently asked the Congress to give it authority to compel the establishment of through routes and joint rates between railroads and motor carriers, but those requests have not been granted. Also, in 1962 and 1963 the Ad-

ministration unsuccessfully proposed legislation that would have amended section 2 of the Act by adding:

> "Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated." S. 3242, H.R. 11584, 87th Cong., 2d Sess.; S. 1062, H.R. 4701, 88th Cong., 1st Sess.

Two features of this proposed legislation—besides the fact that it was not enacted—are of interest.[33] First, it reflected a recognition that, unless "service" was specifically referred to, section 2 alone would not suffice to require railroads to offer TOFC service to other carriers. Second, the proposal was limited to TOFC service, whereas the Government's view of the requirements of section 2 can hardly be so limited and accordingly would have unpredictable consequences across the entire range of transportation services. To fashion such a radical departure from precedent in a rule-making rather than in a legislative proceeding is not only bad law, but also bad policy.

Conclusion

The Commission's action in this case represents an extraordinary assumption of legislative authority. For some reason not at all disclosed by the Commission's report, the Commission evidently concluded that "open tariff" rules would be beneficial. Since no one was on adequate notice while the record was being made that such rules might be in the offing, no one attempted to demonstrate either that,

[33] The legislative history of the proposal is explored in the briefs of other appellees.

as we believe, they would be undesirable, or that, as the Government asserts, they are imperatively necessary. Bereft of a record that could support the rules on any policy ground, the Commission ambiguously suggested that section 2 of the Act might compel the rules as a matter of law. In this Court—though not in the lower court—the Government abandons the limitations of the record and claims that the railroads are out to "dominate" the motor carriage incident to TOFC, and devises additional statutory authority that it claims supports the rules. For the reasons set forth above, we submit that this effort should not succeed and that the judgment of the lower court should be affirmed.

Respectfully submitted,

FRANCIS M. SHEA,
WILLIAM H. DEMPSEY, JR.,
734 Fifteenth Street, N.W.,
Washington, D.C.

WALTER J. MYSKOWSKI,
712 Ring Building,
1200 18th Street, N.W.,
Washington 6, D.C.

W. GRAHAM CLAYTOR, JR.,
WILLIAM D. MCLEAN,
JAMES A. BISTLINE,
Southern Railway Building,
Box 1808,
Washington 13, D.C.,
Attorneys for Interveners.

Of Counsel:

SHEA & GARDNER,
734 Fifteenth Street, N.W.,
Washington, D.C.

APPENDIX

Statutes and Rules

Interstate Commerce Act, National Transportation Policy, note preceding section 1, 49 U.S.C. 1:

* * * "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act * * * shall be administered and enforced with a view to carrying out the above declaration of policy."

* * * * * * *

Interstate Commerce Act, section 1(4), 49 U.S.C. 1(4):

* * * It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable

through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

* * * * * * *

Interstate Commerce Act section 2, 49 U.S.C. 2:

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. * * *

* * * * * * *

Interstate Commerce Act, section 3(1), 49 U.S.C. 3(1):

* * * It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region,

district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * * *

Interstate Commerce Act, section 3(4), 49 U.S.C. 3(4):

* * * All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

* * * * * * *

Interstate Commerce Act, section 15(3), 49 U.S.C. 15(3):

* * * The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through

route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule cancelling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. * * *

* * * * * * *

Interstate Commerce Act, section 216(c), 49 U.S.C. 316(c):

* * * Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers party thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection, the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in con-

nection therewith shall be subject to the provisions of this chapter.

Interstate Commerce Act, section 216(d), 49 U.S.C. 316(d):

* * * All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * * *

Interstate Commerce Act, section 217(a), 49 U.S.C. 317(a):

* * * Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares,

and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

* * * * * * *

Interstate Commerce Act, section 306(a), 49 U.S.C. 906(a):

* * * Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

* * * * * * *

Interstate Commerce Act, section 402(a)(5), 49 U.S.C. 1002(a)(5):

* * * The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation

of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title.

* * * * * * *

Interstate Commerce Act, section 410(a)(1), 49 U.S.C. 1010(a)(1):

* * * No person shall engage in service subject to this chapter unless such person holds a permit, issued by the Commission, authorizing such service; except that (1) any person engaged in service subject to this chapter when this section takes effect may continue to engage in such service for a period of one hundred and eighty days thereafter without a permit, and (2) if application for a permit is made to the Commission by such person within such period, such person may, under such regulations as the Commission shall prescribe, continue to engage in such service subject to this chapter until otherwise ordered by the Commission.

* * * * * * *

Interstate Commerce Act, Act, section 410(c), 49 U.S.C. 1010(c):

* * * The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such appli-

cation shall be denied. No such permit shall be issued to any common carrier subject to chapters 1, 8, or 12 of this title; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to chapters 1, 8, or 12 of this title, shall be denied because of the relationship between such corporation and such common carrier.

* * * * * * *

Ex Parte 230 Rules 2 and 3, 49 C.F.R. 500.2, 500.3:

2. *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

3. *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(b) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(c) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(d) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract

carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(e) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

PETITION FOR REHEARING OF WESTERN AND SOUTHEASTERN RAILROADS

Appellees, Western and Southeastern Railroads named in the Appendix hereto, petition the Court for a rehearing, pursuant to Rule 58, of the second question stated by the Court, that is: "Does the Interstate Commerce Commission have authority to promulgate rules providing . . . (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service?" (Op. p. 1.)

In support of their petition these appellees respectfully state:

REASONS FOR GRANTING REHEARING

In reaching its conclusion on the second question, the Court devoted all but a small portion of its Opinion concerning the limitations on motor carrier authority to a concession said to have been involved in the argument of appellees and the reasoning of the District Court detailed below. The existence or nonexistence of this concession was not specifically briefed. While a rereading of our brief does not reveal any obvious misstatements that might have lead to misunderstanding of appellees' position, we readily recognize that our brief and argument may not have clarified and stressed the differences between procedures taken to initiate joint intermodal services and steps taken to offer open-tariff operations as much as would have been helpful in the resolution of the issues. *The position of appellees is and has been that motor carriers may not legally ship their freight-laden motor vehicles by rail, with or without railroad consent, but may only participate in a joint motor-rail service.* We respectfully request an opportunity for rehearing to establish that no other position has been conceded.

IN HOLDING AGAINST APPELLEES ON A DECISIVE ISSUE, A POSITION WAS ATTRIBUTED TO THE DISTRICT COURT AND APPELLEES WHICH THEY DID NOT TAKE.

The Court rejected (Op. pp. 15-17) our argument (Brief pp. 18-36) and the District Court's holding (244 F. Supp, pp. 964-965, 968-969) that motor carriers are required by the Interstate Commerce Act to perform their authorized service by operating motor vehicles upon the public highways, and therefore may not ship their trailers by rail under open-tariff TOFC Plans III and IV.

This is an independent and dispositive issue. If, as we contend, the Act forbids motor carriers to ship their trailers under railroad open tariffs, the question of the applicability of §§ 1(4), 2 and 3(1) of the Act, 49 U.S.C. §§ 1(4), 2 and 3(1), is not reached.

As the District Court put it:

> "Even if the Act specifically commanded the railroads to serve motor carriers and ordinary shippers without discrimination, there would remain the question whether the motor carriers could lawfully avail themselves of that service without violating their contracts with customers or exceeding the rights conferred by the certificate of public convenience and necessity which authorizes their operations. In other words, we are bound to consider the statutes regulating the operations of motor carriers as well as those imposing obligations upon the railroads." (244 F. Supp. at 964.)

In discussing this question, this Court concluded that the ". . . 'concurrence' of the railroads, where granted, permits truckers to use TOFC service not only pursuant to Plans I and V, supra, but also under Plans III and IV, the latter being open-tariff arrangements." (Op. p. 16.)

At no point have the railroads taken the position that a "concurrence" was involved in a Plan III or a Plan IV operation. Furthermore, the railroads have at no point conceded that motor carriers could lawfully utilize Plan III and Plan IV railroad open tariffs to perform their authorized motor carrier service, even with railroads' consent. (We assume that the word "appellants" appearing twice on page 16 of this Court's Opinion should be "appellees.")* We believe a careful review of our brief will establish that no such concession has been made.

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* Appellants of course would have no authority to concede away positions taken by appellee railroads, in any event.

Similarily, a review of the District Court's opinion will establish, we believe, that it in no way conceded that motor carriers could lawfully perform their authorized service by trying to make use of railroad Plan III or Plan IV open tariffs, even with railroad consent.

a. The Position of Appellees.

The railroads and the freight forwarders have contended throughout this case, and the District Court agreed, that it would be a violation of the Interstate Commerce Act for a railroad to accept a motor carrier's trailer tendered for transportation under a railroad's open tariff. The law seemed well-settled as to that, at least since the decision in 1954 in *Movement of Highway Trailers By Rail,* 293 I. C. C. 93. There the specific question was posed (pp. 104-105) whether a railroad could lawfully accept a motor carrier's trailer tendered under the railroad's open tariff. The Commission answered no, saying (p. 105):

> "[I]f the railroad is on notice that trailers tendered in this manner are being operated in common carrier service subject to Part II of the act, *it should not thus knowingly join with the motor common carrier in a violation of the law.* It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers." (Emphasis supplied.)

The railroads and freight forwarders cited and relied upon the foregoing passage in their briefs in this Court. See briefs of Western and Southeastern Railroads, p. 40; Eastern Railroads, pp. 38-39; Southern Railway, p. 11; Freight Forwarders, pp. 5, 48-49.

At no place in their briefs, or elsewhere, did the railroads and freight forwarders suggest or agree that motor

carriers may use Plans III and IV open tariffs with the consent of the railroads. That would have been inconsistent with the plainly expressed position which they espoused and to which the Commission had adhered until its decision in the case at bar.

Moreover, the appellants (the Government, and the American Trucking Associations and other motor carrier parties) made no contention or suggestion in their briefs that the appellees or the District Court were taking, or at any time had taken, the position that motor carriers could use railroad open tariffs with the consent of the railroads.

We deal below with the assertion that railroad participation in joint rate-through route operations under Plans I and V, where formal concurrences are filed to create join rates, somehow involves a concession that any kind of consent, including mere acceptance of traffic, wipes away the statutory restrictions limiting a motor carrier to the use of a motor vehicle on a public highway.

b. The Position of the District Court

The District Court specifically held that the Interstate Commerce Act in terms forbids motor carrier use of Plans III and IV, and it found no exception to this rule based on the railroads' consent. 244 F. Supp. at 964-965, 968-969. Thus, the District Court held that the Act authorizes motor carriers "to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highway.'" 244 F. Supp. at 965. Further on the same page the District Court held that the Act requires "that motor carriers shall perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception." The Court found

no statutory exception that authorized use of open-tariff Plans III and IV. These are holdings that exclude any conception that the railroads and motor carriers may lawfully agree upon the use of rail open-tariff TOFC plans. At no place in its opinion did the District Court hold or suggest that the provisions of the Act upon which it relied could be circumvented by the agreement of the railroads.

The District Court cited and relied upon (244 F. Supp. at 968) *Movement of Highway Trailers by Rail (New Haven* case*)*, 293 I.C.C. 93 (1954), and other Commission decisions which held that it is "repugnant to the Act" for a motor carrier "to act as a common carrier by motor vehicle and as a shipper by rail as to the same service." In *New Haven* it was specifically held, as we have shown above, that a railroad would be violating the Interstate Commerce Act if it accepted a motor carrier's trailer tendered for transportation under a rail open tariff, 293 I.C.C. at 105.

The Court apparently bases its appraisal of the District Court's position in substantial part upon the passage from page 967 of the latter's opinion which the Court quotes at pages 15-16. The Court emphasizes the words "without the railroad's concurrence." It should be noted that the word "concurrence" as there used in connection with § 216(c) is a term of art carrying a well defined meaning and does not represent acceptance of traffic under open tariffs from a shipper, whether an ordinary shipper or another carrier. It is the legally approved method of filing a *joint rate* with the Commission. The filing of such "concurrences" in the case of a joint motor-rail service set up under Plan I or Plan V legally invokes the authority of the motor carrier and the authority of the railroad in offering a joint service. Therefore, no violation of the authority provisions of Part II results.

Under Plans III and IV the railroad publishes a railroad tariff and there is no concurrence by the motor carrier in the rail tariff so as to create a joint rate. There is no concurrence by the railroad in any motor carrier tariff. The motor carrier independently purports to offer a shipper rail service, an illegal act since it may not use a rail car to perform its authorized service.

In Tariff Circular 20 issued by the Interstate Commerce Commission the following provision appears:

> 49 CFR § 141.0(b) Definitions. . . . (3) *Joint rate.* The term "joint rate", as used in this part, is construed to mean a rate that extends over the lines of two or more carriers and that is made by arrangement or agreement between such carriers and evidenced by concurrence or power of attorney.

Another provision specifies one of the methods for establishing the existence of a "concurrence:"

> 49 CFR § 141.19 Concurrence. (a) A carrier desiring to become a participant in a tariff or tariffs issued by another carrier (not by an agent) may do so by filing with the Commission a limited or unlimited concurrence (except as provided in § 141.18(f)) in one of the four following forms. In Forms FC2 and FC4 the limitations must be specifically and unambiguously expressed.

The "concurrence" contemplated by Section 216(c) of the Interstate Commerce Act, 49 U.S.C. § 316(c), is the formal act of assenting to and concurring in a freight tariff filed by another carrier, not the mere act of consenting to the tender of traffic by a shipper, whether an ordinary shipper or another carrier. The District Court used the term accurately in the passage quoted by the Court at pages 15-16. The passage quoted does not support a conclusion that it has provided for some sort of exception

which permits a motor carrier to make use of Plans III and IV, with or without railroad consent. Only as thus read is the sentence consistent with the holding and numerous other statements made by the District Court and referred to above.

c. Rail participation by virtue of concurrences in joint rates covering a joint rail-motor Plan I service in no way involves a concession that, absent such joint rates and a joint service, rail consent can expand a motor carrier's authority to permit it to use a rail car in performing Part II motor carrier service.

These appellees argued on brief that "The Interstate Commerce Act specifically Requires That a Motor Carrier May Perform Its Authorized Service Only By Operating Motor Vehicles Upon the Public Highways." (Brief p. 18.) That statutory requirement cannot be abrogated by railroad agreement or consent. The Act permits a motor carrier to join with a railroad in holding out a *joint service* to a shipper; it specifically does not permit a motor carrier to use a rail car to perform its authorized Part II service as a motor carrier by motor vehicle.

An important difference applicable here is that when a motor carrier and a railroad enter into TOFC Plan I or Plan V arrangements under § 216(c), they are *connecting carriers* and each carrier performs only *its own segment* of the joint service. The rail portion of the haul is rail service only; it is not motor carrier service. *Motor-Rail-Motor Traffic in East and Midwest,* 219 I. C. C. 245, 274 (1936). Hence the motor carrier is performing all of its authorized service on its own segment of the through route, which is the public highway. But TOFC Rule 3(a) authorizes motor carriers to perform "all or any portion of their authorized service through the use of open-tariff TOFC

rates published by a rail carrier." Thus in arrangements under § 216(c) the motor carrier performs its authorized service upon the public highways, while under TOFC Rule 3(a) it performs its authorized service by shipping its trailers by rail. Under Rule 3(a) the motor carrier and the railroad are not connecting carriers; instead they occupy a shipper-carrier relationship.

Hence the use of TOFC Plans I and V by the railroads, in which the motor carriers perform their portion of the joint service on the public highways, is entirely consistent with the railroads' position that Rules 2 and 3 are unlawful because they conflict with the provisions of the Interstate Commerce Act which require a motor carrier to perform its authorized service by operating motor vehicles upon the public highways.

d. Section 203(a)(13) and the other authority provisions of Part II relied upon by appellees precluded the concession attributed to appellees and the District Court.

The essential statutes here involved did not permit appellees to "concede" that motor carriers could use Plan III and Plan IV open tariffs with the consent of the railroads. The definition of a "motor vehicle" in Section 203(a)(13) states specifically that it " . . . does not include any vehicle, locomotive, or car operated exclusively on a rail or rails. . . .". The necessary consequence of that provision is that the authority granted to operate by motor vehicle specifically excludes the use of a car operated on rails.

At pages 16 and 17 the Court makes reference to the authority provisions of Part II, stating that " . . . there is no adequate reason to construe the Act so as to deprive the Commission of the power to authorize the *carriers by*

motor vehicle to use TOFC when that service is offered by railroads to the public on open tariff." (Emphasis supplied.) This conclusion is reached without referring to the language quoted above from Section 203(a)(13) that excludes a rail car from the definition of a motor vehicle.

As stated above, railroads have no power to change the statutory definition of a motor vehicle and thus have no authority to expand the authority of motor carriers so as to permit them to use rail cars as well as motor vehicles in performing their authorized service. Railroad consent, therefore, is irrelevant to the definition of motor carrier authority, since railroad consent could not empower motor carriers to do what the Act denies them the right to do.

With regard to motor carrier use of open tariffs, the only point made in the Opinion concerning construction of the authority provisions of Part II of the Act, beyond the concession attributed to the appellees and the District Court, dealt with motor carrier use of ferries (Op. pp. 16-17.) Use of a ferry does nothing to clarify whether or not a "motor vehicle" includes a rail car.*

It is the position of these appellees that the quoted provision from Section 203 (a)(13) precluded the concession attributed to appellees, is central to the determination of the issues of this proceeding, and that the parties and the transportation industry should have the Court's ruling on the bearing of this provision.

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* Moreover, "a ferry is a continuation of the highway from one side of the water over which it passes to the other. . . ." *St. Clair County* v. *Interstate Sand and Car Transfer Co.*, 192 U. S. 454, 466 (1904).

CONCLUSION

For the foreging reasons, this petition for rehearing of the second question stated by the Court should be granted.

Respectfully submitted,

THORMUND A. MILLER
AMOS M. MATHEWS
J. D. FEENEY
Attorneys for Western Railroads

JAMES W. HOELAND
Attorney for Southeastern Railroads

CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 58 (1) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

Amos M. Mathews

APPENDIX

NAMES OF APPELLEES

Western Railroads

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago & North Western Railway Company; Chicago Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; The Denver and Rio Grande Western Railroad Company; Great Northern Railway Company; The Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Soo Line Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; The Western Pacific Railroad Company.

Southeastern Railroads

Atlanta & West Point Railroad Company; Atlantic Coast Line Railroad Company; Clinchfield Railroad Company; Florida East Coast Railway Company; Georgia Railroad; Gulf, Mobile and Ohio Railroad; Illinois Central Railroad; Louisville and Nashville Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railroad Company; The Western Railway of Alabama.

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FILED
JUN 20 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;* and

---

No. 60

UNITED STATES, ET AL., *Appellants,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

FRANCIS M. SHEA,
WILLIAM H. DEMPSEY, JR.,
734 Fifteenth Street, N.W.,
Washington, D.C.

WALTER J. MYSKOWSKI,
712 Ring Building,
1200 18th Street, N.W.,
Washington, D.C.

W. GRAHAM CLAYTOR, JR.,
WILLIAM D. McLEAN,
JAMES A. BISTLINE,
Southern Railway Building,
Box 1808,
Washington, D.C.,
Attorneys for Petitioners.

Of Counsel:

SHEA & GARDNER,
734 Fifteenth Street, N.W.,
Washington, D.C.

IN THE

SUPREME COURT OF THE UNITED STATES

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No. 57

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No. 60

UNITED STATES, ET AL., *Appellants,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

Petitioners The Southern Railway Company et al. petition the Court for a rehearing of its decision in the above-captioned cases. The grounds for this petition are as follows:

1. Although the point is not discussed in the Court's opinion and was neither briefed nor argued, the Court's decision radically extends the scope of section 3(1) of the

Interstate Commerce Act, 49 U.S.C. 3, by applying it so as to require equality between two groups—here, motor carriers and ordinary shippers—between whom there is no competitive relationship. Because of the importance of the issue, and because the precedent against the Court's decision was not brought to the Court's attention, we suggest the desirability of a rehearing. In more detail, our position is as follows:

First, as we read the opinion there can be no reasonable doubt that the Court concluded that section 3(1) of the Act, whether alone or in conjunction with sections 2 and 1(4), supported the Commission's "open tariff" Rules.

Second, an overwhelming weight of authority prior to this Court's decision limits section 3(1) to those situations in which there is a competitive relationship between the person advantaged and the person disadvantaged.[1]

Third, this long line of decisions was not brought to the attention of the Court. In the lower court, we noted that section 3 could not possibly have been relied upon by the Commission in support of the Rules because of this precedent (Br. p. 20). The Government, in turn, concede that the Commission did not rely upon section 3(1) "because competition between favored and disfavored shippers must generally be shown to make out a case of undue prejudice or advantage . . ." (Br. p. 16 n.6). In this Court, however, neither side advised the Court that if it relied upon section 3(1) in support of the Commission's Rules it would be departing drastically from precedent.

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[1] Literally dozens of decisions could be cited. For a compilation, see note 37 under the annotations to section 3(1) in Interstate Commerce Acts Annotated (1930) and its supplements. For representative recent decisions, see, *e.g.*, *Stanislaus County* v. *Atchison. T. & S.F. Ry. Co.*, 302 I.C.C. 365, 377 (1956); *Osborne McMillan Elevator Co.* v. *Mpls., St. P. & S. Ste. M. R.R. Co.*, 306 I.C.C. 155, 160 (1959); *Freight, All Kinds, From Ferguson, Ind., to St. Louis, Mo.*, 302 I.C.C. 11, 12 (1957); *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21, 26-27 (1957).

Fourth, while this default on the part of appellants might appropriately be held against them were this case to involve only the resolution of a private dispute, we suggest that it should be waived where an important question of construction of a fundamental statutory provision is at stake. We also suggest in this connection that it is not entirely irrelevant that the United States, as evidenced by its brief in the lower court, was well aware of the problem and that it, too, did not call it to the attention of the Court.[2]

Fifth, this is not a case in which the other bases for the Court's opinion are self-evidently ample. As to the discrimination questions, those bases, apart from section 3, are sections 2 and 1(4), 49 U.S.C. 2, 1(4). We will not repeat the detail of the argument that on its face section 2 is restricted to rate discrimination and does not extend to service discrimination—particularly since the Court did not explicitly hold otherwise. As to section 1(4), however, we think it not inappropriate to note that by its decision in this case the Court has *sub silentio* overruled *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, in which the Court ruled that violations of section 1(4) are remediable only by judicial action, not by Commission action. While

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[2] There was a parenthetical remark in the Government's brief in this Court conceding that in a section 3(1) case the "two shippers must be in competition with one another," coupled with a following paragraph declaring that this, among other, considerations has "never been deemed relevant in a case of personal discrimination" (Br. pp. 35-36); but that declaration was supported only by a decision relevant to, if anything, the question of competition between the allegedly discriminating carrier and the "victim" shipper, not to the question of competition between the "victim" shipper and the "preferred" shipper. The two questions are wholly different, and the Government did not suggest otherwise. Accordingly, particularly in view of the Government's concession in the lower court that section 3(1) could not have been relied upon by the Commission because of the absence of a competitive relationship between the motor carriers and ordinary shippers, we do not feel that this eliptical—and perhaps inadvertently misleading—reference to this question in the Government's brief detracts from our assertion that the Government did not, for whatever reason, advise this Court of the problem.

we did call the attention of the Court to *Pennsylvania* and the subsequent decisions based upon it (Br. 54), the Court did not in its opinion discuss the issue.

Sixth, the overruling by the Court of prior decisions applying section 3(1)—an overruling that appears to have been inadvertent—underscores the relevance of section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b). From the inception of this litigation, one of appellees' principal contentions has been that the Commission failed to comply with section 8(b) because it did not adequately explain the basis for its decision, and that at the very least the Commission was restricted to defending its decision on the basis of the only provision it even mentioned, section 2 of the Act. The Government studiously avoided this issue, both in the lower court and in this Court. Nor did this Court mention it in its decision, despite the fact that it relied upon sections 3 and 1(4) in addition to section 2. Perhaps the requirement of section 8 of the Administrative Procedure Act can be overlooked where the decision of the agency can be supported on alternative legal grounds not mentioned by the agency. But at the very least the reviewing court should be certain that the relevance of such alternative legal grounds has been thoroughly explored by the parties before it. As we have indicated, that cannot be said in this case.

2. In the portion of the Court's opinion dealing with the authority of motor carriers to utilize TOFC transportation in the performance of their authorized service, there is a fundamental factual error. Before identifying this error, we sketch the Court's analysis as we understand it so that the significance of the error will be clear.

In this part of its opinion, the Court dealt with the contention of appellees that, because of the Act's restriction of motor carrier operating authority, such carriers could not

simply hire railroads to transport by rail the freight tendered to the motor carriers by shippers. As we understand the opinion, the Court disposed of this issue in large part by reference to prior practices, some of them assertedly sanctioned by appellees, involving the employment by motor carriers of rail services to fulfill motor carrier transportation contracts (slip op.pp. 14 ff.).

Those prior practices, according to the Court, fell into three categories. One—the use by motor carriers of ferry services—was mentioned only briefly, and appears to have been given relatively little weight.[3] Another involved motor carrier participation in Plan I and Plan V TOFC arrangements with railroads. But, as the Commission's Report in this case makes clear (*e.g.* p. 343), those arrangements have been regarded by the Commission as valid only on the ground that the rail-motor TOFC service amounts to a through route arrangement under section 216(c), 49 U.S.C. 316(c), and this Court held in the case at bar that the service to be performed by motor carriers under the Commission's Rules would *not* involve through routes (slip op. p. 16, n.8).[4]

It is the third instance of past practice assertedly con-

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[3] It deserved none at all. Where a motor carrier uses a ferry to cross a river because there is no bridge, it would be wholly unreasonable to suggest that the motor carrier had departed from the scope of its operating authority. On the other hand, where water service is employed in a more substantial fashion in conjunction with motor carrier service, a through route must be established. *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157 (1954). Accordingly, to the extent there has been any past practice respecting motor carrier use of ferry service, it is inconsistent with the Court's conclusion. Again, it may be noted, this question respecting motor carrier use of ferry service was not briefed by the parties. Rather, it arose for the first time on oral agument.

[4] In connection with Plan I, which, as the Court noted (slip op. p. 15, n.7), is in litigation, the Court erred in stating that "None [of the appellees] urges the invalidity of Plan I as presently in use. . . ." (slip op. p. 15). As we pointed out in some detail in our brief to this Court (pp. 64-66), "these appellees, the Southern Railway System, have joined the

ceded as proper by appellees that, as we read the opinion, was of critical importance—the use by motor carriers, with railroad consent, of rail TOFC service on the basis of the rail "open tariffs"—a type of substitution of rail for motor service that unquestionably could not be justified as through route service. Thus, the Court stated: "[T]his 'concurrence' of the railroads, where granted, permits truckers to use TOFC service not only pursuant to Plans I and V, *supra*, but also under Plan III and Plan IV, the latter being open-tariff arrangements. The argument of [appellees] and the reasoning of the District Court carefully concede that the motor carriers may, without violating the Act or their charters, utilize this substituted service. . . . [A]ccording to the [appellees] and the District Court it [the statute] is not inconsistent with the use of open tariff TOFC if the railroad is willing" (slip op. p. 16).[5]

We would agree that our argument that motor carriers should be restricted to transportation by highway would be undermined if the established practice was—or perhaps even if appellees conceded that the practice could legitimately be—that motor carriers could hire railroads to transport by way of TOFC, under the railroads' Plan III or Plan IV "open tariff" arrangements available to shippers, the freight that had been tendered to motor carriers. But in point of fact the Court's assertion that appellees, and the District Court, conceded the legality of such a practice *has no foundation whatever*. We can find no pas-

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freight forwarders in attacking the validity of Plan I on the ground that it does not involve a genuine through route-joint rate arrangement." We cannot see how we could have made the point more explicitly. However, since the Court's error does not seem to us to have been material to the Court's decision, and since our—and the freight forwarders'—challenge to the legality of Plan I is incontestably a matter of record and, in our judgment, accordingly cannot be affected by this Court's misstatement, we do not press this mistake as a ground for rehearing.

[5] In the opinion "appellants" appears in this passage, rather than "appellees". This doubtless was a printer's error.

sage in any of appellees' briefs that suggests such a concession; and the District Court, in referring to consensual arrangements, plainly had in mind only arrangements that amounted to valid through route-joint rate plans. That was the way appellees argued the case to that court—namely, that valid through route arrangements were the only means for coordination of rail-motor service—and that was the way appellees argued the case to this Court.

To be sure, a concession on the part of appellees would hardly be necessary if in fact the railroads had established the practice of permitting motor carriers to utilize Plans III or IV with railroad consent. But, again, we can find nothing in the record to support the Court's view that this has in fact been the practice. In short, what seems to be an important element of the Court's opinion—that by concession and by practice motor carriers have been permitted to utilize TOFC in the performance of their authorized service under Plans II and IV—is insupportable.

3. While we have restricted this petition to an issue not briefed to, but decided by, this Court, and to the Court's erroneous view of past practice and its mistaken assertion respecting appellees' concessions, we suggest in addition—without venturing to reargue the point in any detail—that the Court's decision is of enormous importance and accordingly deserves reconsideration if there is any substantial doubt as to its correctness. There is no way to restrict the rule of "equality" fashioned by the Court's opinion. Thus, while the motor carriers, under that opinion, are free to tender freight to a railroad as if they were ordinary shippers, the railroads are likewise free to tender freight to a motor carrier—or to another railroad or a water carrier—as if they were ordinary shippers. Such an investiture of carriers with shippers' rights is alien to the transportation law of this country as it has developed since

1887. Perhaps the outcome will be in the public interest. Perhaps, as we believe, it will not. No one—including this Court by its own admission, and much more significantly the Commission by virtue of its total default in exploring these policy questions—can tell.

Conclusion

For the foregoing reasons, we request that rehearing of these cases be granted.

Respectfully submitted,

FRANCIS M. SHEA,
WILLIAM H. DEMPSEY, JR.,
734 Fifteenth Street, N.W.,
Washington, D.C.

WALTER J. MYSKOWSKI,
712 Ring Building,
1200 18th Street, N.W.,
Washington, D.C.

W. GRAHAM CLAYTOR, JR.,
WILLIAM D. MCLEAN,
JAMES A. BISTLINE,
Southern Railway Building,
Box 1808,
Washington, D.C.
Attorneys for Petitioners.

Of Counsel:
SHEA & GARDNER,
734 Fifteenth Street, N.W.,
Washington, D.C.

Certificate of Counsel

I hereby certify, pursuant to Rule 58(2) of the Rules of this Court, that the foregoing Petition is presented in good faith and not for delay.

WILLIAM H. DEMPSEY, JR.

Nos. 57, 59 and 60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois

PETITION BY FREIGHT FORWARDER APPELLEES FOR REHEARING

D. ROBERT THOMAS
LEE B. MCTURNAN
Sidley & Austin
11 South LaSalle Street
Chicago, Illinois 60603

GEORGE H. LEONARD
THEO. R. SCHNEIDER
GILES MORROW

Attorneys for Appellees Acme Fast Freight, Inc., et al.

June, 1967

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CITATIONS

CASES:

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STATUTES:

Interstate Commerce Act

Part II:

Sec. 216(c); 49 U.S.C. 316(c) 4, 7, 8, 9, 10, 11

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Sec. 410(c); 49 U.S.C. 1010(c) 5

LEGISLATIVE REFERENCES:

Regulation of Freight Forwarders (Part IV of Interstate Commerce Act)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
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No. 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois

PETITION BY FREIGHT FORWARDER APPELLEES FOR REHEARING

The freight forwarder appellees hereby petition the Court for rehearing of its opinion and judgment on the following dispositive question as stated and resolved in these appeals:

> "Does the Interstate Commerce Commission have authority to promulgate rules providing . . . (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service?" (Op. sh. 1)

If rehearing is not granted, we respectfully ask that the opinion be modified with regard to certain important state-

ments describing the position taken by these appellees and the three-judge District Court.

REASONS FOR GRANTING REHEARING

We ask this Court for an opportunity to remove a most unfortunate misunderstanding concerning the position of these appellees on certain critical issues. The problem appears in the portion of the Court's opinion (shs. 14-22) in which it is determined that the Interstate Commerce Commission's Rule 3 is valid, *i.e.*, that motor and water carriers may ship by rail on TOFC open tariffs in lieu of the performance of all or any portion of their authorized motor or water carrier service.

Aside from what seems to be a typographical error, it is clear that the Court understood that these appellees were conceding that a motor carrier's use of open TOFC tariffs is valid *"if the railroad is willing"* (Op. sh. 16).* The Court stated, for example:

> "The argument of *appellants* and the reasoning of the District Court carefully *concede that the motor carriers may, without violating the Act or their charters, utilize this substituted service."* (Op. sh. 16)

It seems probable that the Court intended to refer to the "appellees" rather than "appellants" here. The present wording, which we think was inadvertent, would suggest that the "appellants" conceded something that they were not in a position to "concede."**

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* Italics herein are ours except where otherwise indicated.

** Similarly see sheet 16: ". . . according to the *appellants* and the District Court it is not inconsistent with the use of open-tariff TOFC if the railroad is willing." See also sheet 17: *"Appellants* and the District Court argue, however, that the following factors demonstrate that the Commission may not authorize motor carriers to use TOFC service on open tariffs . . ."

As shown below, the freight forwarder appellees certainly did not "concede" that motor carriers may utilize open-tariff TOFC service "if the railroad is willing." This matter goes to the heart of issues that these appellees endeavored to contest.

The misunderstanding is plainly critical to a review of our position, to the opinion of May 29, 1967, and to the resolution of question (2). Thus, for example, the Court said:

> "It is strenuously contended, however, that whatever may be the railroads' duty, common carriers by motor vehicle may not be authorized to substitute transportation by rail for the transportation by road which is the basis of their franchise—*except with the agreement of the railroad. It is this exception that saps the argument of some of its force, if not its fervor.*" (Op. sh. 15)
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> "This does not exclude joint arrangements with water carriers or rail carriers, which are expressly permitted by § 216(c) on a voluntary basis, and *according to the appellants and the District Court it is not inconsistent with the use of open-tariff TOFC if the railroad is willing.*" (Op. sh. 16)
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> • • •
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> *"It is clear that where the railroad agrees, the trucker may use this ['open-tariff TOFC'] service,* and that a motor vehicle common carrier may assemble, consolidate, *transport by piggyback in these circumstances,* and distribute after arrival at the railroad terminus. The fact that the Commission *enlarges this additional possibility* of transportation of the truckers' trailers may be a competitive fact of some significance, but it does not convert the truckers into freight forwarders, nor deprive the latter of the exclusive rights specified in the Act." (Op. sh. 22)

These and related statements make it clear that the misunderstanding has very materially affected the disposition

of question (2). We appreciate that such concessions, if they had been made, would change one's general approach to that question. The misunderstanding prejudices the legal and policy considerations by, for example, making it appear as if a motor carrier already had the right to ship by rail on open TOFC tariffs, thereby doing everything a freight forwarder does, provided a railroad was willing.

In the following portion of this petition we will attempt to make our position clear and to provide a basis for rehearing free from the misunderstanding. In addition, we submit that the District Court did not decide the case on the supposition indicated in the above-quoted statements.

If rehearing is denied, we ask the Court to modify the above-quoted statements (shs. 15, 16, 22) so that there will be no statement or inference that the freight forwarder appellees made such concessions.

I. THE FREIGHT FORWARDER APPELLEES HAVE CONTESTED RATHER THAN CONCEDED THAT RAILROAD CONSENT OR AGREEMENT WOULD SUFFICE TO LEGITIMATE A MOTOR CARRIER'S USE OF OPEN-TARIFF TOFC SERVICE.

These freight forwarder appellees have consistently contended that a railroad's consent or collaboration cannot suffice to empower a motor carrier to ship by rail or use rail TOFC service. For example, we stated, without exception or qualification, that "Part II [of the Act] does not allow a motor carrier to perform his regulated service by rail shipping" and that "Neither . . . [Section 216(c)] nor any other section permits a motor carrier to ship traffic under a rail tariff for any type of rail service" (Br. pp. 10-11). Despite their vigorous arguments, appellants at no point suggested that these appellees conceded or implied that motor carriers may ship on open TOFC tariffs if the railroad is willing.

Our contention was and is that the authorized activities of a motor carrier could not be unlawfully expanded, regardless of railroad cooperation in that effort, and that for a railroad to consent to motor carrier use of open-tariff TOFC service would be unlawful. In our brief it was submitted that a railroad would be "knowingly participating in a motor or water carrier's violation of the Act by providing rail service for TOFC or other freight traffic tendered by motor and water carriers acting as shippers under a rail tariff" (Br. p. 7). It was shown that the Interstate Commerce Commission had previously and correctly recognized this as one of the established, "fundamental legal principles pertaining" to "an open tariff published by the railroad" (*Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 104, 111 (1954); Br. pp. 47-49):

> "In a declaratory order proceeding in 1954, reaffirming the interpretation, the Commission held that it is unlawful for a motor carrier to utilize rail TOFC service by acting as a shipper under the railroad's tariffs, and the Commission warned *the railroads* that they *should not 'knowingly join' with a motor carrier 'in a violation of the law.' Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 104-105." (Br. pp. 5, 47-49)

These appellees also submitted that motor carrier use of open-tariff TOFC service would violate the mandate of Section 410(c) in Part IV of the Act which carries out the Congressional "policy of not permitting" motor, water or rail common carriers "to engage directly in" or obtain a license for "the freight-forwarding business" (Br. pp. 8-9, 13-20; 49 U.S.C. 1010(c); H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15). No party suggested that this statutory mandate and policy were subject to an exception if a railroad consented to a motor carrier's use of open-tariff TOFC service. Indeed, it is antithetical to

the position of the freight forwarders to suggest that the railroads and motor carriers that compete with freight forwarders may by mutual consent enlarge their authority and engage in the freight-forwarding business.

The ruling of the Court proceeds from the erroneous concession-premise that "where the railroad agrees the trucker may use this ['open-tariff TOFC'] service" to the conclusion that, since such activity would obviously be identical with freight forwarding, Rule 3 merely *"enlarges this additional possibility* of transportation of the truckers' trailers . . ." (Op. sh. 22). Thus the misunderstanding makes it seem that railroad consent to such use of open tariffs already involves an opportunity for motor carriers to act as freight forwarders and that there would be little additional harm in enlarging the opportunity. These appellees contended, however, that all such freight-forwarding activity by motor carriers was unlawful, regardless of railroad cooperation, and that a consenting railroad would be joining in a violation of the law. The misunderstanding minimizes the injury inflicted as a result of the Commission's Rule 3 and prejudices review of the freight forwarders' position by assuming that they effectively conceded that a motor carrier may already ship by rail on open tariffs, thus engaging in freight forwarding, if the railroad is willing.

The relevant position of the freight-forwarding industry is further demonstrated, as the Court noted, by the suit pending in a three-judge District Court and involving "the validity of Plan I service" (Op. sh. 15, n. 7).* There, al-

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* In the brief of these appellees it was stated: "In a suit pending in the United States District Court for the Northern District of Texas (*Lone Star Package Car Co.* v. *United States,* Civil Action

though Plan I clearly involves railroad consent to motor carrier use of a type of rail TOFC service, certain freight forwarders and the Freight Forwarders Institute are among the plaintiffs seeking judicial review of the Commission's approval of Plan I on the ground, *inter alia*, that Plan I does not involve through routes and joint rates within the meaning of Section 216(c) (49 U.S.C. 316(c)). Among the plaintiffs in that case is Southern Railway Company which is also an appellee here* and which in both instances fully agrees that railroad consent does not itself suffice to legitimate motor carrier use of rail TOFC service.

The freight forwarders have recognized that common motor carriers, water carriers and railroads have authority to enter into voluntary through routes and joint rates as provided by Section 216(c) (49 U.S.C. 316(c)). Plan V piggyback is, for that reason, lawful (Br. p. 59). Motor carrier participation in that plan also has different economic effects from such participation in the substituted service plans.

No. 4-355) certain freight forwarders and railroads seek to set aside the Commission's ruling in the same Commission proceeding that Plan I TOFC service is authorized as a through route arrangement under Section 216(c) of the Act. That issue is not involved in these appeals." (Br. p. 2, footnote)

* Thus, in another portion of the same Interstate Commerce Commission opinion under review here, it was noted that "the regulated freight forwarding companies and Southern Railway System" contended "throughout this proceeding that plan I TOFC is unlawful under the Act" (322 I.C.C. at 343). And in the brief of the Southern Railway System in this Court, it was stated: "In Texas, these appellees . . . have joined the freight forwarders in attacking the validity of Plan I on the ground that it does not involve [as the Commission held] a genuine through route-joint rate arrangement" (Br. 64).

The Interstate Commerce Commission ruled, however, that Plan I arrangements, like Plan V arrangements, constitute through routes and joint rates within Section 216(c) and that ruling is, as noted, one of the issues pending in other litigation that has not yet reached this Court. Unlike the open-tariff plans involved here, Plans I and V were treated separately by the Commission as "joint intermodal service" (322 I.C.C. at 337-352) involving different legal and economic considerations. The Commission recognized that Plan I, "if it is to be sustained at all, must be sustained as a joint-rate arrangement under section 216(c), the only statutory provision authorizing the maintenance of through routes and joint rates between a railroad and a motor carrier" (322 I.C.C. at 343). The Commission found that Plan I involved such an arrangement (322 I.C.C. at 349) and that the open-tariff plans did not (322 I.C.C. at 355) and dealt with the latter plans in the separate fashion being reviewed in these appeals. Indeed, as the Court correctly noted: *"In important respects, motor carrier use of open-tariff TOFC differs from a motor-rail through route-joint rate TOFC arrangement"* (Op. sh. 16, n. 8).

These matters deserve mention because it may now be mistakenly argued that these particular freight forwarder appellees have conceded that railroad consent validates motor carrier use of open-tariff TOFC service and that they have also conceded the validity of Plan I. Neither conclusion would be correct. As intervening plaintiffs in this case, we only noted and did not discuss Plan I because it was not involved in the complaint and because the Commission's decision with regard to it rested on an explicitly different theory and statutory basis.

These appellees certainly never intended to leave open to doubt that they challenged the newly created authority for motor carriers to ship their customers' goods by rail on open tariffs. In contending that "the Commission has no

authority to permit motor or water carriers to engage in freight forwarding with respect to any of their traffic" (Br. p. 10), we never intended to infer or intimate that the question of motor carrier authority for substituted service by rail depended upon railroad collaboration or consent. We contended that the Commission had been correct when it earlier, and repeatedly, ruled that for a railroad to cooperate in such activity would be knowingly to join in a violation of the law.

We recognized on brief that voluntary rail-motor through routes and joint rates are permitted by Section 216(c). Although a "concurrence" (as distinguished from consent) is one of the necessary elements to comply with Section 216(c) and related tariff provisions,* a concurrence is only one essential element in establishing a through route and joint rate under Section 216(c). And, as we have noted, "Appellants do not and cannot suggest that Rules 2 and 3 have a basis in or are made lawful by Section 216(c)" (Br. p. 42).

For the forwarders actually to have made the concessions indicated in the Court's opinion would have been to concede away a primary issue and consideration in this case. The misunderstanding has, as shown in the opinion at several places, inadvertently prejudiced the legal and policy considerations.

II. THE DISTRICT COURT DID NOT CONCEDE OR CONCLUDE THAT RAILROAD CONSENT OR AGREEMENT WOULD SUFFICE TO LEGITIMATE A MOTOR CARRIER'S USE OF OPEN-TARIFF TOFC SERVICE.

The opinion of the Court indicates that the three-judge District Court, as well as these appellees, was believed to

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* *E.g.*, see our brief, pp. 43-44.

have conceded that motor carrier use of open-tariff TOFC service was permissible if or where consented to by a railroad. This problem may have resulted from the unfortunate assumption with regard to appellees' position. The Court's opinion refers to the following sentence from the District Court opinion:

> "The policy explicit in Sections 216(c) and 402(a)(5), and implicit in the structure of the Interstate Commerce Act as a whole, does not allow a motor carrier to perform its authorized service simply by tendering the shipment to the railroad for transportation *without the railroad's concurrence.*" (R. 36; emphasis added in Op. sh. 16)

This does not imply that railroad consent or even "concurrence" validates motor carrier use of the open-tariff TOFC plans. Nor does it imply that a railroad concurrence in a Plan I arrangement would necessarily validate it as a through route and joint rate under Section 216(c). The point being made by the District Court was that *in the absence* of the type of concurrence required by Section 216(c) and the tariff provisions, the motor carrier obviously lacked at least one of the several elements necessary for valid motor-rail coordinations as provided for in Part II of the Act and had no authority to ship its customers' goods by rail.

The District Court held that "motor carriers shall perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception" (R. 31). The District Court certainly did not conclude that some statutory exception permitted a motor carrier to ship by rail on open TOFC tariffs if or because a railroad was willing. Such activity, it held, would have exceeded "the fundamental limit on motor carrier authority" and would have been freight forwarding without statutory authority or license (R. 34, 35-36). And

the District Court, while referring to Section 216(c), did not rule upon the validity of Plan I arrangements, a matter which it noted was being adjudicated in a separate pending case (R. 34, n. 20).

CONCLUSION

For the reasons stated, this petition for rehearing of question (2) (Op. sh. 1) and the decision upholding Rule 3 (Op. shs. 14-22) should be granted. In the event rehearing is denied, we ask that the opinion be modified so that it stands without reference to concessions noted herein (involving Op. shs. 15, 16 and 22) insofar as those are attributed to positions taken by these appellees or the District Court.

Respectfully submitted,

D. Robert Thomas
Lee B. McTurnan

Sidley & Austin
11 South LaSalle Street
Chicago, Illinois 60603

George H. Leonard
2 Lafayette Street
New York, New York 10007

Theo. R. Schneider
1123 Hadley Street
St. Louis, Missouri 63101

Giles Morrow
711 Third Avenue
New York, New York 10017

Attorneys for Appellees
Acme Fast Freight, Inc., et al.

June, 1967

CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 58(2) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to substantial grounds not previously presented, such grounds being concerned with the Court's statement of premises for the decision.

/s/ .....

D. Robert Thomas

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SUPREME COURT OF THE UNITED STATES

Nos. 57, 59, AND 60.—OCTOBER TERM, 1966.

American Trucking Associations, Inc., et al., Appellants, 57 *v.* The Atchison, Topeka, and Santa Fe Railway Company et al.	
National Automobile Transporters Association of Detroit, Michigan, Appellant, 59 *v.* The Atchison, Topeka, and Santa Fe Railway Company et al.	On Appeals From the United States District Court for the Northern District of Illinois.
United States et al., Appellants, 60 *v.* The Atchison, Topeka, and Santa Fe Railway Company et al.	

[May 29, 1967.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

These three cases present the following question: Does the Interstate Commerce Commission have authority to promulgate rules providing (1) that railroads which offer trailer-on-flatcar (TOFC or "piggyback") service to the public under open-tariff publications must make such service available on the same terms to motor and water common and contract carriers, and (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service? *Ex parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I. C. C. 301 (1964).

A three-judge district court, convened under 28 U. S. C. §§ 1336, 2284, 2321–2325, at the request of various railroads and freight forwarders, set aside the rules which the ICC had promulgated in a rulemaking proceeding initiated on its own motion. 244 F. Supp. 955 (D. C. N. D. Ill. 1965). The case is here on direct appeal. 28 U. S. C. §§ 1253 and 2101 (b). 384 U. S. 902 (1966).

The appellees are the railroads and freight forwarders who initiated the District Court proceeding. The appellants are the United States and the ICC (No. 60), together with the American Trucking Associations, Inc., et al. (No. 57), and the National Automobile Transporters Association (No. 59), which intervened below as defendants.

More specifically, the issue presented is the validity of Rules 2 and 3, promulgated by the Commission in *Ex parte 230, supra.* 49 CFR §§ 500.2 and 500.3 (Supp. 1967). Rule 2 provides that "TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available" at the same charge to all other persons. In substance, it is a paraphrase of § 2 of the Interstate Commerce Act. 24 Stat. 379 (as amended) (1887) (hereinafter cited only to U. S. C.); 49 U. S. C. § 2. Rule 3 provides that, with certain qualifications and subject to certain conditions, "motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier." The District Court held that the Commission has no authority to compel railroads to make open-tariff TOFC service available to such carriers, and that such carriers may not be authorized to use TOFC except if and as the railroad consents.

The background of the controversy may be briefly described. The growth of trailer-on-flatcar service has

been "explosive" since the latter half of the 1950's.[1] From the time of passage in 1935 of Part II of the Act, regulating motor carriers, until the institution of the present proceeding, the Commission appears to have regarded trailer-on-flatcar service not as bimodal, but as an adjunct of transportation by railroad—as a facility essentially of, by and for the railroads. This attitude is summed up by the ICC's definition of TOFC in 1954 in *Movement of Highway Trailers by Rail*, 293 I. C. C. 93 (the so-called *New Haven* case), which provided the basic legal framework upon which the development of TOFC traffic has been based. In this case, the Commission described TOFC or piggyback service as transportation of "a freight-laden trailer secured to a flatcar, which in turn is coupled in a train being drawn by a locomotive over steel rails laid on the railroad's right-of-way . . . ." *Id.*, at 100–101.[2]

Even prior to the *New Haven* case, beginning in 1939, in *Substituted Freight Service*, 232 I. C. C. 683, it was

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[1] 322 I. C. C., at 305. The Commission observed, "There can be little doubt that piggybacking has been a decisive factor in returning to the railroads a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." *Id.*, at 307. It found that "In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963 there were 100 class I roads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings, for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 loaded TOFC cars, a weekly rate of approximately 12,700 loadings." *Id.*, at 309.

[2] For a statement of the Commission's earlier position, prior to enactment of Part II of the Interstate Commerce Act, see *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I. C. C. 435 (1936), where it was held that motor carriers, like any other competing mode of unregulated transportation (compare *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235 (1911)), were entitled to utilize a published piggyback tariff.

the Commission's position that a railroad could grant or deny TOFC service to common carriers by motor.[3] Even if the railroad offered such service generally to the public, it could withhold it from for-hire motor carriers. Except for limited uses of rail open-tariffs permitted by certain railroads,[4] contract and common carriers by motor participated in piggyback service only by agreement, including through route-joint rate arrangements between a road and a trucker (see Plan V, *infra*), and railroad acceptance of trailers or containers of truckers, the shipment moving under motor carrier tariffs and the railroad's compensation being based upon a division of charges arrived at through negotiations between the carriers (Plan I, *infra*). These arrangements had to be voluntary for it has been the prevailing view that the roads, as common carriers, had no duty to service truckers under their open tariffs, and, although § 216 (c) (49 U. S. C. § 316 (c)) authorizes motor common carriers to establish through routes and joint rates with rail common carriers, the Commission has no power to compel such joint arrangements.

According to the Commission, five basic forms of piggyback service evolved (322 I. C. C., at 304–305, 309–312). They are:

Plan I (Joint Intermodal):

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs, and the

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[3] Section 1 (4) of the Act, 49 U. S. C. § 1 (4), imposes a duty on railroads to establish joint through routes and rates with water carriers, but there is no such provision with respect to motor carriers. See § 216 (c), 49 U. S. C. § 316 (c).

[4] Cf. *Gordons Transports, Inc.* v. *Strickland Transp. Co.*, 318 I. C. C. 395, 396–397, sustained *sub nom. Strickland Transportation Co.* v. *United States*, 219 F. Supp. 618, 620 (D. C. N. D. Tex. 1963).

railroad's compensation is arrived at by negotiation between the two carriers.

Plan II (All-Rail):

Door-to-door service performed by the railroad, which moves its own trailers or containers on flatcars under open-tariffs usually similar to those of truckers.

Plan III (All-Rail):

Ramp-to-ramp rates to private shippers and freight forwarders, based on a flat open-tariff charge, regardless of the contents of trailers or containers, which are usually owned or leased by freight forwarders or shippers. No pick-up or delivery is performed by the railroad.

Plan IV (All-Rail):

Flat open-tariff charge for loaded or empty-car-movement, the railroad furnishing only power and rails. Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased.

Plan V (Joint Intermodal):

Joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement, and traffic moves on originating carrier's bill-of-lading.

While data are not available precisely to define the growth of traffic under the various plans, the evidence indicates that major growth has been primarily in the all-rail, open-tariff plans—that is, plans under which traffic moves at rail rates and on rail billing. The Commission's summary of responses to piggyback questionnaires, contained in the Record, shows that virtually all of the reporting railroads participate in Plans II and III and about three-fourths participate in Plan IV. However, only "somewhat more than half" of the reporting railroads participate in trucker-rail arrangements under

either Plan I or V, and traffic in Plan V (joint railroad-truck rates-through routes) "generally is extremely limited." A number of the largest railroads do not offer to move trailers or containers for motor carriers on motor carrier bills of lading and billing under regular motor carrier tariffs (Plan I),[5] or offer it only for limited types of traffic such as automobiles, or only to their own subsidiaries. Over 80% of rail movement of motor carrier-rail piggyback is under Plan I. ICC Bur. of Econ., Piggyback Traffic Characteristics (1966), p. 21.

Faced with the explosive growth of piggyback service on the basis of principles which had evolved in the infancy of the development of piggyback, the Commission by notice dated June 29, 1962, commenced this proceeding which was its "first general investigation of what is probably the most significant recent development in transportation-trailer-on-flatcar or piggyback service." 322 I. C. C., at 303. Proposed rules were furnished to participants, opportunity was given to all of them to file statements, and an examiners' report was filed. After exceptions and oral argument, the Commission rendered its decision on March 16, 1964. The Commission stated that "It is our purpose and our hope to encourage the growth of this transportation phenomenon." 322 I. C. C., at 322. The rules which it prescribed incorporate the basic principles here at issue: that "when TOFC service is offered by a rail carrier to the public generally," it should likewise be available to motor or water common

[5] There is "no Plan I service of any type available between midwest points east of the tier of states of Wyoming, Colorado, and New Mexico, on the one hand, and, on the other hand, points in the states west thereof. Transcontinental railroads operating between the latter points have elected not to offer any form of Plan I service to motor carriers between such points." Pacific Intermountain Express Co., Supplemental Statement of W. S. Pilling (R. 123).

or contract carriers, in lieu of their authorized transportation between service points, or to for-hire carriers. *Id.*, at 336. These rules also include ancillary or implementing provisions which are not here at issue; for example, it is provided that the motor carrier must give notice in its tariff publication if TOFC is to be used, and the user of the water or motor carrier may specify "that in any particular instance TOFC service may not be utilized" (49 CFR § 500.3 (b), (c), (d) (Supp. 1967)); and that these carriers may tender and receive traffic, TOFC, only at points that they are authorized to serve. *Id.*, § 500.3 (e).

The three-judge District Court concluded that Rules 2 and 3 (and Rule 5, *id.*, § 500.5, insofar as it amplified those Rules) exceeded the Commission's authority and set them aside. In substance it held that the Interstate Commerce Act did not forbid a railroad to refuse to carry the trailers or containers of a competing mode of carrier; that the structure and plan of the Act, as well as the specific absence of compulsory power to the Commission in § 216 (c), *supra*, which authorizes voluntary joint rates and through routes by motor and rail carriers, indicate that the ICC is not at liberty to require the railroads to provide TOFC service to competing modes; that provisions of the Act regulating freight forwarders impelled the same conclusions; and that the Commission's long history of support for the position which its rules now repudiate, as well as legislative history, compel rejection of the rules now promulgated. We disagree.

I.

We first consider Rule 2, which raises the question whether the Commission may by rule require that if a railroad offers TOFC service to the public through its open-tariff publications, it must make that service available to "any person" without discrimination. We

begin by noting the obvious fact that the Interstate Commerce Act codified the common-law obligations of railroads as common carriers. From the earliest days, common carriers have had a duty to carry all goods offered for transportation. See, *e. g., New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 382–383 (1848). Refusal to carry the goods of some shippers was unlawful. Rates were required to be reasonable, but discrimination in the form of unequal rates as among shippers was not forbidden. In England, legislation to proscribe unequal rates, from which the antidiscrimination language of § 2 of the Interstate Commerce Act derives (*ICC* v. *Delware, L. & W. R. R.*, 220 U. S. 235, 253 (1911)), was enacted in 1845. The Railway Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 20, §§ LXXXVI *et. seq.* In this country, the railroads had a practical monopoly of freight transportation, and secret rebates, special rates to favored shippers, and discriminations flourished. It was this situation that led to enactment of the Interstate Commerce Act in 1887. 1 Sharfman, The Interstate Commerce Commission (1931), pp. 17–19; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 749–750 (1931).

Section 1 (4) of the Act, 49 U. S. C. § 1 (4), provides that it shall be the duty of common carriers by rail to provide transportation "upon reasonable request therefor" and to establish just and reasonable rates. Section 2, 49 U. S. C. § 2, prohibits discriminatory rates or charges. Section 3 (1), 49 U. S. C. § 3 (1), forbids undue preferences or advantages, and undue or unreasonable prejudices or disadvantages to any person, area or particular description of traffic. The Act does not contain any provision expressly exempting traffic offered by carriers by motor vehicle from these broad common-carrier obligations of the railroads. On the contrary, these sections of the Act, read in light of the historic obligations

and duties of common carriers and the large number of decisions of the Commission, and of the courts in this country and in England, indicate, presumptively at least, that railroads may not offer the service of transporting trailers for other shippers and deny that service to motor carriers.[6] Indeed, as we have observed, the Commission's Rule 2 is practically a paraphrase of § 2 of the Act. It provides that if a rail carrier through its open-tariff publications offers TOFC services, it shall make the same available "to any person" at the same charge. It is, of course, of no consequence that the Act does not expressly command that the railroads furnish this service to motor carriers. Their obligation as common carriers is comprehensive and exceptions are not to be implied. The fact that the person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor. See *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235 (1911) (unlawful for railroads to charge less-than-carload rates for carload shipments tendered by freight forwarders); *ICC* v. *Baltimore & Ohio R. R.*, 225 U. S. 326 (1912) (lower rates on coal shipped by another railroad for its own use as fuel held unlawful). Cf. *Wight* v. *United States*, 167 U. S. 512 (1897). As this Court said in *Delaware, L. & W. R. R., supra:*

> "The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to

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[6] See, *e. g.*, *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L. 226 (1869); *London and N. W. Ry. Co.* v. *Evershed*, 3 App. Cas. 1029 (1878); *Wight* v. *United States*, 167 U. S. 512 (1897); *ICC* v. *Baltimore & Ohio R. R.*, 225 U. S. 326 (1912); *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740 (1931); *Kansas City S. Ry.* v. *United States*, 282 U. S. 760 (1931); *ICC* v. *Delaware, L. & W. R. R.*, 220 U. S. 235 (1911); *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 (1940).

> carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement." 220 U. S., at 252.

This Court was faced with an intermodal problem, comparable to that in the present cases, in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612 (1945) (the *Seatrain* case). The railroads refused to interchange their freight cars with Seatrain, a water carrier, for interstate transportation by Seatrain in competition with the roads. The ICC ordered the railroads to desist from this practice, and the roads brought an action to set aside its order. The railroads contended that the Transportation Act of 1940 did not in "specific language" authorize the Commission to require them to furnish the disputed facility to a competing water carrier. But this Court rejected that contention. It said:

> "There is no language in the present Act which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to

> cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system." Cf. *Chicago, R. I. & P. R. Co.* v. *United States*, 274 U. S. 29, 36; *Interstate Commerce Commission* v. *Railway Labor Executive Assn.*, 315 U. S. 373, 376–377. 323 U. S., at 616.

In *Seatrain*, this Court emphatically rejected the analysis upon which the the District Court here essentially based its position—that since the Act regulates rail, motor, and water carriers separately, in Titles I, II, and III, the Commission may not compel the mutual furnishing of services and facilities other than as expressly directed. Recognizing that in the case of water carriers (as distinguished from motor carriers), the Act specifically directs railroads to establish through routes with them, the Court held that this is not the end of the railroads' obligation or the limit of the Commission's power. On the contrary, the Court, relying on the National Transportation Policy (49 U. S. C. preceding § 1), held that the Act is designed "to provide a completely integrated interstate regulatory system over motor, railroad and water carriers. . . ." 323 U. S., at 618–619, and that the Commission therefore had powers commensurate with that goal. In this connection, the Court said:

> "The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and correlatively broadened the Com-

> mission's powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' The declared objective was that of 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, . . . adequate to meet the needs of the commerce of the United States . . . .' Congress further admonished that 'all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' 54 Stat. 899." 323 U. S., at 616–617.

In view of this, we cannot accept arguments based upon arguable inference from nonspecific statutory language, limiting the Commission's power to adopt rules which, essentially, reflect its judgment in light of current facts as to the proper interrelationship of several modes of transportation with respect to an important new development. For example, § 216 (c), 49 U. S. C. § 316 (c), authorizes the railroads to enter into voluntary arrangements for through routes and joint rates with motor carriers. There is no Commission power to compel the railroads to do so, and it is argued that from this we should derive a congressional intent that the ICC may not compel the railroads to furnish services to the motor carriers in any circumstances. There is no basis for this vast leap from a particular authorization to a pervasive prohibition. See our discussion of *Seatrain, supra.*

It is also argued that a proviso to § 3 (1) of the Act, 49 U. S. C. § 3 (1), demonstrates that Congress did not intend to inhibit the railroads from discriminating against motor carriers. This contention, strenuously supported, is without merit. Section 3 (1) broadly prohibits any

common carrier by rail from giving "any undue or unreasonable preference" to any person, locality or type of traffic. It then sets forth this proviso: "*Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." This is language more notable for its awkwardness than for its clarity; but it certainly was not intended, as appellees urge, to grant license to discriminate against traffic *offered to the railroad* by another carrier. We have noted above that this Court has clearly held that such discrimination is not permissible. Moreover, there is an intelligible meaning which can be ascribed to the proviso and which is consistent with its history. The proviso means that the prohibition against "undue or unreasonable preference or advantage" is not to be construed to forbid practices, otherwise lawful, solely because they operate to the prejudice of another carrier. It was in these terms that the language of the proviso was explained by Senator Wheeler, the bill's sponsor. The proviso was taken almost verbatim from § 216 (d) of the Motor Carriers Act of 1935, 49 Stat. 558 (now 49 U. S. C. § 316 (d)). Explaining it, Senator Wheeler said:

> "Paragraph (d) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.
>
> "In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.
>
> "*This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for*

> *a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage. This contention is not well founded* in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3 (1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons. However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5656 (1935). (Italics added.)

Accordingly, we are remitted to consideration of the provisions of the Act which, in the most general terms, require the railroads to perform as common carriers. It is not our duty, of course, to concern ourselves with a nice evaluation of the arguments as to whether the Commission pursued the course of wisdom in ordering the railroads to make piggyback service available to motor carriers if it is offered to others on open-tariff rates. It is our task to scrutinize the Commission's authority, not the substance of its exercise. We conclude that, in light of the mandate of the National Transportation Policy, the Commission had authority derived from the common-carrier obligations of the railroads as reflected in §§ 1 (4), 2, and 3 (1) of the Act to promulgate Rule 2 requiring that any railroads offering TOFC service through its open-tariff publications must make that service available "to any person" on nondiscriminatory terms. We come, then, to Rule 3.

II.

Rule 3, in general, authorizes "motor common and contract carriers, water common and contract carriers, and freight forwarders" to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates pub

lished by a rail carrier." At the outset, as discussed above, we reject the contention that the railroads, despite their common-carrier obligations and the absence of an exception thereto in the Act, may exclude carriers by competing modes of transportation from access to their publicly offered services and facilities; and we do not accept the argument that § 216 (c), 49 U. S. C. § 316 (c), which authorizes voluntary through route and joint rate arrangements between railroads and truckers, implies that the railroads have no other obligation to motor carriers and that no other obligation may be imposed upon them by the ICC in this respect. That contention is refuted by the *Seatrain* case, *supra*.

It is strenuously contended, however, that whatever may be the railroads' duty, common carriers by motor vehicle may not be authorized to substitute transportation by rail for the transportation by road which is the basis of their franchise—except with the agreement of the railroad. It is this exception that saps the argument of some of its force, if not its fervor. One would assume that if the motor carriers are not authorized by their franchise under the Act to substitute transportation by rail for transportation by road, they could not do so with the consent of the railroads. But neither the railroads, most of which, by agreement, provide TOFC service to some motor carriers, nor the freight forwarders take this position. Nor did the court below. None of them urges the invalidity of Plan I as presently in use, which provides for trucker utilization of TOFC service with the railroad's concurrence.[7] As the District Court put it: "The policy explicit in Sections 216 (c) [authorizing voluntary rail-truck through routes, dis-

[7] A suit attacking the validity of Plan I service is pending. *Lone Star Packing Car Company* v. *United States*, Civ. No. 4–355 (D. C. N. D. Tex.).

cussed above] and 402 (a)(5) [49 U. S. C. § 1002 (a)(5), defining freight forwarders, discussed below], and implicit in the structure of the Interstate Commerce Act as a whole, does not allow a motor carrier to perform its authorized service simply by tendering the shipment to the railroad for transportation *without the railroad's concurrence*." 244 F. Supp., at 967.[8] (Italics added.) As we have discussed, this "concurrence" of the railroads, where granted, permits truckers to use TOFC service not only pursuant to Plans I and V, *supra*, but also under Plan III and Plan IV, the latter being open-tariff arrangements. The argument of appellants and the reasoning of the District Court carefully concede that the motor carriers may, without violating the Act or their charters, utilize this substituted service.

But, regardless of this, there is no adequate reason to construe the Act so as to deprive the Commission of the power to authorize the carriers by motor vehicle to use TOFC when that service is offered by railroads to the public on open tariff. The Interstate Commerce Act defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage . . . in transportation by motor vehicle." This does not exclude joint arrangements with water carriers or rail carriers, which are expressly permitted by § 216 (c) on a voluntary basis, and according to the appellants and the District Court it is not inconsistent with the use of open-tariff TOFC if the railroad is willing. Clearly, too, a trucker which utilizes a ferry to transport his trailer and its cargo is not violating the statute

[8] In important respects, motor carrier use of open-tariff TOFC differs from a motor-rail through route-joint rate TOFC arrangement. Hence the District Court's exception for open-tariff TOFC where the railroad consents cannot be justified as based upon the voluntary through route-joint rate provision of the Act, § 216 (c); 49 U. S. C. § 316 (c).

or his certificate. We may properly assume, therefore, that the Act cannot be construed to require that the trucker must always transport its cargo exclusively by road. Appellants and the District Court argue, however, that the following factors demonstrate that the Commission may not authorize motor carriers to use TOFC service on open tariffs: the long history of the Commission's construction and application of the Act contrary to its present position, the history of congressional consideration, and the provisions of the Act relating to freight forwarders.

It is true, as we have stated, that the Commission for over 25 years has insisted that railroad concurrence is essential for trucker use of TOFC services. In *Substituted Freight Service, supra,* the Commission held that a person may not be both a carrier and a shipper as to the same service. See also *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 263 I. C. C. 139, 141 (1945); and the *New Haven* case, 293 I. C. C. 93, 104–105 (1954). But see the earlier contrary holding in *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I. C. C. 435 (1936). The Commission's Report argues that *Substituted Freight Service*, correctly understood, does not proscribe the kind of substituted service here at issue, "in which one common carrier service is substituted for another through the use of an open-tariff rate of the carrier performing the substituted service—provided that proper notice is given in the tariff publication of the carrier using the substituted service." 322 I. C. C., at 333. The Commission also argues that its subsequent decisions, cited above, are based upon an incorrect view of the *Substituted Freight Service* case. And it cites *Greer Broker Application*, 23 M. C. C. 417 (1940), and *Stone's Exp., Inc., Common Carrier Application*, 32 M. C. C. 525 (1942), as consistent with its present reading of *Substituted Freight Service*. We

do not rest upon this analysis because, in any event, we agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947); *FCC* v. *WOKO*, 329 U. S. 223 (1946). In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

It is true that the attention of the Congress had been called to the need for action to secure the relief which the Commission subsequently granted in its rules. In February 1962, the American Trucking Association, in the course of oral argument in *Gordons Transports, Inc.* v. *Strickland Transp. Co.*, 318 I. C. C. 395, sustained *sub nom. Strickland Transportation Co.* v. *United States*, 219 F. Supp. 618 (D. C. N. D. Tex. 1963), apparently urged that motor carriers be allowed to utilize TOFC open tariffs. On April 5, 1962, President Kennedy sent a transportation message to Congress calling for legislative action to "[a]ssure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers . . ." so that the various carriers would be placed "in a position of equality with freight forwarders and other shippers in the use of the

promising and fast-growing piggyback and related techniques." H. R. Doc. No. 384, 87th Cong., 2d Sess. (1962), p. 5. Secretary of Commerce Hodges transmitted to Congress proposed legislation to implement the President's message. Hearings on S. 3242 and S. 3243 before the Senate Committee on Commerce, 87th Cong., 2d Sess., pt. 1 (1962), p. 13. See also Hearings on S. 1061 and S. 1062 before Surface Transportation Subcommittee of the Senate Committee on Commerce, 88th Cong., 1st Sess., pt. 1 (1964), p. 3. Bills were introduced in 1962 and 1963. See S. 3242 and H. R. 11584, 87th Cong., 2d Sess. (1962); S. 1062 and H. R. 4701, 88th Cong., 1st Sess. (1963). On June 29, 1962, the Commission instituted the present proceeding. It advised Congress of its action and of its intention to "resolve" the matter or, if it could not, to recommend appropriate legislation. Surface Transportation Subcommittee Hearings, *supra*, pt. 2, p. 801; Hearings on H. R. 4700 and H. R. 4701 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., pt. 1 (1963), p. 32. Following this, requests came from the industry to Congress that it withhold legislative action pending the Commission's decision. See, *e. g.*, Hearings on H. R. 4700 and H. R. 4701, *supra*, pt. 1, p. 213; pt. 2, p. 991. We do not regard this as legislative history demonstrating a congressional construction of the meaning of the statute, nor do we find in it evidence of an administrative interpretation of the Act which should tilt the scales against the correctness of the Commission's conclusions as to its authority to prescribe the present rules. The advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable, guide to statutory construction. The possibility of its use to prove more than it

means may, but should not, deter administrative agencies from seeking helpful clarification of authority or a fresh and specific congressional mandate.[9]

The final argument to which we must address ourselves is vigorously made by the freight forwarder appellees. Freight forwarding is authorized and regulated in Part IV of the Interstate Commerce Act (49 U. S. C. § 1001 *et seq.*). This Part was enacted in 1942 (56 Stat. 284). A freight forwarder is defined as "any person which (otherwise than as a carrier . . . [by rail, motor vehicle or water]) holds itself out to the general public as a common carrier to transport or provide transportation of property, . . . and which . . . (A) assembles and consolidates . . . shipments . . . and (B) assumes responsibility for the transportation of such property . . . and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of" a rail, motor vehicle or water carrier. § 402 (a)(5), 49 U. S. C. § 1002 (a)(5). It cannot perform the physical transportation except in its terminal areas. § 410 (h), 49 U. S. C. § 1010 (h). It assembles shipments, consolidates them, ships them by common carrier (usually a railroad), receives them and separates and distributes them to individual consignees. The Act specifically provides that no permit to engage in freight forwarding shall be issued to any common carrier by rail, motor vehicle or water. § 410 (c), 49 U. S. C. § 1010 (c). But a freight forwarder may be controlled by such a carrier, or under

[9] It should also be noted that the legislation proposed by the ICC itself (S. 3510 and H. R. 12362, 87th Cong., 2d Sess. (1962); S. 676 and H. R. 2088, 88th Cong., 1st Sess. (1963)) would have required railroads to establish motor-rail through routes-joint rates and granted the Commission power to compel such arrangements—which is quite different from entitling motor carriers to use railroad open tariffs.

common control with it, and the Act specifically provides that the Commission may not for this reason deny a permit to the freight forwarder. *Ibid.*

It is obvious that there is a good deal of overlap between the work of the freight forwarders and that of the other common carriers. The freight forwarders' argument here is that the Act authorizes only freight forwarders to engage in the assembly and consolidation of shipments and the subsequent use of rail facilities for transportation, and that permitting the truckers to engage in this sort of service, by means of TOFC on open tariffs, is to authorize them to engage in this service in violation of the Act's prohibition against licensing other carriers as freight forwarders.

Forwarders are presently permitted to utilize railroad open-tariff TOFC service. *Movement of Highway Trailers by Rail,* 293 I. C. C. 93, 111 (1954). They may even quote trailer-load rates in competition with truckers and with rails. *Eastern Express, Inc.* v. *United States,* 198 F. Supp. 256 (D. C. S. D. Ind.), aff'd, 369 U. S. 37 (1962). But railroads, within their terminal areas (§ 202 (c), 49 U. S. C. § 302 (c)), and truckers have also traditionally assembled, consolidated, and distributed cargo in connection with providing their authorized transportation services. The Act expressly exempts from the freight-forwarder provisions any person who performs these services—which are similar to those of freight forwarders—as a carrier subject to another part of the Act. § 402 (a)(5), 49 U. S. C. § 1002 (a)(5). The House Report on Part IV makes it clear that the Part does not apply "with respect to transportation performed by . . . motor . . . carriers in accordance with the applicable provisions of the Interstate Commerce Act." H. R. No. 1172, 77th Cong., 1st Sess. (1941), p. 6.

The mere fact that the truckers, by reason of the Commission's Rules 2 and 3, may utilize open-tariff TOFC service, where offered generally, certainly does not convert their activity into freight forwarding, in conflict with the Act. It is clear that where the railroad agrees, the trucker may use this service, and that a motor vehicle common carrier may assemble, consolidate, transport by piggyback in these circumstances, and distribute after arrival at the railroad terminus. The fact that the Commission enlarges this additional possibility of transportation of the truckers' trailers may be a competitive fact of some significance, but it does not convert the truckers into freight forwarders, nor deprive the latter of the exclusive rights specified in the Act.

III.

The controlling fact of the matter is that all piggyback service is, by its essential nature, bimodal.[10] It partakes of both the railroad and the trucking functions. The proper allocation of these bimodal functions involves complex considerations. It is not and cannot be precise or mathematical. Railroads are not now confined to the rails. They operate trucks. They are permitted to assemble cargo and, if they so desire, to use their own trucks or subsidiary companies to do so. § 202 (c), 49 U. S. C. § 302 (c). Truckers are not now strictly confined to the highway. In the absence of congressional direction, there is no basis for denying to the ICC the

[10] As the ICC observed: "What [those who object to open-tariff TOFC] overlook is that *all* TOFC is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation . . . ." 322 I. C. C., at 329. Thus, the District Court's view of the statutory compartmentalization of transportation as *either* rail *or* motor *or* water, fails to recognize the primary fact about TOFC, which in *any* of its varieties cannot be made to fit the District Court's rigid modal conceptualization.

power to allocate and regulate transportation that partakes of both elements; and there is no basis whatever for denying to the Commission the power to carry out its responsibilities under the National Transportation Policy, 54 Stat. 899 (1940), 49 U. S. C. preceding § 1, to "provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act . . . so administered as to recognize and preserve the inherent advantages of each . . . to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." [11] This Court has observed that "The National Transportation Policy, formulated by the Congress, specifies in its terms that it is to govern the Commission—the administration and enforcement of all provisions of the Act," and the Court has styled the National Transportation Policy as "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transp. Co.* v. *United States*, 355 U. S. 83, 87–88 (1957). Here the Commission has found that "the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination, and . . . encouragement of such coordination is in the public interest." 322 I. C. C., at 330. This conclusion, and its implementation in the TOFC rules, has obvious importance to "adequate, economical, and efficient service" and to the "establishment and maintenance of reasonable charges for transportation services," which are mandates of the National Transportation Policy.

[11] Cf. *United States* v. *Rock Island Co.*, 340 U. S. 419, 433 (1951): "Complete rail domination [over motor transportation] was not envisaged as a way to preserve the inherent advantages of each form of transportation."

We cannot sustain the District Court's ruling that the Commission lacked power to promulgate the rules here in issue.

Accordingly, the decision below is *Reversed.*

MR. JUSTICE BLACK and MR. JUSTICE STEWART would affirm the judgment of the District Court for the reasons stated in the opinion of District Court Judge Hoffman reported at 244 F. Supp. 955, 961–964.

MR. JUSTICE HARLAN, finding it impossible to escape the impact of the proviso to § 3 (1) of the Interstate Commerce Act, 49 U. S. C. § 3 (1), would, for reasons elaborated in the portion of Judge Hoffman's opinion dealing with that point, 244 F. Supp. 955, at 961–964, affirm the judgment of the District Court.